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Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?

Lisa M. Schenck*

“President Barack Obama said Tuesday that he has ‘no tolerance’ for sexual assault in the military, comments made in the wake of a new Pentagon report showing the instances of such crimes have spiked since 2010 ‘I expect consequences’ Obama added. ‘So I don’t just want more speeches or awareness programs or training, but ultimately folks look the other way. If we find out somebody’s engaging in this, they’ve got to be held accountable – prosecuted, stripped of their positions, court[-]martialled, fired, dishonorably discharged. Period.’”¹

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¹ Michael O’Brien, *Obama: ‘No Tolerance’ for Military Sexual Assault*, NBC NEWS (May 7, 2013, 6:15 PM) http://nbcpolitics.nbcnews.com/_news/2013/05/07/18107743-obama-no-tolerance-for-military-sexual-assault?lite.

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—President Obama, May 7, 2013

I. INTRODUCTION

The Commander-in-Chief, President Barack Obama, as quoted above, recently turned his attention to sexual assault in the military Services. The President is not alone in his concern. Congress, the media, and the American public have focused similar attention on this hot topic over the past twenty years. The Congress and media have criticized, analyzed, and pushed the Department of Defense (DoD),² to review and revamp its sexual assault prevention, training, and response programs, as well as its accountability, methods of reporting, investigating, and disposing of sexual assault cases. Part of the Congressional “push” included requesting the DoD to propose revisions to the existing punitive articles addressing sexual assault in the Uniform Code of Military Justice (UCMJ). Congress passed sweeping legislative changes to military law in 2006 and made modest changes in 2011. As a result, the military Services have been trying sexual

² In this article, the terms “military,” “military Services,” and “Armed Forces” will be used interchangeably. Although Congress emphasizes the importance of the DoD’s sexual assault prevention and response policies, the DoD is a civilian organization that oversees the military Services. The DoD “is responsible for providing the military forces needed to deter war and protect the security of the United States (U.S.). The major elements of these forces are the Army, Navy, Air Force, and Marine Corps. The President is the Commander-in-Chief, while the Secretary of Defense exercises authority, direction, and control over the Department. This includes the Office of the Secretary of Defense, Organization of the Chairman of the Joint Chiefs of Staff, the three Military Departments, the Combatant Commands, the Office of the Inspector General, 17 Defense Agencies, 10 DoD Field Activities, and other organizations, such as the National Guard Bureau (NGB) and the Joint Improvised Explosive Device Defeat Organization (JIEDDO).” *Organizations and Functions of the Department of Defense*, OFFICE OF THE SEC’Y OF DEF., OFFICE OF THE DIR. OF ADMIN. AND MGMT, http://odam.defense.gov/omp/Functions/Organizational_Portfolios/Organization_and_Functions_Guidebook.htm 1 (last visited Mar. 17, 2013).

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assault cases using a completely revised punitive article, grouping sexual assault offenses under Article 120 of the UCMJ.

Although described as being more protective of victims and covering the vast array of sexual assault offenses, this article argues that the recent changes in substantive military law regarding sexual assault in 2007 and 2012 are not sufficient to fully protect victims and may not result in the convictions that the President, Congress, media, and the public are so anxious to see in military sexual assault cases. While perpetrators may be tried by courts-martial, they may not be “stripped of their positions, court[-]martialled, fired, dishonorably discharged”³ as President Obama hopes; rather, they may be acquitted.

This article evaluates military substantive criminal law (UCMJ art. 120 (Article 120) and Military Rules of Evidence (Mil. R. Evid.) 404(a) and 405(c)). Drawing on lessons-learned from state and federal⁴ laws, the article then makes recommendations regarding statutory changes in military criminal sexual assault and procedural statutes. Specifically, the author recommends amending substantive military criminal law to add the offense of “Indecent Acts with Another” back into Article 120, modify the definition of force, eliminate the increased emphasis on whether the victim’s fears are “reasonable,” remove the focus from the accused’s perceptions of the victim, return the statutory limitations on the affirmative defense of mistake of fact as to consent, and create a statutory structure to restrict judicial appellate discretion in determining the need for some lesser-included offense instructions.

The author also notes that some military justice system critics attribute unwarranted acquittals in sexual assault cases to the courts-martial practice of allowing evidence of the accused’s good military character. Admitting such

³ O’Brien, *supra* note 1.

⁴ As used in this article, the term “federal” does not include the military or Armed Forces.

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evidence regarding the accused's good military character may shift the trial focus from the misconduct at issue to the accused's stellar military service record. In many cases, the chain of command may testify on the accused's behalf, and a process known as "reverse command influence," a type of "jury nullification," may result in the accused's acquittal, even in cases where evidence of the accused's guilt is overwhelming. The author supports amendment of Military Rule of Evidence (Mil. R. Evid.) 404(a) and 405(c) to clarify that general military character is not admissible to show probability of innocence for sexual assault offenses.

II. BACKGROUND: WHY THE CRY FOR CHANGE?

Substantive military criminal law is set forth in the UCMJ punitive articles.⁵ Since Congress passed the UCMJ in 1950, two enumerated articles covered the most serious sexual assault offenses, "Rape and Carnal Knowledge" (Article 120), and "Sodomy" (Article 125), and the general article covered a broad category of

⁵ See 10 U.S.C. §§ 877–934 (2006). The Uniform Code of Military Justice punitive articles are listed in Appendix 2 of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter 2012 MCM]. The President and various service regulations are important sources of *substantive* military criminal law. See 2012 MCM (2011); U.S. DEP'T OF ARMY, REG. 27-10, (2011) [hereinafter AR 27-10], available at http://www.apd.army.mil/pdffiles/r27_10.pdf. On June 30, 1775, the Second Continental Congress established sixty-nine Articles of War to govern the conduct of the Continental Army. William Winthrop, *Military Law and Precedents*, 21 (Government Printing Office 1920), available at http://www.loc.gov/rr/frd/Military_Law/ML_precedents.html. (last visited Dec. 23, 2013). Upon the ratification of the United States Constitution in 1789, Article I, Section 8 endowed Congress with the power to regulate the land and naval forces. Using its newly endowed powers, on April 10, 1806, Congress enacted 101 Articles of War, superseding the Revolutionary War articles, under which the Army operated for decades. *Id.* at 23. Discipline in the Navy was governed by the Articles for the Government of the United States Navy. DEPARTMENT OF THE NAVY—NAVAL HISTORICAL CENTER, available at <http://www.history.navy.mil/faqs/faq59-7.htm> (last visited Dec. 23, 2013). Congress passed the UCMJ on May 5, 1950, which placed the military and naval services under the same disciplinary statutes, and President Harry S. Truman signed it into law. On May 31, 1951, the UCMJ went into effect. UNIFORM CODE OF MILITARY JUSTICE, available at <http://www.ucmj.us/history-of-the-ucm> (last visited Aug. 1, 2013).

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sexual offenses under the categories of “Indecent Assault,” “Indecent Acts or Liberties with a Child,” “Indecent Exposure,” and “Indecent Acts with Another” (Article 134).

Prior to the statutory changes implemented in the past ten years, the offense of rape, under Article 120 reflected the common law and was defined as, “Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.”⁶ This definition of rape became widely criticized as antiquated because “force” lacks “obvious or plain” meaning, the statutory scheme focused attention on the victim’s conduct as opposed to the accused’s conduct, and culpability-based gradations of conduct and punishment are more effective in deterring crime.⁷ The “requirement that a woman resist her assailant grew out of the law’s suspicion of the credibility of unchaste or vengeful women.”⁸ As views of women’s place in society changed, however, the law eventually followed.⁹

In 2005, the Court of Appeals for the Armed Forces identified the problems associated with Article 120’s dated rape definition:

⁶ UCMJ art. 120(a) (2006) (codified at 10 U.S.C. § 920(a) (2006)).

⁷ Major Timothy W. Murphy, USAF, *A Matter of Force: The Redefinition of Rape*, 39 A.F.L. Rev. 19, 19-23 (1996). A brief description of courts-martial jurisdiction over offenses such as rape, and the changing jurisprudence of rape prosecutions in the military over the last hundred years is provided in Mark Harvey, SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (Feb. 2005) available at http://www.defenselink.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc (last visited Apr. 14, 2013) [hereinafter 2005 SEX CRIMES REPORT TO JSC]; see also Dep’t of Def. Office of the Gen. Council, *Comparison of Title 18 Sexual Offenses and UCMJ Sexual Offenses* (May 2005), http://www.dod.gov/dodgc/php/docs/comparison_with_Title18_3-2-05.pdf (last visited Mar. 12, 2013).

⁸ Susan Schwartz, *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 LOY. L.A. L. REV. 567, 569–71 (1983) (internal citations omitted).

⁹ *Id.*

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[Article 120 did] not reflect the more recent trend for rape statutes to recognize gradations in the offense based on context. These statutes incorporate the legal realization that the force used may vary depending on the relationship and familiarity, if any, between perpetrator and victim, but the essence of the offense remains the same—sexual intercourse against the will of the victim. Because Article 120 is dated, its elements may not easily fit the range of circumstances now generally recognized as “rape,” including date rape, acquaintance rape, statutory rape, as well as stranger-on-stranger rape. As a result, the traditional military rape elements have been applied in contexts for which the elements were not initially contemplated. Case law has evolved to address this reality.¹⁰

III. WILL THE REVISED ARTICLE 120 RESULT IN MORE SEXUAL ASSAULT CONVICTIONS?: STATUTORY ANALYSIS AND RECOMMENDED CHANGES TO THE UCMJ

Without recommending specific statutory changes, Department of Defense reports published over the past decade have included some review¹¹ of the sex

¹⁰ United States v. Leak, 61 M.J. 234, 246 (C.A.A.F. 2005) (internal citations omitted) (*citing* United States v. Simpson, 58 M.J. 368, 377 (C.A.A.F. 2003) (drill instructor’s coercive influence over recruits); United States v. Palmer, 33 M.J. 7, 9 (C.M.A. 1991) (parental compulsion found to be a form of constructive force); United States v. Henderson, 4 C.M.A. 268, 273, 15 C.M.R. 268 (1954) (concept of constructive force recognized as applicable to military)).

¹¹ DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 27 (2011), *available at* http://www.sapr.mil/media/pdf/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf [hereinafter 2010 DoD SEXUAL ASSAULT REPORT] (citing previous year’s report) stated:

[P]ractitioners consistently advised Task Force members that the new Article 120 (effective October 1, 2007) is cumbersome and confusing. Prosecutors expressed

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offenses available under military law for which military offenders may be tried for sexual assaults.¹² Congress, in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, required the Secretary of Defense to propose changes to the existing sex offenses in the UCMJ, “to conform.... more closely to other [f]ederal laws and regulations that address sexual assault,”¹³ but existing federal statutes¹⁴ were primarily used to prosecute cases on Indian

concern that Article 120 may cause unwarranted acquittals. In addition, significant issues related to the constitutionality of Article 120’s statutory affirmative defense of and consent to lesser-included offenses have evolved.

¹² Military offenders may also be tried by non-military federal and state civilian authorities pursuant to federal and state criminal law.

¹³ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 1920 (2004). In 2005, the Defense Task Force on Sexual Harassment & Violence at the Military Service Academies further highlighted the problems with the existing UCMJ sexual offenses, finding that “a key obstacle to increasing accountability for rape and sexual assault is that current statutes, though flexible, do not reflect the full spectrum of criminal sexual behaviors encountered at the military service academies and society at large,” and recommended “Congress revise the current sexual misconduct statutes to more clearly and comprehensively address the full range of sexual misconduct.” REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES ES-2 (2005) [hereinafter 2005 DTF ON SEXUAL HARASSMENT & VIOLENCE REPORT], available at http://www.defense.gov/home/pdf/High_GPO_RRC_tx.pdf.

¹⁴ Today’s UCMJ art. 120 (2012) [hereinafter 2012 Article 120] is similar to Title 18, but the latter does not have definitions and the offenses include the term “knowingly.” The term, “knowingly,” is used in many Title 18 offenses to indicate the requisite acts were not done inadvertently or by accident. For the sex offenses in 18 U.S.C. §§ 2241–44 (2006), the Government need not prove the touching of the victim was for sexual gratification. Under military law, mistake is an affirmative defense. Most Title 18 offenses include the word “knowingly” and most military offenses do not. The concept of “knowingly” is automatically incorporated into UCMJ offenses. See, e.g., 2012 MCM, pt. IV, ¶ 1.b(2)(a). The definitions in 2012 Article 120 and 18 U.S.C. § 2246 (2006) of “sexual act” require a sexual penetration of the body of the victim versus “sexual contact,” which only requires a sexual touching of the body of the victim. Penetration of the victim’s body makes the offense more aggravated. Using the definitions of sexual act and sexual contact is a very efficient way to list offenses. The definitions are somewhat involved and taking them out of the offense and putting them into a definition section makes it easier for the practitioner to recognize what is different between the two offenses. Of course, some might describe this as “cumbersome” because they are not trained in how to apply non-UCMJ statutes. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), REPORT TO THE SUBCOMMITTEE ON MILITARY PERSONNEL, COMMITTEE ON ARMED SERVICES, HOUSE OF REPRESENTATIVES, MILITARY JUSTICE: OVERSIGHT AND BETTER COLLABORATION NEEDED FOR SEXUAL ASSAULT INVESTIGATIONS AND ADJUDICATIONS 22 (Jun. 2011).

