

**WHEN A CONVICTED RAPE IS NOT REALLY A RAPE: THE  
PAST, PRESENT, AND FUTURE ABILITY OF ARTICLE 120  
CONVICTIONS TO WITHSTAND LEGAL AND FACTUAL  
SUFFICIENCY REVIEWS**

MAJOR MARK D. SAMEIT\*

I. Introduction

*It is true rape is a most detestable crime, and therefore ought severely and impartially be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.*<sup>1</sup>

Sir Matthew Hale famously offered this quotation in 1680, and it succinctly summarizes the difficulties Western societies have faced with rape laws. On the one hand, rape is truly a detestable crime that can leave lasting scars on a victim. On the other hand, a false accusation of rape can leave equally deep scars on an innocent accused who faces jail time and a lifetime stigma as a sex offender. This delicate balance has led to a battle of ideas between victim's rights groups and Due Process advocates in crafting effective legislation to define rape as well as proper rules of evidence to protect both the victim and the accused.

In large part, the victim's rights groups have triumphed by redefining nearly every state's rape laws since the 1970s<sup>2</sup> and securing passage of

---

\* Judge Advocate, U.S. Marine Corps. Presently assigned as Trial Counsel, Legal Services Support Section—National Capital Region, Quantico, Virginia. LL.M., 2012, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D. 2008, College of William and Mary Law School; B.S., 2000, University of Virginia. Previous assignments include Legal Services Support Section, Combat Logistics Regiment 17, 1st Marine Logistics Group, Camp Pendleton, California, 2008–2011 (Senior Defense Counsel 2010–2011; Trial Counsel 2010; Defense Counsel 2008–2010); Aviation Supply Officer, Marine Aviation Logistics Squadron 11, Marine Aircraft Group 11, 3d Marine Aircraft Wing, Marine Corps Air Station Miramar, California, 2002–2005. Supply Accounting Officer, Marine Aviation Logistics Squadron 36, Marine Aircraft Group 36, 1st Marine Aircraft Wing, Marine Corps Air Station Futenma, Okinawa, 2001–2002. Member of the bar of the District of Columbia. This article was submitted in May 2012 in partial completion of the Master of Laws requirements of the 60th Judge Advocate Officer Graduate Course.

<sup>1</sup> 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 635 (1st Am. ed. 1847).

<sup>2</sup> Jennifer McMahon-Howard, *Does the Controversy Matter? Comparing the Causal Determinants of the Adoption of Controversial and Noncontroversial Rape Law Reforms*,

specific federal rules of evidence to protect victims and prosecute alleged offenders.<sup>3</sup> The U.S. military has not been immune to these changes and, in 2006 and again in 2011, Congress amended the Uniform Code of Military Justice (UCMJ) to make rape and sexual assault offenses more “offender centric” with less focus on consent and more focus on the alleged offender. Despite significant changes to statutes and rules of evidence, studies of jurors have shown that they are statistically no more likely to convict offenders for rape under these new statutes than they were under the old statutes.<sup>4</sup> Researchers studying these puzzling results have concluded that no matter how the statute is written, jurors will still apply their own beliefs and experiences in judging a case; thus, legal reforms will have minimal effects on conviction rates.<sup>5</sup>

One area unique to the military that has not yet been studied is how rape and sexual assault convictions have withstood the UCMJ’s requirement for appellate factual sufficiency review. The U.S. military is unique in requiring service appellate courts to review cases for both legal and factual sufficiency.<sup>6</sup> This means that even if there are no legal errors in a case, and the accused received a fair trial, the service-level appellate court can still overrule the judge or the members and find that in their opinion the government did not prove the case beyond a reasonable doubt.<sup>7</sup> This extraordinary power of the service appellate court cannot be

---

45 LAW & SOC’Y REV. 401, 402 (2011) (noting that nearly every state has removed noncontroversial reforms, such as eliminating the resistance requirement, but more controversial reforms have been slower to be adopted).

<sup>3</sup> FED. R. EVID. 412–414 (generally, Rule 412 makes most types of victim sexual predisposition evidence inadmissible; Rule 413 makes evidence of other sexual assaults admissible against the accused in a sexual assault case; and Rule 414 makes evidence of other allegations of child molestation admissible against an accused in a child molestation case).

<sup>4</sup> Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. OF CRIM. L. AND CRIMINOLOGY 554 (1993); Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); see also Marisa Taylor & Chris Adams, *Military’s Newly Aggressive Rape Prosecution Has Pitfalls*, MCCLATCHY NEWSPAPERS, Nov. 28, 2011, available at <http://www.mcclatchydc.com/2011/11/28/131523/militarys-newly-aggressive-rape.html> (documenting the low conviction rate for sexual assaults under the reformed sexual assault statute).

<sup>5</sup> Braman, *supra* note 4, at 1462.

<sup>6</sup> 10 U.S.C. § 866(c) (2008).

<sup>7</sup> This review is based solely on the record of trial. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

overruled by the Court of Appeals for the Armed Forces (CAAF) because it lacks the power to review a case for factual sufficiency.<sup>8</sup>

This article analyzes all of the cases overturned in the U.S. military from the year 2000 until March 2012 for a lack of factual sufficiency and how the changes in the military rape law statute have affected the likelihood a case will be upheld on appeal. Part II of this article analyzes the evolution of sexual assault law within the U.S. military to its present form. Part III identifies and categorizes the military sexual assault cases that have been overturned between January 2000 and March 2012 and explains the pertinent reasoning used by the courts. Part IV explains why the 2007 and 2012 revisions of the military rape and sexual assault statutes create legal uncertainty, but overall make it more likely that a case will be upheld under a factual sufficiency analysis. While the revisions of Article 120 have been a painful process for military justice, the overall effect has been to create a statute that better withstands factual sufficiency review at the appellate level.

## II. Evolution of Sexual Assault Law Inside and Outside of the Military

### A. Pre-World War II Rape Law

Interestingly, the U.S. Army did not develop any rape jurisprudence during the first eighty years of its existence. The precursors to the UCMJ were the Articles of War for the Army and the Articles for the government of the Navy.<sup>9</sup> When the Continental Congress developed the first Articles of War in 1775, they approved sixty-nine enumerated offenses; however, rape was not among the prohibited offenses triable by a court-martial.<sup>10</sup> This was not an oversight of the Continental Congress, but an intentional decision to defer to the local jurisdiction to handle the prosecution of all capital crimes, including rape.<sup>11</sup> The Articles of War mandated that the commander turn over an accused to the civilian magistrate upon “due application” at the risk of harboring a fugitive

---

<sup>8</sup> It can only review whether the service court applied the correct standard for factual sufficiency. *See, e.g., id.* (announcing the standard of review for factual sufficiency).

<sup>9</sup> WILLIAM T. GENEROUS JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 11 (1973).

<sup>10</sup> U.S. DEP’T OF ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975*, at 12–13 (1975).

<sup>11</sup> American Articles of War (1776), *reprinted in* WILLIAM WINTHROP, *MILITARY LAW & PRECEDENTS* 964 (2d ed. 1920 reprint).

otherwise.<sup>12</sup> In contrast, the Articles for the Government of the Navy allowed prosecution of all crimes, including capital crimes, at a general court-martial.<sup>13</sup> This was likely due to the international character of the U.S. Navy versus the Continental focus of the U.S. Army and unwillingness to subject U.S. Sailors to foreign prosecution.<sup>14</sup>

Outside the military, the states developed most of their rape laws from British common-law.<sup>15</sup> In order to prove the crime of rape at common-law, the prosecutor had to prove “the carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will.”<sup>16</sup> The term “against her will” required proof that the woman did not consent and that the rapist forced himself upon her.<sup>17</sup> These laws remained largely unchanged throughout the American states for the first two hundred years of their existence.<sup>18</sup>

It was not until 1863, in the midst of the Civil War, that Congress finally altered the Articles of War to provide Army commanders the authority to prosecute capital crimes during a time of war.<sup>19</sup> This change filled a gap in the legal system created by the obvious unwillingness to subject Union soldiers to state prosecution within the Confederate states during an active insurrection.<sup>20</sup> The modification covered not only rape,

---

<sup>12</sup> Section X of Article 1 mandated turning over the accused and provided that if the accused was not turned over, the commanding officer shall be “cashiered” *Id.* The term “cashiered” is an old term for “dismissed”. *Id.*

<sup>13</sup> Articles for the Better Government of the Navy, 2 Stat. 47 (1800) (providing “[i]f any person in the navy shall, when on shore, plunder, abuse, or maltreat any inhabitant, or injure his property in any way, he shall suffer such punishment as a court-martial shall adjudge”).

<sup>14</sup> *Id.*

<sup>15</sup> Sally Gold & Martha Wyatt, *The Rape System: Old Roles and New Times*, 27 CATH U. L. REV. 695, 699–701 (1978).

<sup>16</sup> HALE, *supra* note 1, at 627–28.

<sup>17</sup> *See id.* at 633 (describing that if a woman conceals her injuries or a rape occurs in a city and no one hears an “outcry” then there is a “strong presumption that her testimony is false or feigned”; however, if the woman is of “good fame,” pursued the rapist, had injuries witnessed by other women, and was in a remote location, then her testimony is more credible).

<sup>18</sup> Gold & Wyatt, *supra* note 15, at 701 (noting that the “typical common law definition of rape states that ‘[a] person commits rape when he has carnal knowledge of a female, forcibly and against her will’” (citing GA CODE ANN. § 26-2001 (1978) and twenty-one other states)).

<sup>19</sup> 12 Stat. 736 (1863).

<sup>20</sup> WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 667 (2d ed. 1920).

but other common law civilian crimes, including murder, arson, and various assaults during a time of war.<sup>21</sup>

While both the Articles for the Government of the Navy and the Articles of War provided some jurisdiction over the crime of rape, neither defined the crime of rape.<sup>22</sup> Instead, both codes looked to British common law for the definition of rape: “the unlawful carnal knowledge of a woman forcibly and against her will or consent.”<sup>23</sup> The force required had to be “sufficient to overcome resistance,” so a verbal protest or freezing in fear would not be sufficient.<sup>24</sup> The only exceptions to the resistance requirement were if “resistance [was] . . . useless if not perilous” or if the victim was intoxicated or otherwise unconscious.<sup>25</sup>

The next major change in the Articles of War occurred in 1916.<sup>26</sup> Congress significantly increased the jurisdiction of courts-martial to include most common law crimes committed anywhere in the United States; however, rape and murder were both specifically excluded during times of peace.<sup>27</sup> The modification increased jurisdiction over any allegations of rape that occurred overseas in addition to the already existing jurisdiction over rapes occurring during times of war.<sup>28</sup> Despite the amendment, the Articles continued to rely upon British common law for the definition of rape.<sup>29</sup>

Even though both the Army and the Navy had the limited ability to prosecute the crime of rape, there was no independent appellate body to review the cases for legal sufficiency or legal error.<sup>30</sup> Most courts-martial in both the Navy and the Army were simply reviewed by the same officer that appointed the court-martial in the first place.<sup>31</sup> There were limited exceptions—for instance, the courts-martial of general

---

<sup>21</sup> 12 Stat. 736 (1836).

