9 October 2008

INFORMATION PAPER

Subject: Sexual Offenses under the "New" Article 120, Uniform Code of Military Justice

1. Purpose. To provide information to Fort Knox leaders regarding recent changes to Article 120, Uniform Code of Military Justice (UCMJ), which expanded the types of sexual offenses with which Soldiers may be charged.

2. Background. In an effort to combat the problem of sexual assault in the military, Congress in the Fiscal Year (FY) 2006 National Defense Authorization Act completely overhauled Article 120, UCMJ, by removing "without consent" as an element of rape and other sexual assaults. It opted instead to make "consent" and "mistake of fact" as to consent affirmative defenses that the accused must raise. Moreover, Congress not only clarified the definition of rape, but it also expanded the types of sexual offenses, with which a Soldier may be charged. It is vitally important for commanders to have a general understanding of this new expanded law and how it could apply to certain Soldier misconduct.

3. Discussion. All sexual offenses are now contained within the "new" Article 120 with the exception of Article 125 Sodomy and Article 134 Adultery. The "new" Article 120, which is now entitled "Rape, Sexual Assault, and Other Sexual Misconduct," provides for the following specific offenses:

- Rape
- Rape of a Child
- Aggravated Sexual Assault
- Aggravated Sexual Assault of a Child
- Aggravated Sexual Contact
- Aggravated Sexual Abuse of a Child
- Aggravated Sexual Contact with a Child
- Abusive Sexual Contact
- Abusive Sexual Contact with a Child
- Indecent Liberty with a Child
- Indecent Act
- Forcible Pandering
- Wrongful Sexual Contact
- Indecent Exposure

4. Commander Focus. Although the technical details regarding the many changes to Article 120 are too numerous for this paper, two are vitally important for commanders.

a. First, regarding rape, under the "Old" Article 120, the government had to prove that the Soldier committed sexual intercourse by force and without consent. The revised Article 120 eliminates the requirement that the government prove that the victim did not consent to sexual intercourse, unless the issue of consent is first raised by the accused. This change brings the military definition of rape in line with Federal law regarding victim conduct during a sexual assault.

b. Second, the amendment creates the offense of "aggravated sexual assault." This revision is vital for the prosecution of misconduct in one of the most common sexual assault scenarios: intercourse with a drunken victim. For example, a victim becomes voluntarily intoxicated, passes out or blacks out, and a Soldier has sexual intercourse with her while the victim is semi or completely unconscious. Under the "Old" Article 120 this could only be charged as rape. Under the "New" Article 120, in this scenario the accused may be charged with aggravated sexual assault.

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