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reservations and were seldom applied, and therefore, rarely reviewed on appeal.¹⁵ In response to Congress' request, a subcommittee of the Joint Service Committee (JSC) provided an 826-page report focused on statutory changes to assist Congress in bringing the UCMJ up to date with the latest state and federal sex offense statutes.¹⁶ The Subcommittee members, however, concluded that change was unnecessary, stating:

[We] were unable to identify any sexual conduct (that the military has an interest in prosecuting) that [could not] be prosecuted under the current UCMJ and [Manual for Courts-Martial¹⁷] . . . [and] unanimously concluded that change [was] not required. [And a] majority of the subcommittee believed that the rationale for

¹⁵ In FY 2009, the nation's tribes Uniform Crime Report indicated 882 forcible rapes, and in FY 2010, they reported 852 rapes. STEVEN W. PERRY, TRIBAL CRIME DATA COLLECTION ACTIVITIES, 2012, at 9 (Dep't of Justice Oct. 2012), *available at* <http://bjs.gov/content/pub/pdf/tcdca12.pdf>. Convictions for sexual abuse of adults from 2007 to 2012 varied from 87 to 137 per year in U.S. District Courts. Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, Ohio State J. of Crim. L., n. 178 and accompanying chart (citations omitted). In 2009 and 2011, ninety-seven percent of trials in U.S. District Court were guilty pleas. Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3,599; 3,602; 3,611 (2013). Of the sexual abuse cases where the defendants plead not guilty, and nevertheless resulted in convictions, a fraction were jury trials, which involve instructions on offenses, evidence, burdens, and lesser-included offenses. Consequently, few sexual abuse cases ever undergo appellate review and are reversed for legal errors concerning instructions. From 2007 to 2011, the most recent years of statistics available, there were only 154 convictions of sexual abuse offenses after contested trials under 18 U.S.C. §§ 2241, 2242, 2243, 2244, and 2250. Bureau of Justice Statistics Database, <http://www.bjs.gov/fjsrc/tsec.cfm>. An individual may be convicted of more than one title 18 offense at a single trial. From 2006 to 2010, 86 sexual abuse offenses were reversed or remanded on appeal and 33 cases were partially affirmed on appeal. *Id.* Many of those cases likely involved litigation over application of sentencing guidelines rather than instructions on elements of offenses, lesser-included offenses, burdens, and defenses.

¹⁶ See 2005 SEX CRIMES REPORT TO JSC, *supra* note 7.

¹⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005) [hereinafter 2005 MCM].

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significant change was outweighed by the confusion and disruption that such change would cause.¹⁸

Despite the Subcommittee's assertion that change was not required, "the [S]ubcommittee concluded that if Congress direct[ed] a UCMJ change to substantially conform to Title 18, Option 5 [was] the alternative that best [took] into account unique military requirements."¹⁹ In 2006, Congress implemented Option 5 and created a "new" Article 120 (effective October 2007)²⁰ which outlined sexual assault offenses. In 2011, Congress created additional changes to Article 120 (effective June 2012)²¹ and revamped available defenses. This article contends that some of these changes are beneficial, but further modifications should be made.

A. Article 120 Changes Effective Oct. 1, 2007 (2007 Article 120)

In the past ten years, Congress has changed statutory sex offenses and applicable burdens of proof twice.²² In 2006, Congress created a "new" Article 120 modeled after the Title 18 sexual assault offenses. The 2006 changes are the most significant changes to military substantive criminal offenses since enactment of the 1950 version of the UCMJ. Specifically, the new Article 120 set forth a

¹⁸ 2005 SEX CRIMES REPORT TO JSC, *supra* note 7, at 1.

¹⁹ *Id.*

²⁰ See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §§ 551-553, 119 Stat. 3136, 3256-64 (2006) (codified as amended at 10 U.S.C. § 920 (2006)). [hereinafter 2007 Article 120].

²¹ 2012 MCM, Appendix 28, ¶ 45.

²² The 2012 MCM contains the punitive articles, elements of offenses, and some definitions applicable to sex offenses committed before October 1, 2007 at Appendix 27; committed between October 1, 2007 through June 27, 2012 at Appendix 28; and committed after June 27, 2012 at pt. IV, ¶ 45.

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gradation of sex offenses based on aggravating factors, establishing the following categories:

(a) rape; (b) rape of a child; (c) aggravated sexual assault; (d) aggravated sexual assault of a child; (e) aggravated sexual contact; (f) aggravated sexual abuse of a child; (g) aggravated sexual contact with a child; (h) abusive sexual contact; (i) abusive sexual contact with a child; (j) indecent liberty with a child; (k) indecent act; (l) forcible pandering; (m) wrongful sexual contact; and (n) indecent exposure.²³

The changes in 2006 also included definitions of numerous terms²⁴ and limitations on the two most common affirmative defenses, consent and mistake of fact as to consent, which were not specifically included in the previous UCMJ sex offenses and were not included in Title 18. These definitions served to fill a widening gap created due to appellate decisions which continuously modified the scope of offenses and changed instructions trial judges were required to provide to court members. In the past, the military courts relied on case-law-based definitions, which trial judges used to instruct the court members regarding the offenses. This became problematic with appellate courts occasionally deciding to change a definition or, in some cases condemning the instruction a trial judge had

²³ UCMJ art. 120 (2007) [hereinafter 2007 Article 120]. See also, Lieutenant Colonel Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, 2006 ARMY LAW. 23, 27 (Jun. 2006).

²⁴ Definitions included in the 2007 Article 120 included: (1) sexual act; (2) sexual contact; (3) grievous bodily harm; (4) dangerous weapon or object; (5) force; (6) threatening or placing another in fear under (a) rape or (e) aggravated sexual contact; (7) threatening or placing another in fear under (c) aggravated sexual assault or (h) abusive sexual contact; (8) bodily harm; (9) child; (10) lewd act; (11) indecent liberty; and (12) indecent conduct.

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used without providing a model definition or instruction.²⁵ A vicious cycle developed with trial judges crafting instructions, and appellate courts reversing cases. By providing statutory definitions in the 2006 provisions, trial judges were able to simply read the definitions to the panel members (i.e., the jury), vastly simplifying the trial process and providing transparency to the UCMJ, as the definitions of offenses were no longer buried in case law.

Furthermore, the new Article 120 effective in 2007: 1) moved the following Article 134²⁶ sex offenses to Article 120: “Indecent Assault,” “Indecent Acts or Liberties with a Child,” “Indecent Exposure,” and “Indecent Acts with Another;” 2) amended Article 134’s “Indecent Language” communicated to another;²⁷ and 3) added “compelled” pandering (coercing a person to commit prostitution) as an offense.²⁸ These offenses were crimes in the majority of state jurisdictions. Transferring these Article 134 offenses to Article 120 was beneficial for two reasons: 1) the requirement to prove that the offense was prejudicial to good order and discipline or service discrediting conduct as an element of the offense no longer existed, and 2) Article 120 was an offense that the legislative branch created

²⁵ A brief description of courts-martial jurisdiction over offenses such as rape, and the changing jurisprudence of rape prosecutions in the military over the last hundred years is provided in 2005 SEX CRIMES REPORT TO JSC, *supra* note 7; *see also* Dep’t of Def. Office of the Gen. Council, *Comparison of Title 18 Sexual Offenses and UCMJ Sexual Offenses* (May 2005), http://www.dod.gov/dodgec/php/docs/comparison_with_Title18_3-2-05.pdf (last visited Mar. 12, 2013).

²⁶ UCMJ art. 134; 2012 MCM, pt. IV, ¶¶ 61–113 [hereinafter Article 134]. The Article 134 (general article) prohibits “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital,” which includes application of the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (2006). 2012 MCM, pt. IV, ¶ 60c(3–4).

²⁷ This offense remains an Article 134 offense but “the communication of indecent language.... in the physical presence of a child” is now prohibited under Article 120.

²⁸ UCMJ art. 120 (2006) [hereinafter 2006 Article 120]; Defense Sexual Trauma Response Oversight and Good Governance Act, S. 1018, 112th Cong. (2011). Pandering remained an Article 134 offense. Article 134; 2012 MCM, pt. IV, ¶ 97.

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with statutory elements and definitions, rather than an Article 134 offense promulgated by a Presidential Executive Order.²⁹

Essentially, the JSC subcommittee concluded that these Article 120 revisions provided the following advantages:

1. All citizens, military or civilian, [would] face similar prohibitions.
2. Sex[] crimes [would be divided] into degrees based on culpability of defendant.
3. More specific notice of prohibited conduct [would be provided] because offenses are more detailed (compare Article 120, UCMJ with 18 U.S.C. § 2242(2)(B)).³⁰
4. [The] Government's requirement to prove lack of consent as an element [would be eliminated] –reduc[ing] an implied element that [the] victim must resist.
5. Most serious sex[] offenses [would be consolidated] under one UCMJ article.³¹

²⁹ The enumerated punitive articles in the UCMJ receive greater deference from the CAAF than offenses generated by the President and the Executive Branch.

³⁰ The pre-2007 version of Article 120(a) defined rape as: “Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court martial may direct.” 2006 Article 120. Sexual abuse is prohibited by 18 U.S.C. § 2242(2)(B) (2006), which provides:

Whoever [jurisdictional statement] knowingly—(2) engages in a sexual act with another person if that other person is—(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

Essentially, if an accused has sexual intercourse with an intoxicated woman who cannot communicate her unwillingness to engage in sexual intercourse, he has a markedly greater chance of being convicted under 18 U.S.C. § 2242(2)(B) than he would have under the pre-2007 version of Article 120(a) because the vague, amorphous concepts in Article 120(a) left more room for reasonable doubt.

³¹ 2005 SEX CRIMES REPORT TO JSC, *supra* note 7, at 6.

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B. Article 120 Changes Effective June 28, 2012 (2012 Article 120) – Article 120 Today: Analysis, Problems, and Recommendations

Effective June 28, 2012, the sex offenses in Article 120 were separated into three distinct sub-sections: Article 120(a) for adult victims, Article 120(b) for child victims, and Article 120(c) for other sex offenses. The reorganization placed the following offenses under Article 120(a): (a) rape, (b) sexual assault, (c) aggravated sexual contact, and (d) abusive sexual contact. Article 120(b) defined the same four offenses in relation to child victims. Other changes made may prove to be problematic for prosecutors and as a result, victims. The military Services continue to face statutory difficulties in prosecuting sexual assault offenses that could be corrected with further statutory changes to Article 120. Existing problems include the following: the 2012 Article 120 changes eliminated Indecent Acts with Another as an offense, included a problematic definition of force, inappropriately increased the emphasis on whether the victim's fears are reasonable, shifted the focus to the accused's perceptions of whether the victim was consenting, and eliminated the burden shift for the affirmative defenses of consent of mistake of fact as to consent. Each of these issues could be corrected by legislative action as suggested in the following section of this article.

1. Indecent Acts with Another Offense Eliminated

The 2012 Article 120 legislative revision continued the trend set in 2007 by making some offenses more specific. The legislation created two new offenses that at most will affect a handful of cases each year: Article 120(b)(1)(C) and (D). These offenses prohibit sexual assault by "(C) making a fraudulent representation

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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.”³² The revisions also eliminated the catch-all offense of “Indecent Acts with Another,”³³ which is not included in the offenses counted in the Department of Defense sex offense reports.³⁴ This legislative revision also merged the offense of wrongful sexual contact into abusive sexual contact, which will affect about one third of the sexual assault cases.³⁵

In the 2007 revision of Article 120(k), “Indecent Acts with Another” was moved from Article 134 to Article 120, eliminating the element of prejudicial to good order and discipline or service discrediting conduct, and the President removed “Indecent Acts with Another” as an offense under Article 134.³⁶ “Indecent Acts with Another”³⁷ traditionally proscribed a variety of sexual misconduct not otherwise prohibited such as consensual sexual intercourse in the

³² See *Id.* at 503–04.

³³ In the 2007 version, “Indecent Act” was moved from Article 134 to Article 120(k).

³⁴ See DEPARTMENT OF DEFENSE, I DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 3 (2012), available at http://www.sapr.mil/media/pdf/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf (last visited June 5, 2013) [hereinafter 2012 DoD SEXUAL ASSAULT REPORT, VOL. I]. Wrongful sexual contact (580 offenses) and abusive sexual contact (308 offenses) were the most serious sex offenses cited in 35% of the unrestricted reports (2,558 offenses). *Id.* at 63–64. If a subject commits a rape and wrongful sexual contact, the offense for statistical purposes in the 2012 DoD SEXUAL ASSAULT REPORT is counted as the most serious offense, rape. Thus, the number of wrongful sexual contact offenses may be substantially higher. DEPARTMENT OF DEFENSE, II DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (2012), available at http://www.sapr.mil/media/pdf/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_TWO.pdf. [hereinafter 2012 DoD SEXUAL ASSAULT REPORT, VOL. II].

³⁵ 2012 DoD SEXUAL ASSAULT REPORT, VOL. I, *supra* note 34, at 62.

³⁶ 2012 MCM, pt. IV, ¶ 90 (“90. Deleted—*See* Appendix 27 Indecent acts with another was deleted by Executive Order 13447, 72 Fed. Reg. 56179 (Oct. 2, 2007). *See* Appendix 25”). The 2007 Article 120 revision adopted the traditional maximum punishment for indecent acts from Article 134, of dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. *Compare* 2012 MCM, pt. IV, ¶ 90(e) (Article 134 offense of indecent acts), *with* 2012 MCM, pt. IV, ¶ 45(f)(6) (2007 Article 120 offense of indecent acts).

³⁷ 2005 SEX CRIMES REPORT TO JSC, *supra* note 7, at 87, 199.

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presence of others³⁸ and sex acts with an animal or a corpse.³⁹ Under the 2007 Article 120, the Indecent Acts with Another offense was a lesser-included offense for most sex offenses under Article 120.⁴⁰

The 2012 version, however, inexplicably deleted the prohibited “indecent” conduct from Article 120, which is even more problematic due to the removal of “Indecent Acts” from Article 134 in 2007.⁴¹ This Congressional (Article 120

³⁸ See *United States v. Tollinchi*, 54 M.J. 80, 83 (C.A.A.F. 2000); *United States v. Brundidge*, 17 M.J. 586, 587 (A.C.M.R. 1983).