<sup>22</sup> WINTHROP, *supra* note 20, at 677.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 678.

<sup>26</sup> 39 Stat. 619, 664 (1916).

<sup>27</sup> *Id.*

<sup>28</sup> Before, the Army did not have jurisdiction over overseas peacetime rapes, nor did the states. *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See William F. Fratcher, *Appellate Review in Military Law*, 14 MO. L. REV. 15 (1949) (detailing an excellent history of the appellate process before the enactment of the UCMJ).

<sup>31</sup> *Id.* at 25.

officers and sentences of death--requiring review by the President; however, Presidential review did not create any type of binding precedent upon future cases.<sup>32</sup> Thus, with respect to rape, the U.S. military did not develop binding legal jurisprudence beyond the inherited common law throughout its first 150 years of existence. It was not until World War II, and the exposure of the UCMJ to such a large number of U.S. citizens, that the lack of binding legal jurisprudence struck home with Congress and the general public.<sup>33</sup>

## B. The Evolution of the Uniform Code of Military Justice and Its Handling of Rape Law

### 1. Creation of the Uniform Code of Military Justice and Article 66 Review.

In the aftermath of World War II, Congress undertook a complete overhaul of both the Articles of War and the Articles for the Government of the Navy, combining them into a single code.<sup>34</sup> This revision was in response to several reports that noted “serious faults” and “flagrant miscarriages of justice” in the court-martial system that existed during World War II.<sup>35</sup> The major criticisms were the unduly large influence that commanding officers played in the court-martial and the lack of qualified defense counsel defending the service member.<sup>36</sup> At the time, the commanding officer could charge a service member with a crime, convene a court-martial, appoint members and officers (including defense counsel) and conduct a review of the proceedings afterward.<sup>37</sup> All of this could occur within days, and if the commanding officer intervened to force a guilty finding, the accused was left with little

---

<sup>32</sup> *Id.* There was a brief period from 1862 until 1874 when all sentences to a penitentiary were to be reviewed by the President; however, a wide exception existed during a time of war, for certain specified crimes including rape, when a sentence of death could be carried out by the field general without review by the President. *Id.* at 23–24.

<sup>33</sup> GENEROUS, *supra* note 9, at 15–16 (noting that there were over two million courts-martial convictions during the war and almost 80,000 general courts-martial convictions, an average of sixty per day).

<sup>34</sup> *Id.* at 34.

<sup>35</sup> *Id.* at 16, 18.

<sup>36</sup> *Id.* at 16. There were reports of commanders “who demanded convictions regardless of guilt or innocence” and the defense counsel were not required to be qualified lawyers, which often resulted in “grossly inexperienced” defense. *Id.*

<sup>37</sup> *Id.* at 11.

recourse.<sup>38</sup> The only review available was by the service Judge Advocate General who usually was not even a lawyer himself.<sup>39</sup>

These criticisms, combined with the wide exposure of the public to military justice during World War II, led the Secretary of Defense to create a committee to reform the military justice system.<sup>40</sup> The two primary goals were to unify the service codes of military justice into a single system and to increase public confidence in military justice by “protecting the rights of those subject to the code.”<sup>41</sup> This revision ultimately succeeded in creating the UCMJ and increasing the rights of the accused.<sup>42</sup>

The first significant right afforded to an accused under the UCMJ was the right to independent appellate review. In order to accomplish this review, the committee had to create an independent appellate system outside of the chain of command.<sup>43</sup> This appellate system consisted of a board of review for each branch of the service and a Court of Military Appeals (CMA) overseeing all appeals from the service boards.<sup>44</sup> The CMA had the statutory duty to review all cases for legal error. The service appellate courts, however, had the additional duty to review all cases for factual sufficiency as well as legal error.<sup>45</sup>

---

<sup>38</sup> *Id.* at 12, 45, 51.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 14, 34.

<sup>41</sup> *Id.* at 34.

<sup>42</sup> *Id.* at 34–53.

<sup>43</sup> Act of 5 May 1950, Pub. L. No. 81-506, 64 Stat. 108, 128 [hereinafter 1950 UCMJ] (codified as amended at 10 U.S.C. § 866).

<sup>44</sup> *Id.* The service boards of review became service courts of criminal review in 1968 and were provided statutory authority and functions. The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. This statutory change was due in part to the perceived abuses of the military justice system by convening authorities. See Andrew S. Effron, *United States v. Dubay and the Evolution of Military Law*, 207 MIL. L. REV. 1 (2011) (providing an excellent recounting of the events of that era and the conflict between legal officers (now military judges) and the president of the court-martial, a staff judge advocate and his convening authority, and between the boards of review and the Army Judge Advocate General). Ultimately in 1994, Congress renamed the Court of Military Appeals (CMA) to its current name of the Court of Appeals for the Armed Forces and the courts of criminal review became courts of criminal appeals. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994). Due to the confusion of all the name changes, the boards of review will be referred to as the service appellate courts in this article.

<sup>45</sup> See 10 U.S.C. §§ 866–867 (2008).

The second significant protection provided to accused service members went hand-in-hand with the first. The UCMJ finally codified all the offenses with which a service member could be charged and the UCMJ, along with the *Manual for Courts-Martial (MCM)*, defined the legal elements required for a conviction.<sup>46</sup> While the UCMJ did increase the jurisdiction of a court-martial, by including rape and murder during peacetime,<sup>47</sup> it also provided the basis for legal and factual review by the service appellate courts.<sup>48</sup> This meant that a commander could no longer simply instruct the members to find an accused guilty no matter the evidence because it would quickly be overturned on appeal.<sup>49</sup>

When Congress gave the service appellate courts the power to review cases for both legal sufficiency and factual sufficiency, they empowered the courts to review and reverse cases beyond any other criminal appellate court in the country.<sup>50</sup> Every appellate court in the country is required to review cases for legal sufficiency of the evidence as part of the Due Process Guarantee of the Fourteenth Amendment.<sup>51</sup> The standard applied during a legal sufficiency review is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”<sup>52</sup> This standard is deferential to the fact finder; however, it also protects an accused from being convicted due to factors other than the evidence.<sup>53</sup>

---

<sup>46</sup> See *id.* 10 U.S.C. §§ 877–934 (1950); MANUAL FOR COURTS-MARTIAL UNITED STATES (1951) [hereinafter 1951 MCM]. For any offense that does not have statutorily defined elements under the UCMJ, the *MCM* defines the elements; however, this definition is not binding on the court’s analysis of the offense since it is an executive document rather than a legislative statute. See, e.g., *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) (holding that Article 134 adultery charges must expressly allege that they are prejudicial to good order and discipline or service discrediting even though not required by the 2008 MCM at the time).

<sup>47</sup> 10 U.S.C. §§ 918, 920 (1950).

<sup>48</sup> *Id.* § 866.

<sup>49</sup> The CMA wasted little time in reversing a case for a lack of legal sufficiency in its first term. *United States v. O’Neal*, 2 C.M.R. 44 (C.M.A. 1952).

<sup>50</sup> “Let it be said at the outset that probably no one accused of a crime in any state or federal jurisdiction is given more opportunity to assert his innocence or more privileges of appellate review than one convicted by court-martial.” Bernard Landman, Jr., *One Year of the Uniform Code of Military Justice: A Report of Progress*, 4 STAN. L. REV. 491, 492 (1952).

<sup>51</sup> *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

<sup>52</sup> *Id.* (emphasis added.)

<sup>53</sup> *Id.*

Article 66 of the UCMJ requires more than a legal sufficiency review; it mandates review for factual sufficiency as well.<sup>54</sup> The test for factual sufficiency is “after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the judges on the service appellate court are themselves convinced of the accused’s guilt beyond a reasonable doubt.”<sup>55</sup> This requires the service appellate judges to substitute their own judgment and experiences rather than “any rational trier of fact” when weighing the evidence. Obviously, substituting the judgment of the individual judges, rather than deferring to “any rational trier of fact,” creates a subjective standard that can vary with the composition of the service appellate court.<sup>56</sup>

## 2. 1950–2007: *The Evolution of Rape Law Within the United States*

While the UCMJ significantly expanded the military’s jurisdiction to prosecute rape, the adoption of several common law rules of evidence made it difficult to convict a service member accused of rape.<sup>57</sup> First, unlike every other crime under the UCMJ, the adopted military rules of evidence required corroboration in order to prosecute most rape cases if the victim’s testimony was “self-contradictory, uncertain, or improbable.”<sup>58</sup> Second, the fresh complaint rule allowed “evidence that the alleged victim failed to make a complaint of the offense within a reasonable time after its commission” to be admissible in court.<sup>59</sup> Third, the military carried over the rule from the 1700s that the victim had to resist to her utmost in order to prove force.<sup>60</sup> Finally, evidence of a victim’s “unchaste” behavior was admissible to show that she was likely to consent to sexual advances.<sup>61</sup> This evidence was perhaps the most

---

<sup>54</sup> 10 U.S.C. § 866 (2010).

<sup>55</sup> *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

<sup>56</sup> See discussion *infra* Part III.B.

<sup>57</sup> See Sally Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 983–90 (2008) (describing the difficulties in prosecuting a case under the old common law); 1951 MCM, *supra* note 46, pt. XXVII, ¶¶ 142c, 153b, 199a (adopting the common law requirements discussed in the Klein *supra* note 57);

<sup>58</sup> 1951 MCM, *supra* note 46, pt. XXVII, ¶ 199(a) (stating that the exact language required that “[a] conviction cannot be based upon the uncorroborated testimony of an alleged victim in a trial for a sexual offense . . . if such testimony is self-contradictory, uncertain, or improbable”).

<sup>59</sup> *Id.* ¶ 142c.

<sup>60</sup> *Id.* ¶ 199a.

