

ENCLOSURE (2) AFFIRMATIVE CONSENT AND MILITARY RAPE LAW
GREG JACOB, POLICY DIRECTOR, SERVICE WOMEN'S ACTION NETWORK

In 2012 the National Defense Authorization Act revised the previous confusing and nearly incomprehensible military rape law, Article 120 and in doing so made it simpler for investigators, prosecutors, judges and jury panels to understand. Although those changes were substantive and greatly helped refine the Article, the revisions did not far enough to ensure guilty offenders are convicted, military rapes decline, and most importantly the military culture that surrounds these acts of sexual violence changes.

During the process of drafting this change to Article 120, SWAN proposed that the military make a fundamental change in the way the military courts look at sexual assault and adopt a consent-based statute for its rape law. Although SWAN's proposal was supported by several influential Members on the Armed Services Committee, it was not adopted in the revisions. Currently the military continues to adhere to a forced-based definition of rape that dates back to 18th century British law. This is problematic, SWAN argued, because a forced-based rape statute ultimately means that the courts define rape by the behavior of the victim rather than the actions of the perpetrator.¹

In order to secure a conviction, military prosecutors must prove that there was sufficient force used on the victim to constitute non-consensual sex. The only way to prove this is to show that the victim must have demonstrated in some way that he or she did not want sex. The courts look at specific evidence that proves that the victim was not consenting: Did he or she struggle? Did he or she scream? Was there physical evidence showing that penetration was forcible? Was the victim abducted? Was the victim bound? Were the clothes of the victim torn? Was a weapon used?

In a recently dismissed sexual assault lawsuit filed against former Secretaries of Defense Donald Rumsfeld and Robert Gates, one of the plaintiffs in the case testified that her perpetrator videotaped her assault. A copy of that tape was found and shown to her commanding officer who stated that in his opinion it the sex was consensual because the victim "did not struggle enough."² This illustrates is the problem with force-based rape laws, what does "struggling enough" mean? There is no clearly defined line.

Compounding this issue is medical proof that in addition to the "fight or flight" response humans have to an attacker, another common reaction is for victims to "freeze" or exhibit some other type of dissociative behavior during the attack. If a victim reacts by freezing, he or she will not be physically capable of resisting and thus cannot demonstrate to the degree necessary that the sex was non-consensual.

The result is that the sexual assault is no longer defined by the actions of the accused perpetrator, but has shifted to the behavior of the victim. Defense lawyers no longer need to show that the perpetrator did not rape, all they need to do is demonstrate that the victim's behavior was not enough to prove force. Thus it becomes relatively easy to create reasonable doubt with regard to consent which leads to an acquittal. Since the focus is now on the activities of the victim, part of the defense strategy invariably leads to a discussion of the victim's sexual history, what he or she was wearing that night, if the victim was out late, if the victim was walking alone, if the victim had been drinking, if the victim was seen

¹ For an in-depth look at force-based vs consent-based statutes in the context of the military, see Jennifer Knies' paper, "Two Steps Forward, One Step Back: Why The New UCMJ Rape Law Missed The Mark, And How An Affirmative Consent Statute Will Put It Back On Target", [https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/0/12117b40e2e364bb8525738d005b4d5b/\\$FILE/Article%20%20-%20By%20MAJ%20Jennifer%20S.%20Knies.pdf](https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/0/12117b40e2e364bb8525738d005b4d5b/$FILE/Article%20%20-%20By%20MAJ%20Jennifer%20S.%20Knies.pdf).

² <http://www.scribd.com/doc/109560203/First-Amended-Complaint-Cioca-v-Rumsfeld>.

flirting/talking/kissing/leaving the club willingly with the perpetrator, etc. Such a discussion can and often does create a doubt in the minds of the jury that maybe the victim did something that encouraged the perpetrator or led to the assault. This process of victim-blaming often times re-traumatizes the victim and ultimately discourages other victims from reporting their own assaults.

Over the past decade, more than 20 states in the US have adopted some kind of consent-based rape law, throwing out their older force-based statutes in favor of a simpler, clearer definition of consent.

In its simplest form, a consent-based statute simply requires that both parties verbally consent to having sex prior to engaging in sex. Anything other than that clear, affirmative consent by both individuals constitutes non-consensual sex.

Such a change in individual behavior would benefit the overall culture within the military. Even the United States Supreme Court has recognized that sexual intimacy is a center point of relationships, and that intimate relationships are fundamental to our society. A communicative system that allows sexual behavior to proceed unless explicitly prohibited leads to a situation where silence becomes consent. This has directly contributed to the US having some of the highest levels of sexual violence in the world, cannot be good for such relationships. A social structure that encourages women to play an equal role in the sexual relationship and encourages both partners to determine whether sex is actually desired by their partner is surely an advance. The effects of such communication and behaviors will even go farther than just reducing the incidence of rape, but will improve the existing hostile climate found in the military and creating a more productive, cohesive and mission-capable work environment.

A consent-based standard will encourage men to engage in more mature, professional and rational behavior by ascertaining and respecting the wishes of their prospective sexual partners. It is the best way to recognize legally that women are equal partners in any sexual interaction, and that their input is equally valid as that of the male participant. Additionally, it will promote more mature, professional and rational behavior in women by encouraging them to indicate directly their willingness to participate in sexual intercourse. Additionally, by creating parity in sexual interactions, it creates an effective statute for regardless of sexual preferences. Just like the recent revisions to Article 120 that anal and oral penetration, a change to a consent-based Article 120 will become more significant in a post-DADT military and the recent DOD data showing that the majority of sexual violence is perpetrated on men only reinforces the importance of this change.

A consent-based Article 120's has the added value of being well-suited for use by commanders and leaders to enforce good behavior among their troops. Soldiers will follow rules, even rules they don't like, as long as they understand at some level what those rules are. A consent-based Article 120 would be clear and understandable for everyone. It creates a bright line that clearly defines acceptable and unacceptable conduct. Leaders understand that when it comes to military rules and policies that contain any vagueness or "gray area", there are troops who will exploit that vagueness.

Affirmative consent laws are a good fit for the military in several different ways:

- Armed Forces personnel represent a younger, high-risk population that needs clear, trainable and enforceable rules.
- Affirmative consent is a bright line, a feature that is the hallmark of good military rulemaking.
- A clear "yes" is required prior to any sexual penetration. Anything other than that is a crime.
- Verbal consent is teachable and trainable particularly in the controlled, disciplined environment of the military services.

- Responsibility for consent is placed on both parties - courts will be required to examine the consent of both individuals and not just focus on the behavior of the victim.
- There will be less “he said she said” situations commonplace in military sex assault cases.
- Parties are treated as equals – this approach is effective regardless of the gender or sexual preferences of those involved.
- Consent-based laws support and encourage mature, open, responsible conversation among individuals about sex and engaging in sexual acts. This can help change culture.

If the military changes “no means no” to “yes means yes”, and servicemembers have to give and get a clear affirmative “yes” as opposed to an unclear or sometimes even unstated “no” before having sex, there will be far less confusion on the part of the individual participants, and if a sexual assault should occur, there will be far less prosecutorial ambiguity and opportunity for defense counsel shenanigans. The military will see convictions rise, reports of sexual assaults increase, and the current cultural issues that have fed into this epidemic of military sexual violence will change. But until the military adopts a modern consent-based statute, Article 120 will not effectively serve the Armed Forces.