³⁹ *United States v. Sanchez*, 29 C.M.R. 32, 34 (1960) (holding anal sodomy of a chicken is indecent *per se*); *United States v. Mabie*, 24 M.J. 711, 713 (A.C.M.R. 1987) (determining sexual acts with corpse are indecent); see also *United States v. McDaniel*, 39 M.J. 173, 175 (C.M.A. 1994) (finding it indecent act to instruct female recruits to disrobe, and then change positions, and bounce up and down while he videotaping them without their knowledge); *United States v. Proctor*, 34 M.J. 549, 557–59 (A.F.C.M.R. 1992) (holding it an indecent act to spank young boys on the bare buttocks). The 2007 Article 120 also prohibited viewing and various types of photography and videotaping of intimate actions of another without permission, based on COLO. REV. STAT. § 18-3-404(1.7) (2004). The definition of “indecent conduct” in the 2007 Article 120(t)(12) includes voyeurism and unauthorized videotaping as crimes. See 2005 SEX CRIMES REPORT TO JSC, *supra* note 7, at 195 n. 694 (describing Colorado law as the source for this provision). The 2012 Article 120 specifically added broadcasting and distributing a recording of a person engaged in intimate actions to the videotaping and viewing prohibitions. 2012 Article 120c(a)(4–5). Under both the 2007 and 2012 versions of Article 120 the fact finder must determine whether the conduct at issue is indecent; the statute provides a definition of indecent taken from traditional military case law. Military law also recognizes that some sexual acts at the appellate level are “indecent conduct *per se*.” *United States v. Littlewood*, 53 M.J. 349, 353 (C.A.A.F. 2000) (holding sexual activity between a twelve-year-old daughter and her natural father was indecent *per se*).

⁴⁰ See 2012 MCM, pt. IV, ¶¶ d(2)(a), d(6)(a), d(7)(a), d(9)(a), d(10)(a), e(1), e(3), e(5)(a), e(5)(c), e(5)(d), e(5)(e), and e(8).

⁴¹ Paragraph 90 of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008), which prohibited indecent acts under Article 134, was deleted by Executive Order 13447, 72 Fed. Reg. 56179 (Oct. 2, 2007). See 2012 MCM, Apps. 25, 27. The 2007 Article 120 followed the traditional military justice scheme and included indecent statements or indecent exposure to a child as a separate offense from indecently touching a child. See 2007 Article 120(j) (prohibiting indecent liberties with a child); 2012 MCM, pt. IV, ¶ 87 (“Article 134—(Indecent acts or liberties with a child)”). The 2012 Article 120 merged the two offenses and prohibited four types of lewd acts in the expanded sexual abuse of a child offense in 2012 Article 120b(c) by incorporating the offenses into a complex definition of “lewd act” in 2012 Article 120b(h)(5). “This combination of offenses was intended to capture the gravamen of the offenses while maintaining the simplicity that was desired for counsel, judges and members. Any lewd act with a child of any age is punishable under this subsection.” See ARTICLES 120, 120B, 120C, 43, AND 118, UCMJ – DoD PROPOSED NDAA FY 11 AMENDMENTS, AS INCLUDED IN S. 3454 BY SENATE ARMED SERVICES COMMITTEE, JUNE 4, 2010 16 (2010), available at

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revisions) and Presidential change (modification of Article 134) may have been intentional; nevertheless, indecent conduct may still be a chargeable offense under the Article 134 (general article), an offense prejudicial to good order and discipline or service discrediting conduct. However, acquittals are more likely because the definitions and elements are broad and do not explicitly prohibit indecency or describe an improper sexual component for Article 134, UCMJ. Additionally, Article 134 offenses do not receive the same degree of judicial deference from the Court of Appeals for the Armed Forces as statute-based offenses.⁴²

Incorporating multiple elements of the offenses and importing the case facts into a single definition, such as lewd acts, reduces the number of lesser-included offenses; however, trial practitioners must understand that parts of the definition that are not present in the case at trial should not be presented to the panel members.

2. Revised Definition of Force

The 2012 Article 120(g)(5) defines “force” as:

(A) the use of a weapon;

http://www.bragg.army.mil/18abc/SHARP/Documents/articles120_43_118.pdf [hereinafter 2010 DoD Proposed Amendments].

⁴² “It is well established that when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citation omitted) (internal quotation marks omitted). The Court of Appeals of the Armed Forces accords minimal deference to the President’s generation of offenses. *Ellis v. Jacob*, 26 M.J. 90, 92 (C.M.A. 1988) (President’s rulemaking authority does not extend to substantive military criminal law). *See also* *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007) (holding the President’s description of the affirmative defense of self defense in the MCM was incomplete). [Note: should this be moved to footnote 29?]

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- (B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person;^[43] or
- (C) inflicting physical harm sufficient to coerce or compel submission by the victim.^[44]

Moreover, the 2012 Article 120 limits “force” to situations where a weapon is *used* as opposed to *displayed* or *suggested*. Article 120(g)(5)(C) was changed from, “sufficient that the other person could not avoid or escape the sexual conduct” to two degrees of force: (B) “sufficient to overcome, restrain, or injure a person” and (C) “sufficient to coerce or compel submission by the victim.” Under the current Article 120’s definition, unlike the 2007 version, the degree of force to compel the victim’s submission is more subjective and places less emphasis on whether the victim had the opportunity to escape or avoid the sexual assault.⁴⁵ However, to better protect victims, the definition of force should include

⁴³ See *United States v. Johnson*, 492 F.3d 254, 257 (4th Cir. 2007) (noting 18 U.S.C. § 2241(a)(1) requires force “sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim”); *United States v. Weekley*, 130 F.3d 747, 754 (6th Cir. 1997) (quoting *United States v. Fire Thunder*, 908 F.2d 272, 274 (8th Cir. 1990) (“A force sufficient to sustain a conviction . . . includes ‘the use of such physical force as is sufficient to overcome, restrain or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.’”); *United States v. Lauck*, 905 F.2d 15, 17 (2d Cir. 1990) (“[T]he requirement of force may be satisfied by a showing of . . . the use of such physical force as is sufficient to overcome, restrain, or injure a person. . . .”).

⁴⁴ The rationale for the amendment of the force definition was to simplify it from its previous iteration. 2012 MCM, App. 23, ¶ 45. The physical harm “sufficient to coerce or compel submission by the victim” language is from *Johnson*, 492 F.3d at 257. The threat component is defined in Article 120(g)(7).

⁴⁵ Jim Clark, *Analysis of Crimes and Defenses 2012 UCMJ Article 120, effective 28 June 2012*, 2012 LEXIS EMERGING ISSUES 6423 (2012), http://www.lexisnexis.com/documents/pdf/20120705060050_large.pdf (last visited Mar. 17, 2013). See also, Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ’s Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put it Back on Target*, 2007 ARMY LAW. 1, 6 (2007). The 2007 Article 120(t)(5)(C) provided one of three components of force to be, “action to compel submission of another or to overcome or prevent another’s resistance by . . . (C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.” *Id.*

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suggesting possession of a dangerous weapon. Article 120(g)(5) should include, “(A) the use, display, or the suggestion of use, of a weapon.”⁴⁶

3. The “Reasonable Person” Restriction for Victims

In addition to addressing “Indecent Acts with Another” and the definition of force, the Department of Defense should also solicit Congress to change the definition of “threatening or placing a person in fear” to recognize vulnerable victims. The 2012 Article 120 section (g)(7) defines “threatening or placing that other person in fear” as, “a communication or action that is of sufficient consequence to cause a *reasonable* fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.”⁴⁷ The 2012 Article 120(g)(7) requires a showing of the victim’s “reasonable fear,” as opposed to proof of the victim’s *subjective* fear, thus giving greater weight to the victim’s mental state in deciding whether to comply with demands for sex. As a result, an accused may benefit by selecting a more vulnerable victim who may comply through fear; such a vulnerable victim may succumb in response to a lower level communication or action than that

⁴⁶ The 2007 Article 120(t)(5) included “(A) the use or display of a dangerous weapon or object.” Rhode Island provides an example of a definition of force that includes the “threat of use:”

(2) “Force or coercion” means when the accused does any of the following:

(i) Uses or threatens to use a weapon, or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(ii) Overcomes the victim through the application of physical force or physical violence.

(iii) Coerces the victim to submit by threatening to use force or violence on the victim and the victim reasonably believes that the accused has the present ability to execute these threats.

(iv) Coerces the victim to submit by threatening to at some time in the future murder, inflict serious bodily injury upon or kidnap the victim or any other person and the victim reasonably believes that the accused has the ability to execute this threat.

R.I. GEN. LAWS § 11-37-1(2) (2004).

⁴⁷ 2012 Article 120(g)(7) (emphasis added).

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required to meet the “reasonable” person standard. The phrase “a reasonable fear” should be replaced with “the victim to fear.”

4. Eliminate Charge Based on the Accused’s Perception of the Victim’s Behavior

Another provision in the 2012 Article 120 that should be modified is the provision that results in focusing on the accused’s perception of the victim’s behavior. The 2012 Article 120(b)(2–3) describes “sexual assault” as when an accused:

(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.⁴⁸

This statutory provision requires the Government to prove that the accused “knows or reasonably should know” the victim’s state of consciousness. Even if the victim testifies about her capacity to consent or ability to resist, the

⁴⁸ 2012 Article 120(b)(2–3) (emphasis added). These elements are also contained in the definition of “marriage” in 2012 Article 120b(f).

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Government must prove the *accused's knowledge* or at least that the accused *should have known*. The accused may testify and describe the victim's behavior to disprove his knowledge of the victim's condition and support the defense theory of mistake of fact as to consent.

To further protect victims, this additional element should be deleted and the following language from the 2007 Article 120(c), the offense of aggravated sexual assault⁴⁹ should be imported into Article 120, UCMJ:

[a]ny person who—(2) engages in a sexual act with another person of any age, if that other person is substantially incapacitated or substantially incapable of—(A) appraising the nature of the sexual act; (B) declining participating in the sexual act; or (C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault.⁵⁰

This provision primarily reflected the Title 18 offense of sexual abuse,⁵¹ with the addition of the word “substantially” which was added in this proposed language to reduce the possibility that the fact finder might acquit based on the belief that the victim might need to be completely incapable of appraising the nature of the conduct or communicating unwillingness to engage in the sex act. Under the proposed provision, the victim need only testify that she lacked capacity

⁴⁹ The 2012 amendment to Article 120 changed the name of the offense and deleted the term “aggravated.”

⁵⁰ 2007 Article 120(c)(2).

⁵¹ Title 18 criminalized the following:

Whoever knowingly—(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or (2) engages in a sexual act with another person if that other person is— (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life. 18 U.S.C. § 2242 (2007).

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or was intoxicated to the extent where she was incapable of resisting the defendant's advances or consenting to the sexual activity because she was asleep, passed out from alcohol, or too impaired to communicate lack of consent.

5. Affirmative Defenses of Consent and Mistake of Fact as to Consent

The 2012 Article 120 included changes in response to an appellate case that provided a review of the affirmative defense of consent. One of the 2012 changes, the elimination of the affirmative defense of mistake of fact as to consent from the statute, should be reconsidered.

i. Affirmative Defense of Consent and Burden Shifting.

The 2007 Article 120(r) limited the applicability of the affirmative defenses of consent and mistake of fact as to consent to specific offenses⁵² and added a provision (similar to other affirmative defenses) establishing an initial burden of preponderance of evidence before the prosecution had the burden of proving these affirmative defenses did not exist.⁵³ The defense's requirement to fulfill an initial burden as to consent was based on District of Columbia Code § 22-3007, which

⁵² 2007 Article 120(r) stated:

(r) Consent and mistake of fact as to consent.—Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).

⁵³ 2007 Article 120(t)(16) stated:

Affirmative defense.—The term “affirmative defense” means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.

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provided, “consent by the victim is a defense which the defendant must establish by a preponderance of the evidence.”⁵⁴

Affirmative defenses involving a shift in the burden of proof are not unusual in criminal law.⁵⁵ For example, the defendant has a specified initial burden⁵⁶ in raising the affirmative defense of insanity by clear and convincing evidence,⁵⁷ self-

⁵⁴ In *Russell v. United States*, 698 A.2d 1007, 1015-16 (D.C. 1997), the District of Columbia Court of Appeals upheld the constitutionality of this statute, but cautioned “that the jury should be expressly instructed that it may consider the affirmative defense evidence when it determines whether the government has met its burden to prove all the elements of the offense beyond a reasonable doubt.” D.C. Law 18-88 amended D.C. Code §§ 22-3002–22-3007 in 2009, deleting “which the defendant must establish by a preponderance of the evidence” following “a defense.” See also *Hatch v. United States*, 35 A.3d 1115, 1125 (D.C. 2011) (reversing because of confusion over burdens in instructions relating to consent in sexual abuse prosecution); *Gaynor v. United States*, 16 A.3d 944, 945–46 (D.C. 2011) (same).

⁵⁵ See 1-303 WEINSTEIN’S FEDERAL EVIDENCE § 303.06, Matthew Bender & Company, Inc. (2013) (discussing presumptions in affirmative defenses in criminal cases).

⁵⁶ In most jurisdictions, the judiciary through case law determines what evidence is sufficient to meet the burden, but the judiciary has not set a bright-line rule determining how much evidence is necessary to meet that burden:

[T]he precise dimensions of this burden of production remain inexact; [courts] have established no bright-line rule . . . as to the quantum of proof which will enable the proponent to cross the threshold and warrant a charge to the jury . . . [The case has not yet arisen] to delineate what evidence actually suffices to meet the defense’s burden of production.