<sup>61</sup> *Id.* ¶ 153b.

difficult to convict because victims were often publicly humiliated by their entire sexual histories paraded before the public in open court. All of these factors combined to make an unfriendly environment for victims claiming rape.<sup>62</sup>

In the 1970s, women's rights advocates pushed hard to change the requirements for corroboration, resistance, the fresh complaint rule, and to protect the victims from having their sexual histories publicly exposed at trial.<sup>63</sup> These rules seemed to most scholars to be antiquated and discriminatory rules specific to rape crimes that needed to be modernized.<sup>64</sup> Michigan led the reform effort, passing legislation in 1974 to adopt these reforms and eliminating many of the requirements advocates viewed as unfair.<sup>65</sup> Nationally, the requirement for corroboration disappeared the quickest because only fifteen states held onto this requirement by the 1970s.<sup>66</sup> By far the most public national reform came in 1978 when Congress passed the Privacy Protection for Rape Victims Act<sup>67</sup> which prevented the defense from probing a victim's sexual history in federal cases except for limited circumstances.<sup>68</sup> The

---

<sup>62</sup> Klein, *supra* note 57, at 983. A search in Westlaw supports this assertion as well, showing 215 Article 120 appeals reviewed before 1980—the year the military adopted the Federal Rules of Evidence (FRE), including FRE 412—and 983 Article 120 appeals reported between 1980 and 2007. The year 2007 was used as the cutoff year since Article 120 was significantly modified that year to encompass a much greater range of offenses. While this search double-counts cases appealed to the CMA after a service court appeal, it demonstrates a four-fold increase in the number of Article 120 convictions over a twenty-seven-year span after the evidentiary rules affecting rape prosecutions were changed. This increased number of prosecutions also corresponds with increasing numbers of women within the military, as well as increased congressional scrutiny over rape prosecutions, which could account for the whole or part of the difference.

<sup>63</sup> *E.g.*, Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L. J. 1365 (1972) (arguing for the repeal of the rape corroboration requirement, which only existed in fifteen states and the military); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977) (arguing for the advent of a rape shield rule).

<sup>64</sup> See Klein, *supra* note 57, at 985–86 (discussing the widely agreed upon reform of the requirements of consent, utmost resistance, and the rape shield rule).

<sup>65</sup> Act of August 12, 1974, Pub. L. No. 266, 1974 Mich. Pub. Acts 1025 (codified as amended at MICH. COMP. LAWS ANN. §§ 750.520a–5201 (West 2011)).

<sup>66</sup> *The Rape Corroboration Requirement*, *supra* note 63, at 1367 (noting that as of 1972 only fifteen states had some form of corroboration requirement); Klein, *supra* note 57, at 987 (noting that as of 2001 no states required corroboration).

<sup>67</sup> Pub. L. No. 95-540, 92 Stat. 2046 (1978) (codified as FED. R. EVID. 412.)

<sup>68</sup> The exceptions are 1. “evidence of specific instances of sexual behavior . . . offered to prove that a person other than the accused was the source of semen, injury, or other

military did not adopt these reforms until 1980 when President Carter updated the Military Rules of Evidence by Executive Order.<sup>69</sup>

In addition to these widely agreed upon reforms, some advocates began pushing to eliminate the requirement that the prosecution prove lack of consent by the victim.<sup>70</sup> These advocates argued that the requirement to prove lack of consent by the victim was a requirement from a bygone era when a woman's chastity was put on trial and she was required to "prove her own innocence as to the requisite lack of consent."<sup>71</sup> The reform advocates argued that the victim of the rape was "treated like any other criminal defendant, but without many of the other substantive and procedural protections."<sup>72</sup> This argument to remove consent from rape statutes did not gain much traction within the states; however, the federal government took up this call.<sup>73</sup>

The military was not averse to the idea of removing consent from its rape statute. The 2005 Defense Authorization Act<sup>74</sup> required the Secretary of Defense to review both the UCMJ and the MCM and make recommendations on how to improve "issues relating to sexual assault" and conform them more closely to other federal laws.<sup>75</sup> The Department of Defense (DoD) conducted an extensive review of over 800 pages and studied six separate options for reforming its rape statute.<sup>76</sup> The study found that the current rape statute requiring both force and lack of consent was adequate and that "no statutory . . . change is likely to significantly increase the number of sexual offenses prosecuted."<sup>77</sup> However, realizing the push for change, the Committee recommended that if Congress required legislative change that it should adopt a new

---

physical evidence"; 2. "evidence of specific instances of sexual behavior . . . [with the] accused . . . to prove consent"; or 3. where otherwise constitutionally required. *Id.*

<sup>69</sup> Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 14, 1980).

<sup>70</sup> Gold & Wyatt, *supra* note 15.

<sup>71</sup> *Id.* at 695.

<sup>72</sup> *Id.*

<sup>73</sup> Donald Drips, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 966–71 (2008) (noting that sixteen states have eliminated the element of force as an element of rape and focus only on consent and other states are trending in that direction).

<sup>74</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004) [hereinafter 2005 NDAA].

<sup>75</sup> *Id.* § 571, 118 Stat. at 1920.

<sup>76</sup> SEX CRIMES AND THE UCMJ: A REPORT TO JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (Feb. 2005), available at [http://www.defenselink.mil/dodgc/php/docs/sub-committee\\_reportMarkHarvey1-13-05.doc](http://www.defenselink.mil/dodgc/php/docs/sub-committee_reportMarkHarvey1-13-05.doc).

<sup>77</sup> *Id.* at 208.

statute significantly widening the scope of Article 120.<sup>78</sup> The recommended statute created fourteen separate offenses for various types of sexual crimes and removed the element of lack of consent from all but one of the offenses.<sup>79</sup> It also bifurcated the traditional crime of rape into two separate offenses, rape and aggravated sexual assault.<sup>80</sup> Rape covered five different theories, including the traditional theory where a victim is overpowered by the force of the perpetrator.<sup>81</sup> Aggravated sexual assault covered most situations where the victim was unable to consent due to “substantial incapacity” or where the force was not so great as to overpower the victim.<sup>82</sup> Congress adopted these changes in the 2006 Defense Authorization Act, which removed lack of consent as an element of rape and made consent an affirmative defense.<sup>83</sup>

Removing lack of consent as an element of rape and sexual assault and making consent an affirmative defense drew immediate criticism that Congress went too far and the resulting statute was unconstitutional.<sup>84</sup> The argument advanced by commentators and defense counsel was that lack of consent was an implied element of both rape and sexual assault, so shifting the burden of proving consent to the defense violated the accused’s right to due process.<sup>85</sup> The military appellate courts held that

---

<sup>78</sup> *Id.*

<sup>79</sup> The element of lack of consent was removed from everything except wrongful sexual contact. *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> The lesser force theory was aggravated sexual assault by causing bodily harm, which includes “any offensive touching, no matter how slight.” *Id.*

<sup>83</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3256, 3262 [hereinafter 2006 NDAA].

<sup>84</sup> See Howard H. Hoege III, “Overshift” *The Unconstitutional Double Burden-Shift on Affirmative Defenses in the New Article 120*, ARMY LAW., May 2007, at 1 (arguing how the double burden shift is a legal impossibility and unconstitutional); see also James G. Clark, “A Camel is a Horse Designed by Committee”: *Resolving Constitutional Defects in Uniform Code of Military Justice Article 120’s Consent and Mistake of Fact as to Consent Defenses*, ARMY LAW., July 2011, at 14 (recounting the appellate history challenging the burden shift created by the affirmative defense of consent and suggesting that consent should not be an element or an affirmative defense, but should simply be evidence countering the government’s theory); Jack Nevin & Joshua R. Lorenz, *Neither a Model of Clarity Nor a Model Statute: An Analysis of the History, Challenges, and Suggested Changes to the “New” Article 120*, 67 A. F. L. REV. 269 (2011) (documenting how the double burden shift led to several reversals on appeal and suggesting fixes to make the statute workable).

<sup>85</sup> Hoege, *supra* note 84, at 2; United States v. Neal, 67 M.J. 675, 678–79 (N-M. Ct. Crim. App. 2009), *aff’d* 68 M.J. 289 (C.A.A.F. 2010) (challenging the statute as

this burden shift did not violate the accused's rights in force cases;<sup>86</sup> however, in 2011, CAAF held that it did violate the accused's due process right in substantial incapacity cases.<sup>87</sup>

In response to CAAF declaring part of the statute unconstitutional, Congress immediately went to work modifying the military's rape statute for a second time in five years.<sup>88</sup> On December 31, 2011, President Obama signed the 2012 National Defense Authorization Act, which completed this modification.<sup>89</sup> Congress went far beyond simply amending the unconstitutional portion of the statute and restructured and redefined Article 120 into four subsections with multiple charging theories under each section.<sup>90</sup> In order to cure the unconstitutional burden shift, Congress removed the burden-shifting scheme for consent, redefined several elements to include consent,<sup>91</sup> and reintroduced lack of consent into sections of Article 120.<sup>92</sup> With an understanding of rape and sexual assault development in the military and civilian community, the next logical question is how effective this reform has been over the past decade.

### III. Results of Sexual Assault Reform

#### A. Studies of Sexual Assault Reform at the Trial Level in Civilian Criminal Courts

In light of the legislation to make state and federal rape statutes and rules of evidence more victim- friendly, several academics undertook

---

unconstitutional in force cases); *United States v. Prather*, 69 M.J. 338, 341–43 (C.A.A.F. 2011) (challenging the statute as unconstitutional in incapacity cases).

<sup>86</sup> *Neal*, 68 M.J. at 304.

<sup>87</sup> *Prather*, 69 M.J. at 343.

<sup>88</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011) [hereinafter 2012 NDAA]. Congress did propose amendments to Article 120 the year before; however, they were not as sweeping as the 2012 revision and were ultimately not adopted in the final bill. *See* S. 3454, 111th Cong. § 920.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (The four separate sections are Article 120, Rape and sexual assault generally; Article 120a, Stalking; Article 120b, Rape and sexual assault of a child; and Article 120c, Other sexual misconduct.).

<sup>91</sup> *E.g. id.* (defining a person as incapable of consenting when asleep within the definition of consent).

<sup>92</sup> *E.g.* 2012 NDAA *supra* note 88, § 541 (defining bodily harm as a “nonconsensual sexual act”).

studies to determine the effect of these changes. The theory reformists advanced was that by protecting victims' privacy with rape shield statutes, victims would be more likely to come forward with allegations.<sup>93</sup> Additionally, by leveling the evidentiary playing field, alleged rapists would be more likely to be convicted of the crime.<sup>94</sup> Studies of eight major cities around the country and the state of California proved these theories largely incorrect.<sup>95</sup> The only exception was Michigan, where the most comprehensive rape law reform occurred.<sup>96</sup> In both Kalamazoo and Detroit, studies found increases in the number of arrests after the reforms were passed; however, the overall conviction percentage remained relatively unchanged.<sup>97</sup> A study of rape law reform in all fifty states found that reform "has not had a very substantial effect on either victim behavior or actual practices in the criminal justice system."<sup>98</sup>

Since the majority of studies on rape law reform found little to no significant increase in reporting or convictions, academics next explored juror behavior to determine why the reform was not working as expected. Prosecutors hypothesized that even though the law no longer requires corroboration, prompt reporting, or victim resistance, jurors still require this evidence to convict a defendant.<sup>99</sup> Research confirms this hypothesis that a person's world view is more important than the law in determining guilt or innocence in rape cases.<sup>100</sup> For instance, in one study, 1,500

---

<sup>93</sup> Bachman & Paternoster, *supra* note 4, at 560.