United States v. Rodriguez, 858 F.2d 809, 812–14 (1st Cir. 1988) (stating that placing the burden of providing some evidence “on a criminal defendant is by no means unprecedented”). For example, entrapment consists of two prongs: “(1) improper Government inducement of the crime, and (2) lack of predisposition on the part of the defendant to engage in the criminal conduct.” *United States v. LaFreniere*, 236 F.3d 41, 44 (1st Cir. 2001) (citations omitted) (internal quotation marks omitted). “Once the defendant meets his initial burden of showing entitlement to an instruction on the [entrapment] defense, the burden shifts to the government to prove beyond a reasonable doubt either that there was no undue government pressure or trickery or that the defendant was predisposed.” *Id.* at 44–45 (internal citations omitted)

⁵⁷ See, e.g., *United States v. Waagner*, 319 F.3d 962, 964 (7th Cir. 2003) (stating that under 18 U.S.C. § 17(b), the defendant “must carry the burden of proving insanity (which is an affirmative defense) by clear and convincing evidence.”). The Eighth Circuit explained:

We believe that this statutorily imposed higher burden of proof calls for a correlating higher standard for determining the quantum of evidence necessary to entitle a defendant to such an instruction. . . . The Ninth, Tenth, and Eleventh Circuits have adopted the following standard to define the quantum of evidence necessary to obtain an insanity instruction: where the issue of insanity has otherwise been properly raised, a federal

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defense by preponderance of evidence,⁵⁸ and all affirmative defenses in trafficking in counterfeit goods by a preponderance of evidence.⁵⁹

Nevertheless, in 2011, the Court of Appeals for the Armed Forces (CAAF) agreed with defense assertions that the defense burden to establish “consent,” by a preponderance of evidence involved an unconstitutional shifting of the burden of proof to the accused in a case involving the victim’s intoxication. The *Prather* court stated:

If an accused proves that the victim consented, he has necessarily proven that the victim had the capacity to consent, which logically results in the accused having disproven an element of the offense of aggravated sexual assault—that the victim was substantially incapacitated. . . . one principle remains constant—an affirmative

criminal defendant is due a jury instruction on insanity when the evidence would allow a reasonable jury to find that insanity has been shown with convincing clarity.

United States v. Long Crow, 37 F.3d 1319, 1323 (8th Cir. 1994) (internal citation omitted). *See also* Art. 50a, UCMJ (accused must prove affirmative defense of lack of mental responsibility by clear and convincing evidence).

⁵⁸ *Smart v. Leeke*, 873 F.2d 1558, 1563–65 (4th Cir. 1989) (as self-defense is an affirmative defense, the defendant could properly be given the burden of proving the affirmative defense by a preponderance of evidence).

⁵⁹ *See* 18 U.S.C. § 2320(c) (2006) (“All defenses, affirmative defenses, and limitations on remedies . . . shall be applicable in a prosecution under this section. . . . [and] the defendant shall have the burden of proof, by a preponderance of the evidence, of any such affirmative defense.”); *United States v. McEvoy*, 820 F.2d 1170, 1173 (11th Cir. 1987) (holding the imposition of the burden of proof for affirmative defenses on the defendant is constitutional because the “statute still requires that the government prove every element of the offense beyond a reasonable doubt”). Also, under The Victim and Witness Protection Act, the defendant’s affirmative defense must meet the initial burden by providing a preponderance of the evidence that: 1) the conduct consisted solely of lawful conduct, and 2) that defendant’s sole intention was to encourage, induce, or cause other person to testify truthfully. 18 U.S.C. § 1512(e) (2008).

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defense may not shift the burden of disproving any element of the offense to the defense.⁶⁰

The court found the initial burden shift was unconstitutional and the second burden shift, while moot in the case at bar, was “a legal impossibility.”⁶¹ The *Prather* decision was controversial in part because it essentially restored consent as an implied element in intoxication-based sex offenses, even though Congress had eliminated “without consent” from the 2007 Article 120.

In the wake of the *Prather* decision, the Department of Defense recommended that Congress eliminate the initial burden that the accused show consent by a preponderance of the evidence.⁶² Specifically, the Department of Defense

⁶⁰ United States v. Prather, 69 M.J. 338, 343 (C.A.A.F. 2011) (holding that Article 120, by placing the burden on the accused to raise the issue of consent as an affirmative defense to a sexual assault prosecution and then shifting the burden to the defense to disprove an implied element of the offense in violation of due process, created a legal impossibility). *See also* United States v. Medina, 69 M.J. 462, 465–66 (C.A.A.F. 2011) (holding instructions that said consent is a defense to the charge of aggravated sexual assault and the prosecution had the burden of proving beyond a reasonable doubt that consent did not exist was harmless error where the members were not instructed of the statutory scheme that required an accused to prove by a preponderance of the evidence that the victim consented).

⁶¹ *Prather*, *supra* note 60, at 345 (footnote omitted).

⁶² 2010 DoD Proposed Amendments, *supra* note 41, at 15 provides:

The definition of consent was left generally unchanged. The restrictions on the use of evidence of consent were deleted. The circular language in the current law using nearly the same words to explain the interaction of consent and capacity, as were used to define an offense under Sexual Assault, was deleted. The Constitutional and other legal issues that have developed in litigation regarding Article 120, as amended in 2007, are resolved. The treatment of consent is simplified and may be disputed where it is relevant. Categories of persons who may not legally give consent to sexual acts or contact are set forth within the statute to simplify the matters at issue in court. For example, the proposed change makes it clear that sleeping or unconscious persons cannot consent. At least two court members’ panels within the last year have acquitted in sexual assault cases due to confusion over this issue. Persons subjected to a fraudulent representation of a professional purpose to accomplish the act, or under the belief that the person committing the act is another person, cannot consent because they do not understand to what they are consenting. Lack of consent was made a permissive inference based on the circumstances of the offense.

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requested that Congress repeal Article 120(r) and 120(t)(16), without explaining how deleting consent and mistake of fact as to consent as affirmative defenses improved Article 120 for prosecutors, judges, panel members, or victims.

Unfortunately, by removing the provisions describing these affirmative defenses, Congress may have removed the clear statutory definition of mistake of fact as to consent and may have returned “consent” of the victim as an implied element of force in intoxication-based sex crimes. In effect, this may return victims to the statutory situation under the original Article 120 from 1950 when the UCMJ became law. In the absence of clear statutory language, the courts will resolve these critical issues on a case-by-case basis which will in all likelihood result in a lack of predictability and consistency and inevitably hard won convictions being reversed on appeal.

ii. Affirmative Defense of Mistake of Fact as to Consent.

The 2012 Article 120 contains a definition of consent but does not provide clear language about mistake of fact as to consent. This leaves military judges without a statutory definition from which to craft a jury instruction.

Some states have determined that the “mistake of fact as to consent” instruction is not constitutionally required and the consent instruction is sufficient.⁶³ “As a general proposition, a defendant is entitled to an instruction as

⁶³ In *Clifton v. Commonwealth*, 468 S.E.2d 155, 157 (Va. Ct. App. 1996), the defendant claimed that he had a prior sexual relationship with the victim and that she consented on the occasion of the offense. The trial judge instructed the jury, “[c]onsent by [the victim] is an absolute bar to conviction of rape. If, after consideration of all the evidence, you have a reasonable doubt as to whether [the victim] consented to have intercourse with him, then you shall find him not guilty.” *Id.* Clifton asked for the following instruction:

If you find the defendant actually believed that [the victim] was consenting to have sexual intercourse, and if his belief was reasonable, then you shall find him not guilty.

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to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.”⁶⁴ Nevertheless, Massachusetts law provides that “mistake of fact as to consent” has “very little application” to the rape statute, which “does not require proof of a defendant’s knowledge of the victim’s lack of consent or intent to engage in nonconsensual intercourse as a material element of the offense.”⁶⁵ Moreover, in Massachusetts, the defendant’s “perception (reasonable, honest, or otherwise) as to the victim’s consent is consequently not relevant to a rape prosecution.”⁶⁶ In U.S. District Courts, the trial judges are not required to provide a mistake of fact as to consent instruction.⁶⁷

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant either knew that [the victim] did not consent to sexual intercourse, or that a reasonable person in the position of the defendant would have known that [the victim] did not consent to sexual intercourse.

Clifton, 468 S.E.2d at 158.

The *Clifton* Court noted that the defendant “may testify as to his observations or perceptions of statements or conduct by the victim suggesting consent.” *Id.* However, the trial judge is not required to instruct the jury on the defendant’s perceptions of the victim’s consent. *Id.*

⁶⁴ *Mathews v. United States*, 485 U.S. 58, 63 (1988); *Taylor v. Withrow*, 288 F.3d 846, 852 (6th Cir. 2002).

⁶⁵ *Commonwealth v. Lopez*, 745 N.E.2d 961, 966 (Mass. 2001).

⁶⁶ *Id.* (citing Rosana Cavallaro, *Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 818 (1996)).

⁶⁷ Aggravated sexual abuse by force or threat in the 2007 Article 120 was derived from 18 U.S.C. § 2241(a) (2006). In *United States v. Martin*, 528 F.3d 746, 752–53 (10th Cir. 2008), the accused was charged with aggravated sexual abuse by force or threat under 18 U.S.C. §2241(a). Although there was evidence of the defendant’s prior consensual sexual relationship with the victim, *Martin* did not testify on the merits. His attorney requested the following instruction:

Consent is willingness in fact for conduct to occur. Consent may be manifested by action or inaction and need not be communicated to the actor. If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.

Martin, 528 F.3d at 753.

The Tenth Circuit noted that the instructions correctly stated the law and required “the government to prove that threat or force *caused* the sexual act.” *Id.* The *Martin* court explained the role of consent and mistake of fact as to consent as follows:

Under the statute, actual consent is relevant to the extent it negates the required causation. But merely apparent consent does not negate causation, because it is apparent, not real. It is therefore not necessarily true that “apparent consent” is “as effective as consent in fact.” “Apparent consent” might be relevant to disproving a defendant’s *mens*

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As for the military, the CAAF has pointed out that the fact finder must be instructed to consider all evidence (including the evidence the accused raises that is pertinent to the affirmative defense) when determining whether the prosecution established guilt beyond a reasonable doubt.⁶⁸ Prior to the major Article 120 modification, military case law applicable to rape cases (unlike federal court case law⁶⁹) was protective of the accused because military courts established a very minimal evidentiary requirement to obtain a mistake of fact as to consent instruction and required an instruction in any case raising consent as an affirmative defense, even in cases where the defendant simply testified that consent was

rea in some cases, but only by negating knowingness, the second element of the crime, not by negating the causation requirement embodied in the first and third. The proffered instruction improperly equated actual and apparent consent, and also failed to explain how either form of consent related to the elements the jury was required to find. *Id.*

In *United States v. Rivera*, 43 F.3d 1291, 1298 (9th Cir. 1995), the trial judge instructed the jury “that to find Rivera guilty of aggravated sexual abuse, they had to conclude, *inter alia*, that he caused Natasha ‘to engage in a sexual act by: (a) the use of force against Natasha; or (b) by threatening or placing her in fear that any person will be subjected to death or serious bodily [injury].’” Rivera’s defenses were that he did not use force and that the victim consensually engaged in intercourse rather than out of fear. The *Rivera* court noted, “[t]he United States is not required to show that the victim did not consent to the sexual act, nor is the prosecution required to show that the victim resisted.” *Id.* at 1297. The defense requested two instructions. The first said, “Consent to sexual intercourse is a total defense to the charges against Defendant of aggravated sexual abuse and sexual abuse.” The second said, “Whether consent to intercourse was given rests on whether an alleged victim of ordinary resolution would not offer resistance or that because of reasonable fear of harm, a woman of ordinary resolution would not offer resistance.” *Id.* at 1297–98. The Ninth Circuit affirmed the trial judge’s decision not to give these special consent instructions concluding “the district court instructed the jury to find Rivera guilty only if they concluded he used force or threats to engage in intercourse with Natasha. If he did not (i.e., Natasha consented), they were to find him not guilty.” *Id.* at 1298.

⁶⁸ *United States v. Neal*, 68 M.J. 289, 303 (C.A.A.F. 2010) (“If [evidence of the affirmative defense of consent] is introduced, the military judge must instruct the members to consider all of the evidence, including the evidence of consent, when determining whether the government has proven guilt beyond a reasonable doubt.”). If the CAAF determines that an instruction is mandatory, it reviews “allegations of error under a *de novo* standard of review.” *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007) (citing *United States v. Bean*, 62 M.J. 264, 266 (C.A.A.F. 2005); *United States v. Forbes*, 61 M.J. 354, 357 (C.A.A.F. 2005)). Allegations of error “rais[ing] constitutional implications, [are] tested for prejudice using a ‘harmless beyond a reasonable doubt’ standard. *Id.* (citing *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006)).

⁶⁹ *Martin*, 528 F.3d at 753.

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unequivocal. Such instruction could be required whether or not the accused testified⁷⁰ and failure to instruct on this defense caused conviction reversals. The CAAF in *United States v. Brown*⁷¹ admonished any military judge who did not provide a mistake of fact as to consent instruction stating:

“[l]astly, it is hard to believe that [the] Military Judges’ Benchbook does not have a statement in 2-inch high letters, ‘INSTRUCT ON REASONABLE AND HONEST MISTAKE IN ALL RAPE CASES INVOLVING CONSENT UNLESS THE DEFENSE COUNSEL AGREES THAT THE DEFENSE IS NOT RAISED.’ Why invite an appellate issue?”⁷²

The 2012 Article 120 turned the focus to the accused’s mental state by adding *known or reasonably should be known*,⁷³ making it easier for the accused to defend his conduct by simply testifying, thus incorporating the mistake of fact as to consent defense into the offenses themselves. The Massachusetts Supreme Court warned against this shift, stating, “[a] shift in focus from the victim’s to the defendant’s state of mind might require victims to use physical force in order to communicate an unqualified lack of consent to defeat any honest and reasonable belief as to consent.”⁷⁴

⁷⁰ *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998).

⁷¹ *United States v. Brown*, 43 M.J. 187, 190 (C.A.A.F. 1995) (emphasis in original).

⁷² *See United States v. Gamble*, 27 M.J. 298, 308 (C.M.A. 1988) (determining that even though accused and victim drank alcohol together in his apartment at 1:00 am, and even though he did not testify that he believed she consented, he was entitled to a mistake of fact instruction and his conviction was reversed).

⁷³ *See supra* text accompanying note 47.

⁷⁴ *Lopez*, 745 N.E.2d at 967.