<sup>94</sup> *Id.*

<sup>95</sup> Compare Susan Caringella-MacDonald, *Sexual Assault Prosecution: An Examination of Model Rape Legislation in Michigan*, 4 WOMEN & POL. 65 (1984) (finding a slight increase in rape arrests and sentences in Michigan, but no increase in reporting or conviction percentage), with Kenneth Polk, *Rape Reform and Criminal Justice Processing*, 31 CRIME & DELINQ. 191 (1985) (finding no increase in California in reporting or convictions for rape after reform); Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543 (1981) (finding no increase in the conviction rate for rape in Seattle after reform), and Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 LAW & SOC'Y REV. 117, 138 (1991) (analyzing six different cities around the country and finding an increase in reporting in Detroit and Houston, but no increase in conviction rates, and no significant increase in reporting or convictions rates in the other four cities: Washington, D.C., Chicago, Philadelphia, and Atlanta).

<sup>96</sup> See *supra* note 95.

<sup>97</sup> Caringella-MacDonald, *supra* note 95, at 67; Horney & Cassia, *supra* note 95, at 138.

<sup>98</sup> Bachman & Paternoster, *supra* note 4, at 573.

<sup>99</sup> Horney & Spohn, *supra* note 95, at 139–40.

<sup>100</sup> Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What and Why in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 781 (2009).

mock jurors around the country reviewed a controversial rape fact pattern involving a woman clearly telling a man no, but not physically protesting.<sup>101</sup> The jurors all had the same facts before them and the experiment presented them with five different legal definitions of rape, including no definition at all, the common law definition, and a liberal definition that excluded force and specifically instructed the jurors that the word “no” indicates a lack of consent.<sup>102</sup> The experiment showed that even under the most liberal definition of rape, thirty-five percent of jurors surveyed believed the accused was not guilty despite clear verbal protests.<sup>103</sup> Further, the study found that the jurors’ underlying belief structure was much more influential than the law in determining guilt or innocence.<sup>104</sup> Finally, only the most liberal statute had any statistically significant difference, but this impact was far less than the impact of a person’s underlying belief system.<sup>105</sup>

#### B. Results of Sexual Assault Reform at the Trial Level in Military Courts

Undoubtedly, the number of military rape prosecutions has significantly increased over the decades.<sup>106</sup> Simply comparing the number of Article 120<sup>107</sup> convictions appealed between the time periods of 1950–1980 and 1980–2007, demonstrates a fourfold increase in the number of convictions appealed after the evidentiary requirements were changed in 1980.<sup>108</sup> During this time period from 1950–2007, the

---

<sup>101</sup> *Id.* at 765. This fact pattern was based off of *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1339 (Pa. Super. Ct. 1992) (per curiam), *aff’d in part and rev’d in part*, 641 A.2d 1161 (Pa. 1994), an extremely controversial case that was convicted at trial and reversed on appeal based on legal sufficiency of the evidence.

<sup>102</sup> *Id.* at 767–68.

<sup>103</sup> *Id.* at 775.

<sup>104</sup> The study divided belief structures into either hierarchal, where a person views the man is the pursuer in sexual situations and women often offer token resistance, or egalitarian, where both women and men are equal sexual partners. The study found that hierarchal women were the most likely to acquit regardless of the law. *Id.* at 777, 781–82.

<sup>105</sup> *Id.* No state has adopted the most liberal version presented to the jurors that excludes mistake of fact as a defense and specifically instructs the jurors that the word “no” indicates a lack of consent. *Id.* at 769.

<sup>106</sup> See discussion, *supra* note 62.

<sup>107</sup> Article 120 is the military statute for sexual assault crimes and is codified at 10 U.S.C. § 920 (2010).

<sup>108</sup> See discussion, *supra* note 62.

statutory defined elements of rape changed little.<sup>109</sup> However, there are several other potential sources of the increase including the evidentiary changes enacted in 1980,<sup>110</sup> the increase in female service members,<sup>111</sup> and the increased congressional pressure to prosecute sexual assaults within the military.<sup>112</sup>

Nonetheless, there is no accurate public data to measure the effect of the recent statutory reform on the military's conviction percentage in rape cases. Beginning in 2004, Congress required the DoD to report annually on its efforts and results in curbing sexual assault within the military.<sup>113</sup> In its 2004 report, the DoD recounted that there were 1700 reports of sexual assault within the military, but only 113 courts-martial and 51 cases referred to state or foreign governments for prosecution.<sup>114</sup> Unfortunately, the DoD did not provide the results of these 164 courts-martial and civilian prosecutions in the report; therefore, it is missing the conviction percentage for these cases.<sup>115</sup> Likewise, in the annual report for fiscal year 2010, the military received 2410 unrestricted reports<sup>116</sup> of

---

<sup>109</sup> Compare 1951 MCM, *supra* note 46, pt. XXVIII, ¶ 199a, with MANUAL FOR COURTS-MARTIAL UNITED STATES pt. IV, ¶ 45a (2005) [hereinafter 2005 MCM].

<sup>110</sup> Exec. Order No. 12,198, 45 Fed. Reg. 16,932 (Mar. 14, 1980).

<sup>111</sup> The percentage of women in the military has significantly increased over the decades from 1.3% in 1960, 1.4% in 1970, 8.4% in 1980, 11.1% in 1990, 14.6% in 2000, and 14.6% as of 2011. RUTGERS INST. FOR WOMEN'S LEADERSHIP, WOMEN'S LEADERSHIP FACTSHEET (2008), available at <http://iwl.rutgers.edu/document/njwomencount/Women%20in%20Military%202009%20Final.pdf>; WOMEN'S MEMORIAL.ORG, WOMEN IN MILITARY SERVICE FOR AM. MEMORIAL FOUND., INC. (2011), available at <http://www.womensmemorial.org/PDFs/StatsonWIM.pdf>.

<sup>112</sup> See generally Marisa Taylor & Chris Adams, *Military's Newly Aggressive Rape Prosecution Has Pitfalls*, McCLATCHY NEWSPAPERS, Nov. 28, 2011, available at <http://www.mcclatchydc.com/2011/11/28/131523/militarys-newly-aggressive-rape.html> (describing how military rape prosecutions have increased from 113 in 2004 to 532 in 2010 and "commanders sent about 70 percent more cases to courts-martial that started as rape or aggravated sexual-assault allegations than they did in 2009" due to congressional pressure).

<sup>113</sup> 2005 NDAA, *supra* note 74, § 577, 118 Stat. 1927–28.

<sup>114</sup> U.S. DEP'T OF DEF., REPORT ON SEXUAL ASSAULTS WITHIN THE MILITARY FOR ANNUAL YEAR 2004, at 12 (2005), available at <http://www.sapr.mil/index.php/annual-reports>.

<sup>115</sup> *Id.*

<sup>116</sup> In the military, a victim of sexual assault has the option of making a report in either a restricted or unrestricted manner. If the report is restricted, the victim can receive counseling and medical services, but law enforcement and the chain of command is not informed. If the report is unrestricted, the victim receives the same counseling and medical services. Additionally, the chain of command and law enforcement are informed and the case is investigated for potential prosecution. See U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 4 (23 Jan.

sexual assault, prosecuted 532 courts-martial, and ultimately convicted 245 service members.<sup>117</sup> The report notes, however, that these 245 convictions may have been for lesser offenses, such as fraternization or adultery.<sup>118</sup> Thus, while there has clearly been an increase in the number of Article 120 prosecutions, the data does not provide an accurate picture of the number of rape or sexual assault convictions.<sup>119</sup>

### C. Overview of Cases Reversed for Lack of Factual Sufficiency

With no data publicly available to measure the effectiveness of statutory reform of the military rape statute at the trial level on convictions, a second place to look to determine the effectiveness of the statute is at the appellate level. As previously discussed, Article 66(b), UCMJ, requires that every sentence that includes a punitive discharge or more than a year of confinement receive appellate review to certify that it is correct in both law and fact.<sup>120</sup> The certification of a case as correct in fact is accomplished through factual sufficiency analysis and it is conducted by the lead appellate judge in every case.<sup>121</sup> Since every case is evaluated for factual sufficiency, an analysis of the quantity and reasoning of cases reversed for a lack of factual sufficiency provides a great measure of a statute's effectiveness at the appellate level. This article uses the year 2000 as a cutoff date for analysis of rape cases reversed for a lack of factual sufficiency in order to capture enough representative cases that have been reversed while limiting the data set to a manageable level.

---

2012) (C1, Apr. 30, 2013); U.S. DEP'T OF DEF., INSTR. 6495.02, Title 25-31 (28 Mar. 2013).

<sup>117</sup> U.S. DEP'T OF DEF., REPORT ON SEXUAL ASSAULTS WITHIN THE MILITARY FOR FISCAL YEAR 2010, at 3, 76 (2011), available at <http://www.sapr.mil/index.php/annual-reports>.

<sup>118</sup> *Id.* at 76.

<sup>119</sup> *Id.*

<sup>120</sup> As discussed previously, the test for factual sufficiency is "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the judges on the service appellate court are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

<sup>121</sup> *See, e.g.*, NAVY-MARINE CORPS CT. OF CRIM. APPEALS RULES OF PRAC. & PROC. 5 (2011) (mandating that the lead judge review the case for factual sufficiency within ten days of assignment).

### 1. Pre-2007 Reform Cases

From the enactment of the UCMJ until 2007, the military's rape statute under Article 120 defined rape as "sexual intercourse by a person, executed by force and without consent of the victim."<sup>122</sup> The force involved could be actual physical force, such as holding down a victim against her will, or constructive force, such as intimidating a person into submission.<sup>123</sup> Additionally, if the victim was unconscious, the mere act of penetration qualified as sufficient force.<sup>124</sup> Lack of consent could be found through the victim's resistance, lack of resistance due to threats or futility, or inability to consent due to mental capacity.<sup>125</sup> However, if a victim did not resist, the law recognized an inference of consent.<sup>126</sup>

Since the year 2000, the service courts of criminal appeals overturned nine convictions under the pre-2007 Article 120 for lack of factual sufficiency,<sup>127</sup> and the CAAF overturned one Article 120 conviction for lack of legal sufficiency.<sup>128</sup> While all of the cases are factually distinct, they generally fall into one of three categories. First, the service court did not believe the victim's version of the events because they are unreliable and uncorroborated; second, the victim did not resist enough to overcome the inference of consent; and third, alcohol cases where incapacity is not sufficiently demonstrated. The cases that fall into each of these categories are discussed below.

#### a. The Unreliable Victim

There are two cases that fall into the unreliable and uncorroborated victim category. In reviewing the courts' rendition of the facts in these cases, the court expresses surprise that the members convicted the

---

<sup>122</sup> 2005 MCM, *supra* note 109, ¶ 45c(1)(a). There was a change in 1992 in which Congress took out the words "with a female" to make the statute gender neutral, but the elements of force and consent remained unchanged. See National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315, 2506 (1992).

<sup>123</sup> United States v. Clark, 35 M.J. 432, 436 (C.M.A. 1992).

<sup>124</sup> 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).

<sup>125</sup> This includes situations in which mental capacity is lacking due to ingestion of alcohol or other drugs. *Id.*

<sup>126</sup> "If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent." *Id.*

<sup>127</sup> See discussion *infra* Part II.C.1.a.-c.

<sup>128</sup> United States v. Tollinchi, 54 M.J. 80 (C.A.A.F. 2000).

service member at all. Both cases involved victims who had significant delays in their reporting, had consensual sexual intercourse before and after the alleged rapes, had little or no corroboration to the allegation, and had inconsistent statements highlighted on the record. In these cases, the service courts do not simply overturn the case on an inference of consent, but rather on a question of whether the events ever occurred.

The first such case is *United States v. Parker*.<sup>129</sup> Sergeant (SGT) Parker was accused of numerous charges including three separate specifications of rape of two different women. The government brought in evidence of rape of a third woman under Military Rule of Evidence (MRE) 413.<sup>130</sup> The members convicted SGT Parker of two of the specifications of rape against two different women. The Army Court of Criminal Appeals (ACCA) reversed one of the rape specifications because based on the “totality of the evidence casting doubt on [the victim’s] credibility . . . [ACCA was] not convinced beyond a reasonable doubt that the appellant raped, forcibly sodomized, or assaulted” the victim.<sup>131</sup>

A brief recounting of the facts demonstrates why the court was left wholly unconvinced of guilt due to “logical and inherent inconsistencies” in the alleged victim’s actions.<sup>132</sup> The alleged victim, KD, and SGT Parker were in “a consensual sexual relationship for several months before the first alleged rape” that involved rough consensual intercourse including spanking and hair pulling.<sup>133</sup> KD made two allegations of rape. In the first allegation, KD alleged that she was physically overpowered and raped by SGT Parker, but that she did not realize that she had been raped for several days and continued to spend time with Parker, both alone and with friends.<sup>134</sup> The members acquitted Parker of this specification of rape.<sup>135</sup> The second specification occurred one month later when KD offered SGT Parker a ride home from a friend’s house at 0130 by herself.<sup>136</sup> She invited him up to her apartment alone and was overpowered by SGT Parker pulling her hair and he raped and

---

<sup>129</sup> 54 M.J. 700 (A. Ct. Crim. App. 2001).

<sup>130</sup> *Id.* at 700–01, 712.

<sup>131</sup> *Id.* at 708.

<sup>132</sup> *Id.* at 707.

<sup>133</sup> *Id.* at 707–08.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

sodomized her.<sup>137</sup> After this second alleged rape and forcible sodomy, KD continued to sleep with SGT Parker and wrote a letter to Army investigators stating that she had never been raped or otherwise sexually assaulted “in an attempt to help [Parker].”<sup>138</sup>

Based on the above facts, ACCA reversed all the convicted specifications relating to KD for a lack of factual sufficiency except for consensual sodomy, which Parker freely admitted.<sup>139</sup> The court specifically noted KD’s admission of lying to investigators, her inconsistent actions in continuing to spend time alone at night with Parker after the alleged rapes, and the lack of corroboration of any of the events led them to doubt the events even occurred. The court interestingly focused more on KD’s lack of credibility in their analysis rather than addressing the potential inference of consent raised by KD’s minimal resistance.<sup>140</sup> Because of this focus on credibility rather than consent or lack of consent, it seems unlikely that this case would withstand factual sufficiency review even under the 2007 or 2011 versions of Article 120 where the inference of consent is eliminated.

The second case that falls in this category is *United States v. Foster*.<sup>141</sup> Unlike SGT Parker, SGT Foster faced only a single count of rape against a single victim, his ex-wife.<sup>142</sup> He was also charged and convicted of two specifications of aggravated assault and wrongfully communicating a threat, all against his ex-wife.<sup>143</sup> Ultimately, the Navy-Marine Corps Court of Criminal Appeals (N-MCCA) reversed SGT Foster’s rape conviction for a lack of factual sufficiency and reversed the other specifications for cumulative error and unreasonable post-trial delay.<sup>144</sup>

---

<sup>137</sup> *Id.* at 708.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *United States v. Foster*, No. 200101955 (N-M. Crim. Ct. App. Feb. 17, 2009). The *Foster* case is best known in the military community for the congressional scrutiny it created after the press publicized the fact that Sergeant Foster spent nine years in the brig awaiting appellate review. In response to the unreasonable delay, Congress ordered an investigation of the Department of the Navy “policies and management and organizational practices” over the judge advocate communities of both the Navy and Marine Corps. Fiscal Year 2010 National Defense Authorization Act, Pub. L. No. 111-84, § 506, 123 Stat. 2190, 2278–79 (2009).

<sup>142</sup> *Foster*, No. 200101955, at \*3.

<sup>143</sup> *Id.* at \*1.

<sup>144</sup> *Id.* at \*3.

Much like the *Parker* case, the primary reason N-MCCA reversed the rape specification in SGT Foster's case was "the evidence for his culpability for rape [was] anemic at best."<sup>145</sup> There was no forensic evidence, and the only testimonial evidence was the victim's testimony and a single consistent statement from the victim to a friend two years after the alleged incident occurred.<sup>146</sup> Much like *Parker*, the court highlighted the victim's own actions after the alleged rape, which called into question her credibility.<sup>147</sup> Ms. Foster delayed reporting the rape for over five years, and reported the rape only after negotiations for child custody broke down in the midst of a divorce.<sup>148</sup> The court further highlighted that Ms. Foster had already agreed to joint custody of her children with her alleged rapist before the negotiations broke down.<sup>149</sup> Other factors that the court cited were the victim engaging in numerous instances of consensual sexual activity with SGT Foster after the alleged rape, including a sex video, and that she never reported this alleged rape to her friends or family.<sup>150</sup>

Much like *Parker*, the court focuses on the victim's lack of credibility rather than the inference of consent in reversing the case. The N-MCCA writes that while a "reasonable member could choose to believe the victim,"<sup>151</sup> the facts do not convince the court beyond a reasonable doubt.<sup>152</sup> Interestingly, N-MCCA does not state which specific legal element they found lacking or rely upon an inference of consent, which suggests that the court believed the entire event did not occur beyond a reasonable doubt.<sup>153</sup> The court noted that it "is clear to this court that the prosecution attempted to bootstrap a rape conviction atop several instances of assaultive conduct."<sup>154</sup>

---

<sup>145</sup> *Id.* at \*5.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at \*4.

<sup>149</sup> *Id.* at \*5.

<sup>150</sup> With the exception of the single consistent statement that occurred two years later. *Id.* at \*6.

<sup>151</sup> *Id.* (This is the test for legal sufficiency from *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

<sup>152</sup> *Id.* (This is the test for factual sufficiency from *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at \*5.

*b. The Compliant Victim*

The second group of cases reversed for a lack of factual or legal sufficiency<sup>155</sup> are perhaps the most peculiar factual circumstances. All six of these cases involve a victim who is sober, largely compliant with the accused's demands, and does little or nothing to voice her lack of consent. Unlike the first group of cases, the reporting is much closer in time to the alleged rape. In these cases the courts question the victim's compliance more than her credibility. The courts primarily reversed the cases based on the statutory instruction that allowed an inference of consent "[i]f a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest."<sup>156</sup> Because of the victim's compliance and failure to take "reasonable steps," the service courts found that the government did not prove the element of lack of consent beyond a reasonable doubt.

The first case that falls into this category is one of very few rape cases overturned by CAAF for a lack of legal sufficiency, *United States v. Tollinchi*.<sup>157</sup> This case is included in this discussion because a case is inherently factually insufficient if it is legally insufficient, and it sets the floor for the factual sufficiency analysis the service courts must apply.<sup>158</sup> Sergeant Tollinchi was a Marine recruiter who recruited a young man referred to as NF.<sup>159</sup> After NF successfully finished his qualification testing, SGT Tollinchi took NF and his girlfriend, EH, back to the recruiting office for drinks.<sup>160</sup> After a few shots, both EH and NF began to feel intoxicated; this is when SGT Tollinchi instructed them to start

---

<sup>155</sup> Legal sufficiency is included in this section since it sets the baseline for factual sufficiency analysis. See *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000).

<sup>156</sup> 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).

<sup>157</sup> *United States v. Tollinchi*, 54 M.J. 80 (C.A.A.F. 2000). The only other recent rape case overturned for a lack of legal sufficiency was *United States v. Bonano-Torres*, 31 M.J. 175 (C.M.A. 1990).

<sup>158</sup> As discussed, the standard for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. The standard for factual sufficiency is "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the judges on the service appellate court are themselves convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Logically, if "any rational trier of fact" could not have the elements beyond a reasonable doubt than the judges themselves could not be convinced beyond a reasonable doubt.

<sup>159</sup> *Tollinchi*, 54 M.J. at 81.

<sup>160</sup> *Id.*

taking off their clothes and eventually to engage in oral sex.<sup>161</sup> Throughout the entire process, both EH and NF were compliant and never objected to any of SGT Tollinchi's instructions.<sup>162</sup> EH and NF disagree on the exact events that occur next, but both agree that SGT Tollinchi engaged in intercourse with EH and no one resisted verbally or physically at the time.<sup>163</sup>

The CAAF reversed the rape conviction for legal insufficiency of the elements of consent and force after N-MCCA had affirmed the case for both legal and factual sufficiency.<sup>164</sup> The court cited to both the *MCM* standard that consent may be inferred if the victim is capable of resisting and fails to resist<sup>165</sup> and to *United States v. Bonano-Torres* where the court previously held that "more than the incidental force involved in penetration is required for conviction."<sup>166</sup> This case was important because the inference of consent provided that the fact finder "may" draw an inference of consent;<sup>167</sup> in contrast, this case sent a clear message to the service appellate courts that if a sober victim does not resist, physically or verbally, they must draw an inference of consent in factual and legal sufficiency analysis.<sup>168</sup>

A year after CAAF decided the *Tollinchi* case, *United States v. Simpson* came before ACCA for factual sufficiency review.<sup>169</sup> The *Simpson* case was unique simply due to the sheer breadth of sexual misconduct charged and convicted. The members ultimately convicted Staff Sergeant (SSG) Simpson of eighteen specifications of rape, three specifications of sodomy, and twelve specifications of indecent assault among other non-sexual charges.<sup>170</sup> The misconduct occurred over

---

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 82.