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Since military judges are required by case law to provide an instruction regarding mistake of fact as to consent, even though some states have decided that such an instruction is not constitutionally required, military law should include a provision to limit the affirmative defense of mistake of fact as to consent in sexual assault cases by including a statutory provision. The 2007 Article 120(t)(15) which was repealed (without explanation) in 2012 defined the affirmative defense of mistake of fact as to consent and thus, significantly limited its scope. The 2007 provision provided:

Mistake of fact as to consent. The term “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 sexual conduct consented. 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. The accused’s state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. A reasonable mistake of fact may not be found that is based upon ambiguous conduct by an alleged victim that is the product of conduct by the accused that amounts to force, violence, duress, menace,

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or fear of immediate and unlawful bodily injury on the person of the alleged victim or another.⁷⁵

The 2007 provision (with the added sentence at the end included above) should be returned as part of the statutory structure of Article 120. With the present state of Article 120 and in the absence of a statutory definition for this affirmative defense, it is unclear how the President may define mistake of fact as to consent, and whether the Court of Appeals for the Armed Forces will accept that definition. Eliminating the “accused state of intoxication” as a factor in this affirmative defense is particularly problematic.⁷⁶ Under the 2012 Article 120, the

⁷⁵ See 2005 SEX CRIMES REPORT TO JSC, *supra* note 7, at 103–05 (stating definition of consent is drawn from statutes and case law from states including Vermont, Utah, Washington State, Washington, D.C., Illinois, Florida, California, Colorado, and Minnesota). The last sentence of the definition is added to the 2007 Article 120 statutory definition of mistake of fact to further limit the scope of the mistake of fact defense as to consent and this sentence is based on 18 CALIFORNIA JURISPRUDENCE § 562 (West, 3d ed. 2013) (*citing* *People v. Williams*, 841 P.2d 961 (Cal. Ct. App. 1992)). Incorporation of California’s case law on the mistake of fact defense effectively limits the scope of the mistake of fact defense. See *People v. Lee*, 248 P.3d 651, 668 (Cal. 2011) (quoting JOHN M. DINSE, ET AL., CALIFORNIA JURY INSTRUCTIONS, CRIMINAL §10.65 (West Group, 7th ed. 2005)). In some cases, a physically dominant defendant may use bodily force or threats, and the victim may become compliant, believing resistance is futile or to avoid injury. At trial, the defendant may deny making the threat and claim the victim either outright consented or consented by complying with his demands. This provision will eliminate the application of the mistake of fact defense under these scenarios.

⁷⁶ Some may conclude that because the 2012 MCM, Rule for Courts-Martial (RCM) 916(j)(3) (established by executive order) includes the 2007 Article 120(t)(15) definition of mistake of fact, eliminating the statutory definition of mistake of fact in the UCMJ punitive Article 120 for sexual assaults is harmless. It is unclear, however, how future MCMs will address this affirmative defense.

Moreover, the President has not yet implemented the 2012 changes to Article 120:

The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President’s authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.

2012 MCM, pt. IV, ¶ 45 at Note.

Two additional problems are evident from the repeal of Article 120(t)(15) and retention of the affirmative defense in RCM 916(j)(3): (1) appellate courts may interpret the repeal of 2007 Article 120(t)(15) as Congressional intent that this RCM definition (pursuant to executive order) was flawed;

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accused has the opportunity to parlay his alcohol consumption into an acquittal, especially with the statutory focus on the accused's state of mind and knowledge at the time of the offense.

The Eighth Circuit en banc recently addressed a controversy involving the necessity of the prosecution to prove the accused's knowledge of the victim's intoxication.⁷⁷ In *Bruguier*, the victim was intoxicated, passed out on the floor of the kitchen, and had no memory of what happened to her. The defendant said she was awake and consented to sexual activity with him.⁷⁸ The Eighth Circuit held the use of "knowingly" in 18 U.S.C. § 2242(2) "requires a defendant to know the victim was 'incapable of appraising the nature of the conduct' or 'physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act,'" and the trial judge committed reversible error when he failed to instruct the jury accordingly.⁷⁹ The dissent concludes "that Congress opted to place the risk of error about incapacity on the sexual aggressor[, and] the correct and most natural grammatical reading of § 2242(2) does not apply any knowledge requirement to the victim's incapacity"⁸⁰ The *Bruguier* dissent noted:

and (2) the Court of Appeals for the Armed Forces may conclude that the President lacks authority to define the terms of the mistake of fact defense because it is substantive law. See *supra* text accompanying note 42 (explaining that very little deference is given to the President's statements about substantive law in the MCM).

⁷⁷ *United States v. Bruguier*, 2013 U.S. App. LEXIS 22422, 735 F.3d 754 (8th Cir. 2013) (*en banc*); *United States v. Rouillard*, 701 F.3d 861 (8th Cir. 2012), *vacated and rehearing en banc granted*, 2013 U.S. App. LEXIS 15795 (8th Cir. S.D., Mar. 4, 2013).

⁷⁸ *Id.* at *4-*5 ("Bruguier testified that [the victim] kept asking him to dance after he arrived at her house and that they kissed and had consensual sex. He testified that [she] was conscious, moving, and moaning throughout their sexual encounter and that she never asked him to stop.).

⁷⁹ *Id.* at *15-*16.

⁸⁰ *Id.* at *68.

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[A]most all of the sexual assault cases which have been brought under § 2242(2) arise from abuse of alcohol or drugs in situations where intent may be difficult to establish. Concerns about practical enforceability therefore reinforce the natural grammatical reading of § 2242(2) that knowledge of incapacity is not an element of the offense.

The type of case now before us has not allowed the government easily to convict defendants. In the past ten years, the district courts in our circuit have conducted twenty-nine trials in which defendants were charged under § 2242(2) and the jury instructed that the “knowingly” requirement applied only to the defendant’s engagement in the sexual act and not to the victim’s incapacity. Nevertheless, nearly half of the defendants were acquitted of the charges under § 2242(2) (thirteen out of twenty-nine).⁸¹

iii. Initial Burden for the Affirmative Defenses of Mistake of Fact as to Consent

The 2007 Article 120’s definition of mistake of fact as to consent should be reinstated in Article 120 to ensure statutory publication of the various internal limitations on the scope of the mistake of fact as to consent defense. A statutory definition provides transparency to victims and non-lawyers, who cannot assess the scope of this defense, which is otherwise buried in case law. Moreover, a statutory definition increases stability since it is less subject to judicial interpretation and reversal of convictions when a trial judge’s instructions do not comport with an

⁸¹ *Id.* at *66-*67.

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appellate body's views. Limiting judicial discretion restricts the defense's scope and thus, ensures a more victim-oriented defense.

Article 120 should also be amended to restrict this defense's applicability since Congress may require the accused's defense to bear the burden of raising, establishing, or proving an affirmative defense, subject to due process restrictions on impermissible presumptions of guilt.⁸² The Court of Appeals for the Armed Forces indicated the burden-shifting scheme in the 2007 Article 120(t)(16)⁸³ for applying the consent defense was confusing and unconstitutional.⁸⁴ In California, the affirmative defense of mistake of fact as to consent in sex offenses (known as the Mayberry Defense⁸⁵) is based on case law rather than statute.⁸⁶ California's Mayberry Defense reflects the 2007 version of Article 120 with two variances which the military could adopt to avoid the issues raised regarding the unconstitutional burden shifting.

In California, the defense has the initial burden of showing there is “*substantial* evidence of *equivocal* conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not.”⁸⁷

⁸² *Neal*, 68 M.J. at 298–301.

⁸³ *See supra* text accompanying note 52.

⁸⁴ *Prather*, 69 M.J. at 338.

⁸⁵ *See James v. McDonald* No. 2:11-cv-022580JKS, 2012 U.S. Dist. LEXIS 165947, at *28–33 (E.D. Cal. Nov. 16, 2012) (*citing* *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975)) (affirming trial judge's decision not to instruct on Mayberry defense).

⁸⁶ 18 CALIFORNIA JURISPRUDENCE § 562 (West, 3d ed. 2013).

⁸⁷ *People v. Martinez*, 224 P.3d 877, 908 (Cal. 2010) (*citing* *People v. Williams*, 841 P.2d 961 (Cal. 1992)) (emphasis added). In *Williams*, the court explained that the defendant must have “honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse” based upon “evidence of the victim's equivocal conduct,” and “the defendant's mistake regarding consent [must have been] reasonable under the circumstances.” *Williams*, 841 P.2d at 965. This mistake of fact instruction “should not be given absent substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not.” *Id.* at 966. *See also Athans v. Vasquez*, No. CV 05-2676-RGK (OP), 2010 U.S. Dist. LEXIS 77726, at *58 (C.D. Cal. 2010) (denying habeas corpus despite California trial court's failure to give requested mistake of fact instruction).

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“Evidence is [substantial when], if believed by the [trier of fact], was sufficient to raise a reasonable doubt [about the defendant’s guilt].”⁸⁸ At the same time, a defendant is only entitled to jury instructions as to a defense “for which there exists evidence sufficient for a reasonable jury to find in his favor.”⁸⁹

In California, the judge, not the jury, must make a threshold finding that the evidence with respect to consent is substantial and equivocal.⁹⁰ If this requirement is not met, the judge does not provide the jury instruction regarding the affirmative defense of mistake of fact as to consent. This requirement, in effect, virtually eliminates the mistake of fact as to consent doctrine in California because defendants who unequivocally assert the other person consented receive the consent instruction and not the mistake of fact as to consent instruction.

For example, *People v. Williams* illustrates the application of the California rule. The trial court held that the mistake of fact as to consent defense was applicable because Deborah (the alleged victim) stated that she and Williams (the defendant) went to a hotel room to watch television, and she did not object when Williams received sheets from the hotel clerk.⁹¹ The Supreme Court of California found otherwise stating:

Williams testified that Deborah initiated sexual contact, fondled him to overcome his impotence, and inserted his penis inside herself. This testimony, if believed, established actual consent. In contrast, Deborah testified that the sexual encounter occurred only after Williams blocked her attempt to leave, punched her in the eye, pushed her onto the bed,

⁸⁸ *People v. Salas*, 127 P.3d 40 (Cal. 2006).

⁸⁹ *Mathews v. United States*, 485 U.S. 58, 63 (1988).

⁹⁰ *Martinez*, 224 P.3d at 908.

⁹¹ *Williams*, 841 P.2d at 966-67.

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and ordered her to take her clothes off, warning her that he did not like to hurt people. This testimony, if believed, would preclude any reasonable belief of consent. These wholly divergent accounts create no middle ground from which Williams could argue he reasonably misinterpreted Deborah's conduct.⁹²

The lower court relied on Williams's statement describing consent and the fact that the hotel clerk did not describe any screams emanating from the defendant's room.⁹³ On appeal, the Supreme Court of California reversed the lower court, affirmed Williams's conviction, and held "there was no substantial evidence of equivocal conduct warranting an instruction on reasonable and good faith mistake of fact as to consent to sexual intercourse in this case."⁹⁴

The California rule limiting the affirmative defense of mistake of fact as to consent has been in effect more than 20 years⁹⁵ and California trial judges have successfully applied it in numerous sexual assault cases. The affirmative defense of mistake of fact as to consent requires structure within Article 120. To ensure a statutory framework, "mistake of fact as to consent" from the 2007 Article 120(t)(16) should be returned to Article 120 as subsection (g) (Definitions) section

⁹² *Id.* at 966–67.

⁹³ *Id.*

⁹⁴ *Id.* at 967–68. The California Supreme Court also recommended, "[t]he jury should, however, be further instructed, if appropriate, that a reasonable mistake of fact may not be found if the jury finds that such equivocal conduct on the part of the victim was the product of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.'" *Id.* at 968.

⁹⁵ *Id.* at 961.

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(9), 10 U.S.C. § 920(g)(9) (as discussed above) and the following provisions should be added to Article 120(f) (Defenses)⁹⁶ as subsection (1):

⁹⁶ 2012 Article 120(f) states, “(f) *Defenses*.—An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.”

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Affirmative defense of mistake of fact as to consent.

The term “affirmative defense” means any special defense that, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The military judge shall not instruct the members that there is a defense of mistake of fact as to consent: (1) if the defense evidence is unequivocal consent and the prosecution’s evidence is of non-consensual forcible sex; or (2) unless substantial evidence has been presented on the merits⁹⁷ that the mistake of fact affirmative defense, as defined in section Article 120(g)(9), 10 U.S.C. § 920(g)(9)⁹⁸ applies.

C. Impact of Military Law Regarding Lesser-Included Offenses

Issues regarding lesser-included offenses in turn impact charging decisions, unreasonable multiplication of charges challenges (i.e., multiplicity), and jury instruction choices, and cause confusion in criminal trials generally; the same is true in the case of Article 120 sexual assault cases in the military justice system.⁹⁹

⁹⁷ The military judge should wait until after all of the evidence is presented on the merits before deciding whether a mistake of fact as to consent instruction is warranted. In *United States v. Neal*, 68 M.J. 289, 298–301 (C.A.A.F. 2010), the Court of Appeals for the Armed Forces concluded the burden shift was constitutional under the facts of the case.

⁹⁸ The proposed definition of mistake of fact as to consent in the new Article 120(g)(9) is the same as in the 2007 Article 120(t)(16) and quoted *supra* note 53.

⁹⁹ Lesser-included offenses and multiplicity have been described as creating “‘chaos’ and [being the] the ‘Sargasso Sea’ of military and federal law” or “a vortex that sucks in all sorts of debris ... and causes great suffering.” Captain Gary E. Felicetti, *Surviving the Multiplicity/LIO Family Vortex*, 2011 ARMY LAW. 46 (2011) (tracing the morass of multiplicity and lesser-included offenses in military law). “No area of law relating to jury instructions has created more confusion than that governing when a court may or must put before the jury for its decision a lesser-included offense.” WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 24.8(d) (West, 2d ed. 1984).