<sup>165</sup> MANUAL FOR COURTS MARTIAL UNITED STATES, pt. IV, ¶ 45.c.1.b (2000) [hereinafter 2000 MCM].

<sup>166</sup> *United States v. Bonano-Torres*, 31 M.J. 175, 179 (C.M.A. 1990).

<sup>167</sup> 2000 MCM, *supra* note 165, ¶ 45.c.1.b.

<sup>168</sup> The CAAF also cited to mistake of fact as to consent, which is a defense that the prosecution must prove does not apply beyond a reasonable doubt; however, service appellate courts picked up on the inference of consent instruction as the larger holding in this case in their factual sufficiency analysis. *Tollinchi*, 54 M.J. at 83.

<sup>169</sup> 55 M.J. 674 (A. Ct. Crim. App. 2001) *aff'd*, 58 M.J. 368 (C.A.A.F. 2002).

<sup>170</sup> *Id.* at 678.

eighteen months while SSG Simpson was a drill instructor at the ordnance school at the Aberdeen Proving Grounds, Maryland.<sup>171</sup>

The ACCA ultimately reversed one of the specifications of rape for a lack of factual sufficiency.<sup>172</sup> This specification involved a trainee who was forced to repeat the school due to imposition of non-judicial punishment and was potentially facing administrative separation.<sup>173</sup> Staff Sergeant Simpson argued for the trainee not to be separated.<sup>174</sup> After the decision was made to retain the trainee, SSG Simpson called her to his office, informed her that she “owed” him and had sexual intercourse with her in his bathroom. A few days later, he instructed her to “go to her room during lunch, take her clothes off, and wait for him” and engaged in sexual intercourse again. The trainee never resisted or verbally refused the SSG’s advances, but stated that she was afraid of him and afraid of being discharged if she did not comply. Similarly to *Tollinchi*, ACCA found in this instance, the facts did not overcome the inference of consent because “with the exception of [this victim], every [other] victim resisted the appellant’s demands verbally, physically, or both.”<sup>175</sup> Additionally, ACCA specifically rejected “the notion that every act of intercourse between a trainee and a drill instructor is inherently nonconsensual,”<sup>176</sup> an important concept in future rank differential cases.

The third case that falls into this category is *United States v. Bell*.<sup>177</sup> Much like SSG Simpson, First Sergeant (1SG) Bell was a senior staff noncommissioned officer (NCO) who abused his position “to target and prey sexually on newly assigned junior enlisted women.”<sup>178</sup> In the reversed specification of rape, 1SG Bell was on duty when a newly arrived female Private First Class (PFC) “attempted to sign out on leave” late at night in order to pick up her children from her mother and move them across country. First Sergeant Bell feigned that he could not find her leave papers and invited the PFC back to his quarters to find the papers. He then proceeded to talk to her about her future in the Army while rubbing her shoulders. The shoulder rubbing turned into a full body massage, followed by a request to see her legs, butt, and eventually

---

<sup>171</sup> *Id.* at 679.

<sup>172</sup> *Id.* at 710.

<sup>173</sup> *Id.* at 706.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 709.

<sup>176</sup> *Id.* at 707.

<sup>177</sup> *United States v. Bell*, No. 20060845 (A. Ct. Crim. App. Dec. 31, 2008).

<sup>178</sup> *Id.* at \*2.

a request for sexual intercourse. Throughout his sexual advances, the PFC was compliant and never verbally refused the 1SG because she was afraid her “life in the company would have gotten harder” if she had refused.<sup>179</sup>

The ACCA specifically cited to the *Simpson* case in reversing *Bell* as factually insufficient.<sup>180</sup> The court found, much like in *Simpson*, “the record is devoid of any evidence showing [the victim] manifested a lack of consent.”<sup>181</sup> The court also held that fearing an individual’s position and power does not amount to constructive force sufficient to sustain a rape conviction. Without any evidence of a lack of consent or constructive force, the court applied the inference of consent and reversed the case.<sup>182</sup>

The next case of the compliant victim again involves a senior-subordinate relationship; however, in *United States v. Leak* the ranks were much closer, so the issue of what constituted reasonable steps to resist received greater attention.<sup>183</sup> Staff Sergeant Leak was a small group leader at a NCO academy in Germany and specialist (SPC) M, the victim, was attending the academy. Unlike the previous cases, SPC M had been on active duty for over four years and was not new to the military.<sup>184</sup> Additionally, SSG Leak was not in her platoon, did not rate her, and did not instruct her, but went out of his way to talk to her. During the course of events, SSG Leak solicited her for sex three separate times. On the first occasion, SSG Leak tried to pull off SPC M’s pants and SPC M successfully resisted both physically and verbally, so SSG Leak resigned to pleasuring himself in front of SPC M. Two days later, SSG Leak again asked SPC M to meet him alone in his office and she complied. This time, after initially resisting physically and verbally, SPC M gave up and let SSG Leak have sex with her. The members convicted SSG Leak of rape for this second incident.<sup>185</sup>

Despite SPC M’s verbal and physical resistance, ACCA found that there was insufficient evidence of force to sustain the case under a

---

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at \*5 (citing *Simpson*, 55 M.J. at 707).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *United States v. Leak*, 58 M.J. 869 (A. Ct. Crim. App. 2003).

<sup>184</sup> *Id.* at 870.

<sup>185</sup> *Id.*

factual sufficiency analysis.<sup>186</sup> The court cited to the fact that SSG Leak never verbally threatened to have SPC M kicked out of the academy and that SPC M had already successfully physically resisted his advances on a prior occasion as evidence that SPC M did not take “such measures of resistance as are called for by the circumstances.”<sup>187</sup> This case is perhaps the most curious factual insufficiency case since the victim reported the incident relatively quickly and there was clear testimony of both verbal and physical resistance that the members found sufficient to convict.<sup>188</sup> The only explanation for the court disregarding the victim’s physical and verbal protests is the closeness in both age and rank that led the court to require a higher standard of “taking such measures of resistance as are called for by the circumstances”<sup>189</sup> than in prior case.<sup>190</sup>

*United States v. Spicer* is yet another compliant victim case; however, this time it involved a parent and a step-daughter rather than a military relationship.<sup>191</sup> Gunnery Sergeant (GySgt) Spicer married the mother of the victim, VL, when VL was only 12 years old. By the time VL was 14 years old, GySgt Spicer began a long series of sexually inappropriate acts with his step-daughter.<sup>192</sup> He would ask to see her breasts, masturbate in front of her, and ask her to model lingerie.<sup>193</sup> During the course of the events over the years, sometimes VL would comply with her stepfather’s requests and sometimes she would refuse them.<sup>194</sup> Eventually, VL wanted to go away with her boyfriend for a weekend, and GySgt Spicer agreed to convince her mom to let her go if VL agreed to have sex with him. VL agreed.<sup>195</sup> At some point during the intercourse, VL believed that GySgt Spicer was videotaping it and immediately terminated the intercourse.<sup>196</sup>

---

<sup>186</sup> *Id.* at 878.

<sup>187</sup> *Id.* at 876. 2005 MCM, *supra* note 109, pt. IV, ¶ 45.c(1)(b).

<sup>188</sup> *Id.*

<sup>189</sup> *Leak*, 58 M.J. at 876 (citing MANUAL FOR COURTS-MARTIAL: UNITED STATES pt. IV, ¶ 45c(1)(b) (1995) [hereinafter 1995 MCM]).

<sup>190</sup> *E.g.*, *United States v. Simpson* 55 M.J. 674, 699–710 (A. Ct. Crim. App. 2001) (upholding numerous rape convictions where the victim’s put up minimal resistance, but there was a greater rank differential).

<sup>191</sup> *United States v. Spicer*, No. 20100241, at \*2 (N-M. Crim. Ct. App. 2009) (reversing a conviction for a single specification of sexual assault, but upholding the conviction for false official statement).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at \*2–3.

<sup>195</sup> *Id.* at \*3.

<sup>196</sup> *Id.* at \*5.

In reversing the case for a lack of factual sufficiency, N-MCCA recognized that parental compulsion can establish force and consent; however, the court found that it did not exist in this case.<sup>197</sup> Similar to *Leak*, N-MCCA highlighted the fact that VL resisted GySgt Spicer's advances on prior occasions. Moreover, the court noted that VL's mother, not GySgt Spicer, ultimately made the serious decisions in her life, and that VL terminated the intercourse on her own when she believed it was being videotaped. All of these factors led N-MCCA to reject the parental compulsion theory and rely upon the inference of consent to reverse the case.<sup>198</sup>

The sixth and final compliant victim case reversed for factual insufficiency is *United States v. Inlow*.<sup>199</sup> This case is unique because it involves two specifications of rape against the same victim within twenty-four hours, one that was upheld and one that was reversed.<sup>200</sup> The victim, KK, was a deployed Soldier's wife who had held a barbeque at her house.<sup>201</sup> During the course of the night, she and Private (Pvt) Inlow became very intoxicated and flirted very heavily, including "wrestling, roughhousing, tickling, and touching."<sup>202</sup> The flirting became so inappropriate that several of the party goers decided to intervene and talked to both KK and Pvt Inlow.<sup>203</sup> Later that night, KK testified that she "passed out" and awoke to Pvt Inlow having intercourse with her; she immediately resisted both physically and verbally.<sup>204</sup> Private Inlow wrote a statement admitting that KK told him "no" at one point during the night, but claimed the intercourse was consensual.<sup>205</sup> The next morning, when both Pvt Inlow and KK were awake, they engaged in intercourse again, this time KK did not resist because she "figured [she] must have done something to make him think that this was OK."<sup>206</sup> The members convicted Pvt Inlow of rape in both instances.<sup>207</sup>

---

<sup>197</sup> *Id.* at \*5-6.

<sup>198</sup> *Id.*

<sup>199</sup> *United States v. Inlow*, No. 20070239 (A. Ct. Crim. App. June 15, 2009).

<sup>200</sup> *Id.* at \*10.

<sup>201</sup> *Id.* at \*2.

<sup>202</sup> *Id.* at \*3.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at \*3-4.

<sup>205</sup> *Id.* at \*5.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at \*1-2.