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For example, multiple sex acts during one episode may be charged separately.¹⁰⁰ When available lesser-included offenses decrease, the Government may charge more offenses by dividing a single event into different offenses, protecting against the exigencies of proof.¹⁰¹ Essentially, “[a]ll American jurisdictions recognize lesser-included offenses as a device that permits a jury to acquit a defendant of a charged offense and instead to convict of a less serious crime that is necessarily committed during the commission of the charged offense.”¹⁰² The confusion occurs first when determining what offenses to charge to capture all criminal conduct and which lesser-offenses fall under the charged offense, and then providing appropriate jury instructions.¹⁰³ Three tests exist to determine what lesser-included offenses fall under the charged offense: the statutory elements test, the evidentiary approach, and the cognate-pleading test.¹⁰⁴

¹⁰⁰ See *United States v. Plenty Chief*, 561 F.3d 846, 851–53 (8th Cir. 2009) (separate specifications charging touching breasts and attempted digital penetration may be charged); *United States v. Two Elk*, 536 F.3d 890, 898–99 (8th Cir. 2008) (finding separately charged aggravated sexual abuse specifications of anal and vaginal penetration during the same incident are not multiplicitous).

¹⁰¹ Felicetti, *supra* note 99, at 51 (citations omitted).

¹⁰² Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 RUTGERS L.J. 351, 354 (2005) (footnote omitted).

¹⁰³ Michael H. Hoffheimer, *The Future of Constitutionally Required Lesser Included Offenses*, 67 U. PITT. L. REV. 585, 588 (2006).

¹⁰⁴ *State v. Keller*, 695 N.W.2d 703, 707 (N.D. 2005) (quoting WAYNE R. LAFAYETTE ET AL., 5 CRIMINAL PROCEDURE § 24.8(e) (2d ed. 1984)) (listing the three tests and stating, “Under the ‘statutory elements’ approach, the elements of the offense must be such that it is impossible to commit the greater offense without committing the lesser. *Id.* ‘The statutory-elements approach, which was the original common law position, is used today in the federal courts and in a growing number of states.’ *Id.* Under the ‘evidentiary’ approach, the instruction would be appropriate if the facts of the case would permit an accused to be convicted of a less serious offense even if the elements do not make it impossible to commit the greater without committing the lesser offense. *Id.* The ‘cognate pleadings’ approach looks to the pleadings rather than to the evidence introduced. *Id.* The evidentiary and cognate-pleadings approaches have been criticized as being unclear and placing both the prosecutor and defense in an untenable position, because they open the door for so many potential lesser included offenses. *Id.*). In the “inherent relationship” test, “the greater and lesser offenses ‘must relate to protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.’” *Id.* See *United States v.*

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Determining what lesser-included offenses fall within a charged offense became clearer for the Armed Forces when in 2010, in *United States v. Jones*, the Court of Appeals for the Armed Forces (CAAF) mandated that military courts use the elements test that other federal courts use, stating that:

[u]nder the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an [lesser-included offense] LIO of Y. Offense Y is called a greater offense because it contains all of the elements of offense X along with the one or more additional elements.¹⁰⁵

In mandating the elements test, the Court of Appeals for the Armed Forces merely followed the Supreme Court's direction.¹⁰⁶ Further establishing the elements test, the court in *United States v. Fosler*, reversed a conviction for adultery and reinforced the Constitutional requirement for notice pleading, stating:

This test [the elements test] requires that “the indictment contain[] the elements of both offenses and thereby give[] notice to the defendant that he may be convicted on either charge. . . .

Horn, 946 F.2d 738, 745 n.5 (10th Cir. 1991) (citation omitted). In *Horn*, the Tenth Circuit abandoned the “inherent relationship test” and returned to “elements test” also known as “the impossibility test . . . because if the elements of a lesser offense must be a subset of the greater offense, then it is impossible to commit the greater offense without first having committed the lesser.” *Id.* at 744 (citing *United States v. Brown*, 604 F.2d 557, 560–61 (8th Cir. 1979)).

¹⁰⁵ *United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010).

¹⁰⁶ *United States v. Bonner*, 70 M.J. 1, 2 (C.A.A.F. 2011) (citing *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010)); *United States v. Schmuck*, 489 U.S. 705, 716 (1989)).

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The military is a notice pleading jurisdiction. . . . A charge and specification will be found sufficient if they, ‘first, contain[] the elements of the offense’ charged and fairly inform[] a defendant of the charge against which he must defend, and, second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense. The rules governing court-martial procedure encompass the notice requirement: ‘A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication.’¹⁰⁷

As for instructions, the CAAF determined that pursuant to the elements test, “the elements of the lesser-offense are a subset of the elements of the charged offense. Where the lesser-offense requires an element not required for the greater offense, no instruction [regarding a lesser included offense] is to be given.”¹⁰⁸ The CAAF declined to accept that a lesser included offense must be included in the greater offense stating:

The basic test to determine whether the court-martial may properly find the accused guilty of an offense other than that charged is whether the specification of the offense on which the accused was arraigned alleges fairly, and the proof raises reasonably, all elements of both crimes so that they stand in the relationship of greater and lesser offenses.¹⁰⁹

¹⁰⁷ United States v. Fosler, 70 M.J. 225, 228–29 (C.A.A.F. 2011) (quoting Patterson v. New York, 432 U.S. 197, 210, (1977)).

¹⁰⁸ Bonner, 70 M.J. at 2 (quoting United States v. Jones, 68 M.J. 465, 472 (C.A.A.F. 2010); internal quotation marks omitted). See also United States v. Alston, 69 M.J. 214 (C.A.A.F. 2010) (quoting United States v. Schmuck, 489 U.S. 705, 716 (1989)).

¹⁰⁹ Jones, 68 M.J. at 469 (quoting United States v. Virgilito, 22 C.M.A. 394 (1973)).

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The presence of Article 120 definitions makes it easier to delineate lesser-included offenses and to identify the accused's acts that must be proven to establish guilt.¹¹⁰ As applied to the Article 120 the elements test, however, may cause cautious military prosecutors (trial counsel) to charge multiple sex offenses to increase the probability of a conviction. Multiple sex offense charges may mislead or confuse panel members who will see the multiple charges on the flyer (a document provided to the military jury at the start of the court-martial).

Additionally, the CAAF requires instructions on all lesser-included offenses if evidence is presented to support the lesser-included offense. The court has concluded:

When evidence is adduced during the trial which “reasonably raises” a lesser-included offense, the judge must instruct the court panel regarding [the] lesser-included offense
.... [Note: is this punctuation correct?]
[T]his Court [has] held that instructions on lesser-included offenses are required unless affirmatively waived by the defense. . . . As the defense did not affirmatively waive an instruction on [the lesser included offense]

¹¹⁰ *Bonner*, 70 M.J. at 3 (assault consummated by a battery is a lesser-included offense of wrongful sexual contact); *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012) (affirming conviction of lesser-included offense “[b]ecause abusive sexual contact piggybacks the definition of aggravated sexual assault, all of the elements of the two offenses necessarily line up, except that aggravated sexual assault requires a ‘sexual act’ whereas abusive sexual contact requires ‘sexual contact’”); *Alston*, 69 M.J. at 215–16 (affirming aggravated sexual assault conviction as a lesser-included offense of a rape). The difficulties with charging lesser-included offenses involving sex offenses preceded the reform of 2007 Article 120. *See Jones*, 68 M.J. at 473 (reversing conviction of indecent acts with another, holding indecent acts with another is not a lesser included offense of the pre-2007 Article 120 version of rape); *United States v. Burleson*, 69 M.J. 165 (C.A.A.F. 2010) (same).

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in this case, the military judge was required to instruct on the lesser-included offense . . . if the evidence reasonably raised it.¹¹¹

Traditionally, the CAAF employed “a liberal standard in determining whether an offense is lesser included in one that is charged.”¹¹² This broad interpretation urged military trial judges to give defense counsel great leeway and liberally grant requests for instructions on lesser-included offenses.

Due to the CAAF’s declaration of the elements test and requiring notice pleading—providing the accused with adequate notice as the offenses charged¹¹³—with the revamped Article 120, trial counsel found themselves charging additional

¹¹¹ United States v. Davis, 53 M.J. 202, 205 (C.A.A.F. 2000) (internal citations and quotation marks omitted); United States v. Wells, 52 M.J. 126, 129 (C.A.A.F. 1999) (“Military law goes further [than federal civilian law]. It requires a trial judge to give such an instruction on a lesser-included offense ‘*sua sponte* . . . for which there is . . . some evidence which reasonably places the lesser included offense in issue.”). Appellate litigation in the past several years has focused on problematic lesser-included sex offenses charged as Article 134 offenses, offenses prejudicial to good order and discipline or service discrediting conduct. Until recently, courts-martial practice permitted instructions to the fact finder on lesser-included offenses, such as when indecent assault or indecent acts (Article 134), rape (Article 120), forcible sodomy (Article 125) was charged. See United States v. Schoolfield, 40 M.J. 132, 137 (C.M.A. 1994) (“although indecent acts requires a service disorder or discrediting circumstances, such an element is included by implication in Article 120.”); United States v. Foster, 40 M.J. 140, 143 (C.M.A. 1994), *overruled in part* by United States v. Miller, 67 M.J. 385, 388–89 (C.A.A.F. 2009). In 2010, the Court of Appeals for the Armed Forces reversed an accused’s conviction of indecent acts, holding that indecent acts (an Article 134 offense) was not a lesser-included offense of rape (an Article 120 offense). *Jones*, 68 M.J. at 473. In United States v. Fosler, 70 M.J. 225, 229–32 (C.A.A.F. 2011), the court held that the terminal element of prejudice to good order and discipline or service discrediting conduct in adultery in violation of Article 134 was not necessarily implied in the specification and would not survive a motion to dismiss. Additionally, an allegation in the specification that accused “wrongfully” engaged in adulterous conduct did not imply the terminal element. *Id.* The Court of Appeals for the Armed Forces further changed the rules on charging Article 134 offenses in *United States v. Humphries*, holding, “that the accused was prejudiced by the failure to allege the terminal element in a contested Article 134, UCMJ, 10 U.S.C. § 934 (2006), specification.” United States v. Wilkins, 71 M.J. 410, 414 (C.A.A.F. 2012) (*citing* United States v. Humphries, 71 M.J. 209, 217 (C.A.A.F. 2012)).

¹¹² United States v. McVey, 4 C.M.A. 167, 175 (1954) (Brosman, J., concurring) (“Traditionally this Court has worn an outside pair of spectacles in viewing the problem of lesser included offenses, and has applied an extremely generous standard in determining whether a related offense is included within the principal one. I am sure of the overall soundness of this policy.”).

¹¹³ *Fosler*, 70 M.J. at 228–29.

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offenses that have different elements.¹¹⁴ In response to concerns that lesser-included offenses relating to charging decisions and panel instructions was causing confusion after the 2006 revision of Article 120, the Department of Defense ordered a review and sought suggestions about the charging of sex offenses.¹¹⁵ Some military prosecutors indicated that the charging of multiple offenses on the charge sheet and complex and lengthy jury instructions confused panel members and might be resulting in acquittals.¹¹⁶

Since the Article 120 offenses were primarily modeled from Title 18 sex offenses,¹¹⁷ one might expect that the same problems would have surfaced through the years of prosecuting hundreds of Title 18 sexual assault offenses;¹¹⁸ however, there is no evidence that assistant U.S. attorneys have blamed unsuccessful prosecutions on confusing jury instructions or multiple charges. Military court-martial practice regarding charging and instructions as they relate to lesser-included offenses is now more consistent with practice in U.S. district courts.¹¹⁹

Federal courts have imposed a more restrictive method of evaluating lesser-included offense instructions by generally applying the five-factor test which entitles a defendant to a lesser-included offense instruction when: “(1) a proper request is made; (2) the lesser-offense elements are identical to part of the greater-

¹¹⁴ *Jones*, 68 M.J. at 465; *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008); *United States v. Miller*, 67 M.J. at 385 (C.A.A.F. 2009); *Fosler*, 70 M.J. at 225.

¹¹⁵ REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES 80–81 (Dec. 2009) [hereinafter DTFSAMS REPORT 2009].

¹¹⁶ *See supra*, note 11. *See also*, Jane A. Minerly, Note, *The Interplay of Double Jeopardy, the Doctrine of Lesser Included Offenses, and the Substantive Crimes of Forcible Rape and Statutory Rape*, 82 TEMP. L. REV. 1103, 1103–04 (2009).

¹¹⁷ *See supra*, note 10.

¹¹⁸ The regime of Title 18 sexual abuse offenses has been in effect for 27 years. 18 U.S.C. § 2241-2245 were added Nov. 10, 1986, by P.L. 99-646, § 87(b), 100 Stat. 3620, and Nov. 14, 1986.

¹¹⁹ *Bonner*, 70 M.J. at 3 (C.A.A.F. 2011) (holding that assault consummated by a battery is a lesser included offense of wrongful sexual contact); *United States v. Alston*, 69 M.J. 214, 215–16 (C.A.A.F. 2010) (holding that aggravated sexual assault is a lesser included offense of rape by force).

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offense elements; (3) some evidence would justify conviction of the lesser offense; (4) there is evidence such that the jury may find the defendant innocent of the greater and guilty of the lesser-included-offense; and (5) mutuality.”¹²⁰ To provide further structure and restrictions for courts, Congress should legislatively impose this five-factor test on the military justice system, causing greater consistency and predictability.