The ACCA reversed the second rape for a lack of factual sufficiency, but affirmed the first specification.<sup>208</sup> The court differentiated the two because first, KK was no longer intoxicated during the second rape and “was in control of her mental faculties and physically able to resist [Pvt Inlow’s] advances during the second round of sexual intercourse.”<sup>209</sup> Second, the court pointed out the KK successfully resisted during the first convicted rape, but “during the second incident KK did not physically or verbally manifest a lack of consent.”<sup>210</sup> This case is unique in applying the inference of consent through inaction mere hours after a previous rape.<sup>211</sup>

*c. The Memoryless Victim*

The final group of cases reversed under the old version of Article 120 are the *memoryless victim* cases. These are cases where the victim knows that she had sex with the accused, but does not know how it occurred. The pre-2007 Article 120 required the government to prove lack of consent beyond a reasonable doubt; however, “[c]onsent . . . may not be inferred . . . where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice.”<sup>212</sup> This removed the burden of proving consent and force if the government could prove the victim was lacking “mental or physical faculties,” typically due to alcohol.<sup>213</sup>

There are two cases overturned for a lack of factual sufficiency under the pre-2007 Article 120 statute.<sup>214</sup> Both cases presented little evidence of incapacitation except that the victim could not remember what occurred. Additionally, multiple witnesses provided evidence of consciousness in both cases, suggesting to the court that the lack of memory was due to loss of memory rather than unconsciousness.

The first case in this area is *United States v. Nicely*, the only Air Force rape case overturned for a lack of factual sufficiency in the last

---

<sup>208</sup> *Id.* at \*9.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at \*8–10.

<sup>212</sup> 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

eleven years.<sup>215</sup> By the time this case went to trial, Airman (Amn) Nicely had already pled guilty to violating numerous articles under the UCMJ, but contested this rape allegation.<sup>216</sup> Airman Nicely and his friend, Amn W, purchased alcohol for two underage female Airmen, Amn G, and the victim, Amn K.<sup>217</sup> The two airmen snuck into the women's room after the final bed check and drank shots of tequila with the women. The victim's last memory was sitting in bed drinking tequila before waking up naked the next morning. Surprisingly, the victim conceded at trial that she may have consented to having intercourse with Amn Nicely. Additionally, Amn W and Amn G were both in the room during the course of the rape.<sup>218</sup> They witnessed Amn Nicely and the victim mutually kissing and heard the victim making noises throughout the intercourse.<sup>219</sup> Airman W even heard the victim talking to Amn Nicely during the intercourse, a further indication of consciousness.<sup>220</sup> Airman Nicely made three statements where he lied about some facts, but claimed the victim was awake and consenting throughout the intercourse.<sup>221</sup>

The Air Force Court of Criminal Appeals (AFCCA) reversed the case for a lack of factual sufficiency.<sup>222</sup> In the court's opinion, there was simply no evidence—except for the lack of memory—that the victim was unconscious or did not otherwise consent to the intercourse.<sup>223</sup> The AFCCA found this lack of memory could easily be explained by alcoholic blackout and all the other evidence pointed to consensual intercourse.<sup>224</sup>

The second intoxication case reversed for a lack of factual sufficiency is *United States v. Wood*.<sup>225</sup> Private First Class Wood attended a party in the barracks that the victim, a visiting college student,

---

<sup>215</sup> *United States v. Nicely*, No. 36730 (A.F. Ct. Crim. App. Aug. 15, 2007).

<sup>216</sup> *Id.* at \*1.

<sup>217</sup> *Id.* at \*2.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at \*2–4.

<sup>220</sup> *Id.* at \*4.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at \*5.

<sup>224</sup> *Id.* This point was made by a defense toxicologist that the described amount of alcohol normally would not lead to an alcohol induced loss of memory. He further testified that, assuming a larger alcohol intake than described, it would still be consistent with a loss of memory rather than a pass out. *Id.* at \*4.

<sup>225</sup> *United States v. Wood*, No. 200900436 (N-M. Ct. Crim. App. Jan. 25, 2010).

was attending.<sup>226</sup> The victim testified that she only had three to four drinks and felt mildly intoxicated that night.<sup>227</sup> In spite of this low level of intoxication, the victim lost her memory for a significant portion of the night, and awoke to PFC Wood on top of her, engaged in intercourse.<sup>228</sup> She further testified that she pushed PFC Wood off of her, and he immediately stopped and left the room.<sup>229</sup> An independent witness testified that he saw the victim getting sick during the night; however, after vomiting, he saw her flirting with PFC Wood in a bed.<sup>230</sup> He further testified that he saw the victim and PFC Wood leave the room together and she was walking without assistance.<sup>231</sup> Private First Class Wood claimed in his statement that the intercourse was consensual and confirmed that at one point, the victim pushed him, and he immediately stopped the intercourse.<sup>232</sup>

Based on the above facts, N-MCCA reversed the case for a lack of factual sufficiency.<sup>233</sup> The court found that the evidence pointed more toward the victim's alcohol-induced blackout rather than unconsciousness.<sup>234</sup> The court specifically cited the victim's willingness to go back to PFC Wood's room, her lack of memory, and the fact that both PFC Wood and the victim agree that PFC Wood immediately terminated the intercourse as soon as the victim pushed him away.<sup>235</sup>

Despite the service appellate courts only reversing two *memoryless victim* cases for a lack of factual sufficiency during the relevant time period, these cases prove to be the most difficult cases to uphold for factual sufficiency, even under a reformed statute.<sup>236</sup> This is typically due to the lack of witnesses as well as the reasonable explanation that the victim may have consented during an alcoholic blackout.<sup>237</sup> With these

---

<sup>226</sup> *Id.* at \*2.

<sup>227</sup> *Id.* at \*3.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at \*1.

<sup>230</sup> *Id.* at \*4.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at \*5.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at \*2–3.

<sup>236</sup> See *United States v. Lamb*, No. 20100044 (N-M. Ct. Crim. App. June 19, 2009); *United States v. Peterson*, No. 200900688 (N-M. Ct. Crim. App. Sept. 21, 2010); *United States v. Collins*, No. 20100020 (N-M. Ct. Crim. App. Aug. 7, 2009).

<sup>237</sup> *Wood*, No. 200900436, at \*4.

difficult fact patterns in mind, Congress undertook reform of the military's rape statute in 2007.

## 2. *Post-2007 Cases*

As previously discussed, Congress radically changed Article 120 in 2007. The two biggest changes were subdividing Article 120 into fourteen different offenses with multiple theories of liability for several of the offenses.<sup>238</sup> The second major change was removing "lack of consent" as an element of rape and making it an affirmative defense to both rape and sexual assault.<sup>239</sup> Logically, since the prosecution no longer had to prove "lack of consent," there was also no longer an inference of consent if the victim did not resist.<sup>240</sup> Instead, Congress shifted the burden of proving consent to the defense, which the courts upheld as constitutional in rape by force cases,<sup>241</sup> but unconstitutional in incapacity cases.<sup>242</sup> Removing the inference of consent has made it much more likely the courts will uphold *compliant victim* fact patterns; however, the *memoryless victim* cases remain a prevalent problem even under the 2007 Article 120. Indeed, the service appellate courts have already reversed three cases for a lack of factual sufficiency.

The first two cases the service appellate courts reversed for a lack of factual sufficiency under the 2007 revision of Article 120 arise from the same fact pattern involving a single incapacitated victim.<sup>243</sup> Private Peterson and Pvt Lamb were both convicted of aggravated sexual assault of the victim, PFC KR, one evening in Pvt Peterson's room. Private Peterson invited PFC KR over to his room with Pvt Lamb to have some drinks.<sup>244</sup> Over the course of two hours, PFC KR "had two or three shots of Jack Daniels and six or seven shots or 'mouthfuls' of Jaegermeister."<sup>245</sup> At this point, she remembers very little until she is

---

<sup>238</sup> See MANUAL FOR COURTS-MARTIAL UNITED STATES pt. IV, ¶ 45a (2008) [hereinafter 2008 MCM].

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* (noting that the instruction that the victim must resist was removed).

<sup>241</sup> United States v. Neal, 67 M.J. 675, 678–79 (N-M. Ct. Crim. App. 2009), *aff'd* 68 M.J. 289 (C.A.A.F. 2010).

<sup>242</sup> United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011).

<sup>243</sup> United States v. Lamb, No. 20100044 (N-M. Ct. Crim. App. June 19, 2009); United States v. Peterson, No. 200900688 (N-M. Ct. Crim. App. Sept. 21, 2010).

<sup>244</sup> *Lamb*, No. 20100044, at \*2.

<sup>245</sup> *Id.*

awakened by the duty NCO. The duty NCO escorts PFC KR back to her room, where she texts her boyfriend that she was raped.<sup>246</sup>

In reversing the case, the court relied heavily upon a blood test conducted within seven hours of the alleged sexual assault that found no detectable drugs or alcohol in PFC KR's blood.<sup>247</sup> Based on this result, a toxicologist testified in both cases that her blood alcohol content at the time of the alleged rape would have been between .10 and .15 (blood-alcohol content (BAC)), enough to potentially blackout, but not to become unconscious. Additionally, the toxicologists opined that PFC KR was not "passed out" if she was capable of waking up and walking unassisted to her own room within thirty minutes of the alleged rape. These facts, coupled with the victim's lack of memory and the absence of reliable evidence of unconsciousness, led the court to reverse the cases because the evidence did not exclude the possibility of a temporary alcoholic blackout.<sup>248</sup>

The final case overturned for a lack of factual sufficiency is *United States v. Collins* and involves the theory of substantial incapacity as well.<sup>249</sup> The victim, Lance Corporal (LCpl) S, attended a barracks party with her roommate, PFC D.<sup>250</sup> At the barracks party, everyone was "drinking, playing beer pong, and having a good time."<sup>251</sup> At some point during the night, PFC D saw that LCpl S was too drunk and escorted her back to her room and put her to bed. After putting her to bed, PFC D checked up on LCpl S three times. The final time she checked on LCpl S, PFC D found LCpl Collins spooning her, naked from the waist down. Private First Class D gathered some Marines to chase out LCpl Collins and during the course of the events, LCpl S exclaimed that "she felt like a slut, [and] that she never hooked up with guys."<sup>252</sup> In a statement admitted by the prosecution, LCpl Collins claimed that he went into LCpl S's room to retrieve a shirt, saw her sleeping on top of her covers, and the LCpl S "pulled him down on top of her," and they engaged in consensual intercourse.<sup>253</sup> Lance Corporal S claimed that she last

---

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at \*3.

<sup>248</sup> *Id.*; *Peterson*, No. 200900688, at \*4.

<sup>249</sup> *United States v. Collins*, No. 20100020 (N-M. Ct. Crim. App. Aug. 7, 2009).