IV. GOOD MILITARY CHARACTER EVIDENCE: CHANGING THE MILITARY RULES OF EVIDENCE TO BETTER PROTECT VICTIMS

In addition to statutory changes to the sexual assault punitive articles, some limits should be made to the admissibility of evidence of the accused’s good military character during courts-martial for sexual assault offenses. Although President Obama signed the National Defense Authorization Act into law in December 2013¹²¹ and that law includes a provision that reduces the influence

¹²⁰ United States v. Meeks, 639 F.3d 522, 528 (8th Cir. 2011) (*citing* United States v. Crawford, 413 F.3d 873, 876 (8th Cir. 2005)); United States v. Parker, 32 F.3d 395, 400–01 (8th Cir. 1994). *See also* David E. Rigney, Annotation, *Propriety of Lesser-Included-Offense Charge to Jury in Federal Criminal Case—General Principles*, 100 A.L.R. FED. 481, 495–96 (Westlaw 2011) (stating federal courts either use the Meeks five-factor test or a four-factor test, eliminating the mutuality test and listing numerous cases applying these tests); United States v. LaPointe, 690 F.3d 434, 339–440 (6th Cir. 2012) (applying four-factor test).

¹²¹ The House Armed Services Committee summarized the sexual assault prevention provisions in the 2014 National Defense Authorization Act (NDAA) as follows:

The legislation includes over 30 provisions or reforms to the Uniform Code of Military Justice directed at combatting sexual assault in the military. These reforms would remove the commanders’ authority to dismiss a finding by a court-martial—a power they have held since the earliest days of our military. It would also prohibit commanders from reducing a guilty finding to a finding of guilty of a lesser offense. Where servicemembers are found guilty of sexual assault-related offenses, the NDAA establishes minimum sentencing guidelines. Currently, such guidelines only exist in the military for the crimes of murder and espionage. Personnel records will now include information on sex-related offenses. Recognizing that victim support is as vital as prosecution, the NDAA grants sexual assault victims authority to apply for a permanent change of station or unit transfer, while authorizing the Secretary of

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accused's character and military service has in the commander's disposition decision,¹²² that provision will not eliminate the impact of such evidence in the courtroom. In addition to statutory changes to the sexual assault punitive articles, some limits should be made to the admission of evidence of the accused's good military character during courts-martial for sexual assault offenses.

Comparing admissibility of good character evidence in federal court with military courts-martial illustrates how the broad admissibility in the Military Rules of Evidence (Mil. R. Evid.) may also lead to acquittals and in turn negatively impact victims. Some modification should be made to these rules to ensure admission of good military character is prohibited in cases of violence or sexual activity, unless the traits correspond to an element of the crime charged.

A. Do the Military Rules of Evidence Provide More Leeway: A Comparison of the Federal and Military Rules of Evidence

Defense to inform commanders of their authority to remove or temporarily reassign servicemembers who are the alleged sexual assault perpetrators. The NDAA requires the provision of victims' counsel, qualified and specially trained lawyers in each of the Services, to be made available to provide legal assistance to the victims of sex-related offenses. The NDAA adds rape, sexual assault, or other sexual misconduct to the protected communications of servicemembers, with a Member of Congress or an Inspector General—and expands those protections for sexual assault crimes. The NDAA eliminates the 5-year statute of limitations on rape and sexual assault. To better protect victims' rights, the NDAA reforms the Article 32 process to avoid destructive fishing expeditions and properly focus on probable cause. A number of victims' rights policies are enshrined in statute. Finally, to ensure that the military is better positioned to deal with the crisis of sexual assault within its ranks, the NDAA requires the Secretary of Defense to assess the current role and authorities of commanders in the administration of military justice and the investigation, prosecution, and adjudication of offenses under the Uniform Code of Military Justice.

House of Representatives, Armed Service Committee, *Fact Sheet: FY14 NDAA Summary Highlights of the National Defense Authorization Act for Fiscal Year 2014* (Dec. 9, 2013), available at http://armedservices.house.gov/index.cfm/files/serve?File_id=127E1D4B-DD70-4B69-80DC-A036DA7B3519 (last visited Dec. 23, 2013).

¹²² National Defense Authorization Act for Fiscal Year 2014, section 1708 states, "Not later than 180 days after the date of the enactment of this Act, the discussion pertaining to Rule 306 of the Manual for Courts-Martial (relating to policy on initial disposition of offenses) shall be amended to strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense."

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Federal Rule of Evidence (Fed. R. Evid.) 404(a) and Mil. R. Evid. 404(a) providing for the admissibility of good character evidence are similar but not identical. Fed. R. Evid. 404(a) provides as follows:

Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

Similarly, Mil. R. Evid. 404(a) provides:

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of the accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if

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evidence of a pertinent trait of character of the alleged victim of the crime is offered by an accused and admitted under Mil. R. Evid. 404(a)(2), evidence of the same trait of character, if relevant, of the accused offered by the prosecution.

An additional rule of evidence allowing for the admissibility of good character evidence in criminal trials is Rule 405. Here, the distinction between the military rule and the federal rule is important and results in facilitating the accused's presentation of specific records reflecting good military character. Fed. R. Evid. 405 provides as follows:

Rule 405. Methods of Proving Character

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

The first few military and federal 405 provisions seem equivalent, both allowing evidence of specific instances in certain cases. The provision regarding

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admissibility of affidavits in the military rules, however, further opens the door to good military character evidence. Mil. R. Evid. 405 provides:

Rule 405. Methods of proving character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

(c) Affidavits. The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(d) Definitions. "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" in the armed forces includes a post, camp, ship, station, or other military organization regardless of size.

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B. Good Character Evidence in U.S. District Courts

If charged with committing a violent crime, the defendant may present specific instances of conduct as proof that the defendant possesses a *relevant* character trait such as “peaceableness.”¹²³ In addition, in federal district courts, a defendant has the right to establish the character trait of being a *law-abiding citizen* in every case, not only where the defendant testifies or when dishonesty is an element of crime.¹²⁴ Specifically, U.S. District Courts permit reputation and opinion testimony regarding law-abiding character because it is almost always a pertinent character trait whenever someone is charged with a crime.¹²⁵ For example, in *United States v. Darland*, involving a robbery charge, the judge erred by excluding evidence of the defendant’s *reputation* for honesty, integrity as a law-abiding citizen, and for peacefulness whether or not the defendant testified.¹²⁶ However, specific instances of law-abiding character are generally excluded. For example, in *United States v. Crockett*, the defendant, a former police officer, could not prove a character trait with evidence of specific instances of good conduct, but character witnesses could testify under Fed. R. Evid. 404(a)(1), 405(a) as to their

¹²³ *United States v. Giese*, 597 F.2d 1170, 1190 (9th Cir. 1979) (“Unlike character witnesses, who must restrict their direct testimony to appraisals of the defendant’s reputation, a defendant-witness may cite specific instances of conduct as proof that he possesses a relevant character trait such as peaceableness.”).

¹²⁴ *United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981).

¹²⁵ *See United States v. Harris*, 491 F.3d 440, 447–48 (D.C. Cir. 2007). *See also United States v. Angelini*, 678 F.2d 380, 381 (1st Cir. 1982) (reversed because evidence of law-abiding character not admitted in case where the defendant was charged with possessing with intent to distribute and distributing methaqualone).

¹²⁶ *United States v. Darland*, 626 F.2d 1235, 1237–38 (5th Cir. 1980). *See also United States v. Lechoco*, 542 F.2d 84, 88 (D.C. Cir. 1976) (defendant need not testify to make truthfulness a pertinent character trait).

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opinions that the defendant was a good person and that they were not aware that he engaged in any illegal activities.¹²⁷

Federal courts further exclude evidence of a defendant's prior good acts in criminal prosecutions as character evidence under Fed. R. Evid. 405 when character is not an essential element of the particular offenses charged.¹²⁸ For example, in *United States v. Nazzaro*, the court found that the trial judge properly excluded the defendant's (a police officer's) resume and other anecdotal proof of commendations or character evidence as they were not pertinent to the crime of stealing civil service exams.¹²⁹ Federal courts have found evidence of a defendant's specific traits of honesty, integrity, truthfulness, and generosity are inadmissible under Fed. R. Evid. 405(b) because those traits were not essential elements of charges against defendants or any defenses they raised. Moreover, character traits raised by defendants were general character traits, and because they were not "essential elements" of crimes or defenses, courts have found that Rule 405(b) does not permit criminal defendants to admit evidence of specific instances of those traits.¹³⁰

Federal courts may also rely on the Fed. R. Evid. 403 balancing test to exclude character evidence. For example, in *United States v. Harris*, although the defendant's mother, girlfriend, and coworker testified that the defendant was a

¹²⁷ *United States v. Crockett*, 586 F. Supp. 2d 877, 884 (E.D. Mich. 2008).

¹²⁸ *United States v. Marlinga*, 457 F. Supp. 2d 769, 770 (E.D. Mich. 2006).

¹²⁹ *United States v. Nazzaro*, 889 F.2d 1158, 1168 (1st Cir. 1989). *See also* *United States v. Hill*, 40 F.3d 164, 169 (7th Cir. 1994) ("law-abidingness" not a "pertinent character trait" related to charges of dealing in cash and checks); *United States v. Santana-Camacho*, 931 F.2d 966, 967-68 (1st Cir. 1991) (holding evidence of character as "a good family man" and as "a kind person" are inadmissible because it was not pertinent to the illegal transportation of aliens into the country); *Nazzaro*, 889 F.2d at 1168 (holding character for "bravery" and "attention to duty" not pertinent to the charges of mail-fraud conspiracy and perjury).

¹³⁰ *United States v. Manfredi*, No. 07-352, 2009 U.S. Dist. LEXIS 104190, at *15 (W.D. Pa. 2009).

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good father with a reputation for truthfulness, and those character traits were pertinent in drug distribution trial under Fed. R. Evid. 404(a)(1), such evidence was properly excluded because its probative value was substantially outweighed by danger of unfair prejudice under Fed. R. Evid. 403.¹³¹

Nevertheless, federal appellate courts review trial court rulings on admissibility of opinion and reputation evidence testimony using an “abuse of discretion,” standard and reversals are very rare. As the D.C. Circuit Court stated in *Harris*, whether reputation testimony should be admissible is best determined at the trial level because,

Both propriety and abuse of reputation testimony depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject.¹³²

In *United States v. Davis*, the court found that excluding a defendant’s prison records was not an abuse of discretion because “[r]arely and only after clear showing of prejudicial abuse of discretion will appellate courts disturb rulings of trial courts admitting character evidence.”¹³³

C. Good Character Evidence in Courts-Martial

¹³¹ *Harris*, 491 F.3d at 447–48.

¹³² *Id.* at 447.

¹³³ *United States v. Davis*, 546 F.2d 583, 592 (5th Cir. 1977) (citations omitted). Additionally, the failure to provide a requested instruction on character evidence may be reversible error. *United States v. John*, 309 F.3d 298, 304 (5th Cir. 2002).

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Similar to federal district courts, military trial judges at courts-martial allow admission of an accused's reputation as a law-abiding citizen to show the probability of innocence; moreover, since 1951, military courts have admitted evidence of an accused's good military character including military record and general character as a moral, well-behaved person.¹³⁴ The accused, "[h]owever, may not introduce evidence as to some specific trait of character unless proof of that trait would have a reasonable tendency to show that it was unlikely that he committed the particular offense charged."¹³⁵

Although no universally accepted definition of "good military character" exists, military courts broadly interpret this term to include overall military performance as well as evaluations. Opinions regarding past or future battlefield performance are often admitted into evidence, and it is not unusual for a character witness to testify, "I would go to war with him [or her]." Or "I would trust him [or her] to have my back on the battlefield."¹³⁶ Dependability, leadership, initiative,

¹³⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951), ¶ 138f(2) (*citing* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1949)) provided:

In order to show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing and evidence of his general character as a moral well-conducted person and law-abiding citizen. However, if the accused desires to introduce evidence as to some specific trait of character, such evidence must have reasonable tendency to show that it was unlikely that he committed the particular offense charged. For example, evidence of reputation for peacefulness would be admissible in a prosecution for any offense involving violence, but it would be inadmissible in a prosecution for a non-violent theft.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969 Rev. Ed.), ¶ 138f retained this provision with only minor changes in word choice.

¹³⁵ *United States v. Vandelinder*, 20 M.J. 41, 44 (C.M.A. 1985).

¹³⁶ Randall D. Katz and Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117, 130–31 (Dec. 2001) (citations omitted).

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duty performance, proficiency, promptness, and “take charge and accomplish the mission” attitude, are all relevant attributes of a good soldier.¹³⁷

Military courts further admit performance evaluation reports as evidence of good military character. Evaluations include traits such as professional performance, military behavior, leadership, supervisory ability, military appearance, and adaptability, as well as descriptions of assigned tasks and performance.¹³⁸ Moreover, military trial judges commit judicial error if they do not admit enlisted evaluation reports as part of the good soldier defense.¹³⁹ The evaluation forms themselves provide definitions such as: professional performance as “skill and efficiency in performing assigned duties;”¹⁴⁰ military behavior as “how well the member accepts authority and conforms to the standards of military behavior;”¹⁴¹ and “[l]eadership and supervisory ability” as “the ability to plan and assign work to others.”¹⁴² Military appearance is defined as the “member’s military appearance and neatness in dress.”¹⁴³

There are no recent cases where the Service Courts of Criminal Appeals and the Court of Appeals for the Armed Forces (CAAF) held the trial judge properly excluded general good military character evidence; regardless of the offense charged, the CAAF (and its predecessor the Court of Military Appeals) in the past simply describes the failure to admit the evidence as an abuse of discretion and

¹³⁷ *Id.* at 131 (*citing* United States v. Brown, 41 M.J. 1, 7 (C.M.A. 1994) (Crawford, J., dissenting); United States v. True, 41 M.J. 424, 427 (1995); United States v. White, 36 M.J. 306, 307 (C.M.A. 1993); United States v. Hallum, 31 M.J. 254, 255 (C.M.A. 1990)).

¹³⁸ *Vandelinder*, 20 M.J. at 43.

¹³⁹ *Id.* at 42–43, 47 (failure to admit reports was harmless error in drug distribution case beyond a reasonable doubt).

¹⁴⁰ *Id.* at 48.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

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then analyzes prejudice. The CAAF analyzes prejudice by employing the following four-part test for prejudice:

First: Is the Government's case against the accused strong and conclusive?¹⁴⁴

Second: Is the defense's theory of the case feeble or implausible?¹⁴⁵

Third: What is the materiality of the proffered testimony? Is the question whether or not the accused was the type of person who would engage in the alleged criminal conduct fairly raised by the Government's theory of the case or by the defense?¹⁴⁶

Fourth: What is the quality of the proffered defense evidence and is there any substitute for it in the record of trial?¹⁴⁷

Presentation of good military character evidence—also known as the “good soldier defense”¹⁴⁸—may shift the panel's attention from the criminal offense to the stellar military record of the accused. If evidence of good military character is presented, the accused is entitled to an instruction regarding good military

¹⁴⁴ United States v. Weeks, 20 M.J. 22, 25 (C.M.A. 1985) (citing United States v. Lewis, 482 F.2d 632, 644 (D.C. Cir 1973)).

¹⁴⁵ Weeks, 20 M.J. at 25 (citing Lewis, 482 F.2d at 646).

¹⁴⁶ Weeks, 20 M.J. at 25 (Cf. Michelson v. United States, 335 U.S. 469 (1948)).

¹⁴⁷ Weeks, 20 M.J. at 25.

¹⁴⁸ See GREGORY MAGGS & LISA SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 596 (2012).

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character,¹⁴⁹ further shifting the trial focus and highlighting the improbability of guilt. As the Court of Military Appeals noted, “[t]he well-recognized rationale for admission of evidence of good military character is that it would provide the basis for an inference that an accused was too professional a soldier to have committed offenses which would have adverse military consequences.”¹⁵⁰ Critics of the DoD’s approach to processing military sexual assault cases point to the impact of the good soldier defense on military courts-martial. While evidence of good military character may be relevant in cases involving inherently military offenses such as failure to obey a lawful order and dereliction of duty (Article 92, UCMJ), critics argue that such evidence clouds the issue of guilt.¹⁵¹ Some support for this

¹⁴⁹ United States v. Smith, 34 M.J. 341, 342 (C.M.A. 1992) (citing United States v. Pujana-Mena, 949 F.2d 24, 31 (2d Cir. 1991)).

¹⁵⁰ United States v. Wilson, 28 M.J. 48, 49 n.1 (C.M.A. 1989) (citations omitted).

¹⁵¹ Elizabeth Lutes Hillman, *The “Good Soldier” Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879 (1999). Professor Hillman persuasively argues that good military character evidence is most relevant when the accused is charged with military offenses, stating:

Courts-martial for offenses defined as “military” present the strongest case for admitting evidence of good military character. Because military law penalizes many acts that are not criminal under civilian law, some of the offenses charged at court-martial cannot be committed by civilians. The good soldier defense is most effective at courts-martial for these military offenses, particularly for relatively minor charges, such as “conduct unbecoming an officer and a gentleman,” abuse of authority, disobedience, and being absent without leave. In short, good military character, presuming that it indicates at least something about an accused’s dedication to the military and duty performance, is most probative in courts-martial for military offenses.

Admitting generic good military character evidence in courts-martial for military-specific offenses seems consistent with the intent and meaning of Military Rule of Evidence 404(a)(1); surely “military character” is a pertinent trait when a servicemember is accused of being disrespectful, disloyal, sloppy, or otherwise unsoldierly. Determining what constitutes a “military” as opposed to a “non-military” offense, however, may call for a nuanced analysis and careful weighing of multiple factors. Faced with the difficulty of making a rule to distinguish “service-connected” from “non-service-connected” offenses, the Supreme Court opted to expand court-martial jurisdiction instead. In the context of sex crimes and sexual harassment, a line between a military and a nonmilitary offense is especially difficult to draw, since an accused often has abused his position of

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assertion exists. For example in 1998, Sergeant Major of the Army (SMA) Gene McKinney was charged with nineteen specifications of sexual abuse or harassment of six female military subordinates.(including a captain and a sergeant major)and obstruction of justice. The jury of at least one-third enlisted members convicted him of one specification of obstruction of justice (he was tape recorded trying to convince one of the victims not to make a statement against him) and reduced his military rank to master sergeant. Several general officers (including a retired four-star general) and an assistant secretary of the Army testified regarding SMA McKinney’s good military character. The highest ranking person who testified on behalf of the female victims was a lieutenant colonel. Sergeant Major of the Army McKinney’s lawyers stated that his good military character evidence was important and perhaps decisive in the acquittal.¹⁵² To avoid the possibility of jury nullification based on the good soldier defense in military sexual assault cases, some change—either through Congressional direction to the DoD or by statute—might be considered.

D. Recommendation: Amend the Manual for Courts-Martial or Enact a New Statute

authority in order to commit an offense not specific to the military. In any case, the practice of restricting good soldier testimony to courts-martial involving military offenses was abandoned soon after the adoption of the Military Rules of Evidence, when military courts eliminated the requirement for a “nexus” between military duty and the charged offense.

Id. at 901–01.

Professor Hillman contends that a military accused should be treated the same as a U.S. defendant in other civilian trials and that such evidence should be inadmissible in prosecutions for drug offenses or sex crimes. *Id.* Professor Hillman cites ten appellate decisions describing sex offenses in which the good soldier character evidence played a role. *Id.* at 902–903, 902 n.121. *See also Wilson*, 28 M.J. 48, 49 n.1.

¹⁵² Hillman, *supra* note 151, at 907.

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To change the Military Rules of Evidence, the Congress could direct the executive branch to amend Mil. R. Evid. 404 and 405, by including the following provision in the National Defense Authorization Act:

Not later than 180 days after the date of the enactment of this Act, Military Rule of Evidence 404 shall be modified to clarify that military character evidence is not admissible to show the probability of innocence for any violation of: Articles 118 to 132; Articles 77 to 82 involving predicate offenses under Articles 118 to 132; and Articles 133 and 134 offenses involving violence or sexual misconduct. However, evidence of other specific traits of an accused's character, including law-abiding character, may be offered in evidence when those specific traits are relevant to an element of an offense for which the accused is being tried.

Military Rule of Evidence 405(c) shall be deleted to make Military Rule of Evidence 405 more consistent with Federal Rule of Evidence 405.

General military character includes but is not limited to past or future battlefield performance, dependability, leadership, initiative, duty performance, proficiency, military bearing, and promptness. Evidence of law-abiding character shall be admissible to the same extent as under Federal Rule of Evidence 404.

Since some risk exists that the executive branch may misinterpret Congressional intent, the Congress could enact a statutory change to the Uniform Code of Military Justice. Congress would maintain more control by providing specific language such as the following:

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§ 850b. Art. 50b. Admissibility of character evidence

In any case, not capital, involving a violation of Articles 118 to 132; Articles 77 to 82 involving predicate offenses under Articles 118 to 132; and Articles 133 and 134 offenses involving violence or sexual misconduct, evidence of military character is not admissible to show probability of innocence. Affidavits or other written statements of persons other than the accused, concerning the character of the accused or of any other witness, and evidence of law-abiding character shall be admissible to the same extent as under Federal Rule of Evidence 405.

General military character includes but is not limited to past or future battlefield performance, dependability, leadership, initiative, duty performance, proficiency, military bearing, and promptness. Evidence of law-abiding character shall be admissible to the same extent as under Federal Rule of Evidence 404.

V. CONCLUSION: RECOMMENDED STATUTORY CHANGES TO PROTECT VICTIMS

In response to the pressure President Barack Obama, Congress, the media, and the American public have placed on the DoD to reform its approach to sexual assault in the military Services, the DoD has conducted multiple reviews and launched several investigations into the issue while Congress has implemented statutory changes to the UCMJ in 2007 and 2012. These past and current efforts, however, are insufficient to reach the goal of convicting more perpetrators.

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Modifications to the UCMJ and the Military Rules of Evidence could assist prosecutors in achieving this goal and better protect victims. A proposed bill, attached as an Appendix to this article, includes recommended provisions that could do just that. As the proposed legislation indicates statutory revisions would do the following: 1) return the offense of “Indecent Acts with Another,” to Article 120 criminal offenses; 2) modify the definition of force to be more inclusive by adding “suggesting possession of a dangerous weapon”; 3) eliminate the increased emphasis on whether the victim’s fears are “reasonable;”; 4) eliminate the focus on the accused’s perception of the victim’s behavior; 5) return the statutory limitations regarding the affirmative defense of mistake of fact as to consent; 5-6) establish a statutory structure restricting judicial appellate discretion in determining lesser-included offense instructions; and, 6 7) limit good military character evidence in courts-martial for crimes of violence and sexual misconduct. The proposals set forth by this article for changing military substantive criminal law (Article 120, UCMJ) and Military Rules of Evidence would result not only in a system more consistent with federal and state laws, but also modify the military justice system to lead to more convictions for sexual assault offenses in the military Services.

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APPENDIX

.....
(Original Signature of Member)

**113TH CONGRESS
1ST SESSION**

H. R. _____

To amend the Uniform Code of Military Justice to provide more consistency with federal and state sexual assault statutes and create a more comprehensive sexual assault statute for the military Services by: including the offense of “Indecent Acts with Another,” in Article 120 criminal offenses; defining force to include “suggesting possession of a dangerous weapon”; eliminating the increased emphasis on whether the victim’s fears are “reasonable;”; by removing the focus from the accused’s perceptions of the victim; by limiting the scope of the mistake of fact as to consent defense to ensure perpetrators cannot be acquitted by only asserting their perceptions that the victims were consenting; establishing a statutory structure restricting judicial appellate discretion in determining lesser-included offense instructions; and, limiting good military character evidence in courts-martial for crimes of violence and sexual misconduct.

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IN THE HOUSE OF REPRESENTATIVES

_____ introduced the following bill; which was referred
to the Committee on _____

A BILL

To amend the Uniform Code of Military Justice (UCMJ) to provide more consistency with federal and state sexual assault statutes and create a more comprehensive sexual assault statute for the military Services.

*Be it enacted by the Senate and House of Representatives
of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the “Military Sexual Assault Reform Act of 2013”.

SEC. 2. REINSTATING THE OFFENSE OF INDECENT ACT AS AN OFFENSE

(a) THE FOLLOWING SECTIONS ARE REINSTATED TO SECTION
920 OF TITLE 10 U.S. CODE:

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(a) Indecent act. Any person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.

SEC. 3. IMPROVEMENT OF THE DEFINITION OF FORCE

(a) SECTION 920(G) OF TITLE 10 U.S. CODE IS AMENDED AS FOLLOWS:

(a) Section 920(g)(5)(A) is repealed and replaced with “(g)(5)(A) the use, display, or the suggestion of use, of a weapon.”

(b) In Section 920(g)(7), the words “a reasonable” are repealed and replaced with “victim to” from the phrase “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.”

(c) Section 920(b)(2) is repealed and replaced with “(2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of— (A) appraising the nature of the sexual act; (B) declining participating in the sexual act; or (C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault.”

SEC. 4. DECREASING THE EMPHASIS IN SEXUAL ASSAULT PROSECUTIONS ON THE PERPETRATOR’S PERCEPTIONS OF THE VICTIM’S CONSENT.

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(a) SECTION 920(F)(1) OF TITLE 10 U.S. CODE IS ADDED TO THE DEFENSE SUBSECTION OF SECTION 920 AS FOLLOWS:

“(1) **Affirmative defense of mistake of fact as to consent.** The term “affirmative defense” means any special defense that, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The military judge shall not instruct the members that there is a defense of mistake of fact as to consent: (1) if the defense evidence is unequivocal consent and the prosecution’s evidence is of non-consensual forcible sex; or (2) unless substantial evidence has been presented on the merits that the mistake of fact affirmative defense, as defined in section Article 120(g)(9), 10 U.S.C. § 920(g)(9) applies.”

(b) SECTION 920(G)(9) OF TITLE 10 U.S. CODE IS ADDED TO THE DEFINITION SUBSECTION OF SECTION 920 AS FOLLOWS:

“(9) **Mistake of fact as to consent.** The term “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 sexual conduct consented. 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

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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. The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. A reasonable mistake of fact may not be found that is based upon ambiguous conduct by an alleged victim that is the product of conduct by the accused that amounts to force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of the alleged victim or another.”

SEC. 5. CONFORMING COURTS-MARTIAL WITH U.S. DISTRICT COURT PROCEDURES

(a) APPLY THE SAME TEST THAT IS USED IN U.S.

DISTRICT COURT FOR INSTRUCTIONS ON LESSER-INCLUDED OFFENSES IN COURTS-MARTIAL BY ADDING SECTION 850(C)(5) OF TITLE 10 U.S. CODE—Section 850(c)(5), is added stating:

“(c) An instruction on a lesser included offense may not be made to the members by the military judge unless (1) a proper

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request is made; (2) the lesser-offense elements are identical to part of the greater-offense elements; (3) some evidence would justify conviction of the lesser offense; (4) there is evidence such that the jury may find the defendant innocent of the greater and guilty of the lesser-included-offense; and (5) mutuality.”

SEC. 6. INADMISSIBILITY OF GOOD MILITARY

CHARACTER EVIDENCE

(a) ADMISSIBILITY OF GOOD MILITARY CHARACTER EVIDENCE IN CASES INVOLVING VIOLENCE OR SEXUAL ASSAULT. Section 850b is added to Title 10 U.S. Code as follows:

“§ 850b. Art. 50b. Admissibility of character evidence

In any case, not capital, involving a violation of Articles 118 to 132; Articles 77 to 82 involving predicate offenses under Articles 118 to 132; and Articles 133 and 134 offenses involving violence or sexual activity, evidence of military character is not admissible to show probability of innocence. Affidavits or other written statements of persons other than the accused, concerning the character of the accused or of any other witness, and evidence of law-abiding character shall be admissible to the same extent as

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under Federal Rule of Evidence 405 in criminal cases tried in U.S.

District Court.

General military character includes but is not limited to past or future battlefield performance, dependability, leadership, initiative, duty performance, proficiency, military bearing, and promptness. Evidence of law-abiding character shall be admissible to the same extent as under Federal Rule of Evidence 404 in criminal cases tried in U.S. District Court.”