<sup>250</sup> *Id.* at \*2.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at \*3.

<sup>253</sup> *Id.* at \*5.

remembered playing beer pong and awoke to LCpl Collins on top of her engaged in intercourse.<sup>254</sup>

*Collins* is unique among the incapacitated victim because there was a witness who saw the victim asleep or unconscious shortly before the sexual assault as well as shortly after.<sup>255</sup> The N-MCCA relied on several inconsistencies to reverse the sexual assault conviction.<sup>256</sup> First, the court found that the victim undermined her credibility when she lied under oath at the Article 32 hearing about underage drinking during the party.<sup>257</sup> Secondly, the court interpreted the victim's initial reaction "that she felt like a slut" as one of embarrassment and not of a crime. A toxicologist testified in this case as well and, similar to *Lamb* and *Peterson*, opined that LCpl S's estimated BAC was consistent with a blackout and not a passout.<sup>258</sup> Finally, the court found that the trial counsel put undue weight on MRE 413 propensity evidence in his closing argument, evidence that N-MCCA did not find persuasive.<sup>259</sup>

Beyond these three cases, the service courts have not reversed any *compliant victim* cases or *unreliable victim* cases under the 2007 Article 120. The next section will explore the 2007 and 2012 statutory changes in Article 120 and the effects they have had on these three categories of cases.

#### D. Effect of the 2007 Article 120 Revisions

The 2007 modification to Article 120 divided the single crime of rape into fourteen different offenses with multiple theories of criminal liability under each offense.<sup>260</sup> Beyond the increased number of offenses, the most significant change was removing the element of lack of consent from the crimes of rape and aggravated sexual assault.<sup>261</sup> By removing the element of lack of consent, Congress also eliminated the inference of consent where a victim did not take "such measures of resistance as are

---

<sup>254</sup> *Id.* at \*4.

<sup>255</sup> *Id.* at \*2–3.

<sup>256</sup> *Id.* at \*6–7.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at \*7.

<sup>260</sup> 2006 NDAA, *supra* note 83, at 3262.

<sup>261</sup> *Id.*

called for by the circumstances.”<sup>262</sup> Instead of focusing on lack of consent, Congress focused on how the sexual act occurred, whether by “force,” by “bodily harm,” or upon a “substantially incapacitated” victim.<sup>263</sup> Congress then made consent an affirmative defense and placed the burden upon the defense to prove this defense by a preponderance of the evidence.<sup>264</sup>

### 1. Effect of 2007 Article 120 on Compliant Victim Cases

Removing lack of consent as an element made the greatest impact upon factual sufficiency analysis for the *compliant victim* fact patterns. Looking first at *Tollinchi*,<sup>265</sup> the CAAF reversed the case relying upon the “inference of consent” if the victim does not take “such measures of resistance as are called for by the circumstances.”<sup>266</sup> The CAAF also stated that the government did not disprove the defense of mistake of fact as to consent in this case since the victim did not manifest a lack of consent.<sup>267</sup> Under the 2007 statute, the government no longer has to prove “lack of consent” or overcome an inference of consent if the victim does not reasonably resist. Instead the burden is on the defense to prove consent, or mistake of fact as to consent, by a preponderance of the evidence.<sup>268</sup> With the inference of consent removed, and the burden now upon the defense to prove mistake of fact as to consent, the reasoning for reversing *Tollinchi* is clearly inapplicable under the 2007 Article 120.<sup>269</sup>

Simply showing that the court’s reasoning in *Tollinchi* is inapplicable is only the first step in analyzing whether the case would withstand legal sufficiency review under the 2007 Article 120. The next

---

<sup>262</sup> 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).

<sup>263</sup> There are numerous other charging theories; however, these are the three predominant theories that are charged. 2006 NDAA, *supra* note 83, at 3262.

<sup>264</sup> *Id.*

<sup>265</sup> United States v. Tollinchi, 54 M.J. 80, 83 (C.A.A.F. 2000)

<sup>266</sup> *Id.* at 82 (citing 1995 MCM, *supra* note 203, pt. IV, ¶ 45c(1)(b)).

<sup>267</sup> *Id.* at 83.

<sup>268</sup> See United States v. Neal, 68 M.J. 289 (C.A.A.F. 2010) (upholding the shifting of the burden of proving consent to the defense as constitutional).

<sup>269</sup> The test for legal sufficiency is “whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979). Since consent and mistake of fact as to consent are now elements of the defense’s affirmative defense, and not essential elements of the prosecution’s case, they would not be tested for legal sufficiency review.

step is to analyze whether CAAF would likely reverse *Tollinchi* for different reasons under the 2007 Article 120. Judging by the lack of force applied, and the minimal alcohol involved,<sup>270</sup> the government's most likely theory of criminal liability under the 2007 Article 120 for *Tollinchi* would be aggravated sexual assault by causing bodily harm.<sup>271</sup> This theory requires two elements: a sexual act<sup>272</sup> and bodily harm.<sup>273</sup> The term "bodily harm" is drawn from the definition used in Article 128 assault as "any offensive touching of another, however slight."<sup>274</sup> Both of these elements could be met simply by the act of penetration since both the victim and the boyfriend testified that it was unwelcome.<sup>275</sup> There is a potential argument that Sergeant Tollinchi's actions did not "cause" the victim to engage in a sexual act. However, the undisputed testimony was that the sexual acts were initiated by Sergeant Tollinchi, that the victim "was drunk and afraid," and that "she pushed his penis away" at one point.<sup>276</sup> These undisputed facts would almost certainly meet the low standard of legal sufficiency that "any rational trier of fact could have found the essential elements beyond a reasonable doubt."<sup>277</sup>

Similar to *Tollinchi*, charging the *compliant victim* cases as aggravated sexual assault by causing bodily harm under the 2007 Article 120, would lead the service appellate courts to uphold at least two of the other five *compliant victim* fact patterns.<sup>278</sup> As discussed, all these cases

<sup>270</sup> *Tollinchi*, 54 M.J. at 81.

<sup>271</sup> Rape by force requires the government prove "action to compel submission of another or to overcome or prevent another's resistance by—the use or threat of a weapon or physical violence, strength, power, or restraint . . . sufficient that the other person could not avoid or escape the sexual conduct." From the record, Sergeant Tollinchi did not use a weapon, physical violence, strength, power, or restraint. *Id.* at 81. Additionally, an incapacitation theory would require the government to prove that the victim was "substantially incapacitated or substantially incapable of—appraising the nature of . . . appraising the nature of . . . or communicating an unwillingness to engage in the sexual act." 2008 MCM, *supra* note 238, pt. IV, 45a.(c)(1)(2). There is nothing in the record to suggest that the victim was anything but coherent, aware of the situation, and capable of communicating. *Tollinchi*, 54 M.J. at 81.

<sup>272</sup> A sexual act is defined as "contact between the penis and the vulva . . . or the penetration, however slight, of the genital opening of another." 2008 MCM, *supra* note 238, pt. IV, ¶ 45a.(t)(1).

<sup>273</sup> *Id.* pt. IV, 45b.(3)(b).

<sup>274</sup> Compare *id.* pt. IV, ¶ 45a.(t)(8), with ¶ 54c(1)(a).

<sup>275</sup> *Tollinchi*, 54 M.J. at 81. The boyfriend testified that victim stated during the intercourse with Sergeant Tollinchi "[s]top him, he's inside of me." *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

<sup>278</sup> This is assuming the cases are charged as aggravated sexual assault by causing bodily harm. See discussion, *supra* note 297 (discussing why compliant victim fact patterns

relied upon the inference of consent in reversing them for a lack of factual sufficiency.<sup>279</sup> Without this inference of consent, all the government would need to prove is a sexual act occurred by “any offensive touching . . . , no matter how slight.”<sup>280</sup>

The two cases that would almost certainly withstand factual sufficiency analysis under the 2007 statute are *Leak* and *Inlow*. In the *Leak* case, ACCA found that the victim resisted SSG Leak by wrestling with him and verbally objecting to his advances, but did not take sufficient measures as called for by the circumstances.<sup>281</sup> These verbal and physical protests could certainly be sufficient to show that the sexual act was an “offensive touching . . . no matter how slight.”<sup>282</sup> Indeed, ACCA faced a similar fact pattern under the 2007 Article 120 in *United States v. Alston* and upheld an aggravated sexual assault conviction by causing bodily harm where the victim tried to prevent her pants from being pulled down, but put up little other resistance.<sup>283</sup> Additionally, under an aggravated sexual assault by bodily harm theory, the *Inlow* case would likely be upheld for factual sufficiency.<sup>284</sup> In that case, the court affirmed a conviction for rape the previous night and only reversed the rape from the next day due to the victim’s lack of resistance.<sup>285</sup> Without the court drawing an inference of consent from a lack of resistance, the court would almost certainly find sexual acts by a rapist of a victim within twenty-four hours of the rape as offensive touching.

The final three cases, *Spicer*,<sup>286</sup> *Simpson*,<sup>287</sup> and *Bell*,<sup>288</sup> would all be much closer decisions on whether they are factually sufficient under an aggravated sexual assault by causing bodily harm theory. In all three cases, the victims were never threatened and merely complied with instructions given by a person in a more powerful position than the

---

should be charged as aggravated sexual assault by causing bodily harm rather than rape by force or aggravated sexual assault of a substantially incapacitated person).

<sup>279</sup> See discussion, *supra* Part III.C.1.b.

<sup>280</sup> 2008 MCM, *supra* note 238, pt. IV, ¶45a(t)(8).

<sup>281</sup> *United States v. Leak*, 58 M.J. 869, 878 (A. Ct. Crim. App. 2003).

<sup>282</sup> 2008 MCM, *supra* note 238, pt. IV, ¶45a(t)(8).

<sup>283</sup> *United States v. Alston*, No. 20080504 (A. Ct. Crim. App. 2009) *aff’d* 69 M.J. 214 (C.A.A.F. 2010).

<sup>284</sup> *United States v. Inlow*, No. 20070239 (A. Ct. Crim. App. June 15, 2009).

<sup>285</sup> *Id.* at \*10.

<sup>286</sup> *United States v. Spicer*, No. 20100241 (N-M. Ct. Crim. App. 2009).

<sup>287</sup> *United States v. Simpson*, 55 M.J. 674 (A. Ct. Crim. App. 2001).

<sup>288</sup> *United States v. Bell*, No. 20060845 (A. Ct. Crim. App. Dec. 31, 2008).

victim.<sup>289</sup> The service appellate courts could simply affirm these cases as factually sufficient since the victim's testimony established that the touching was not wanted and therefore "offensive."<sup>290</sup> Alternatively, there is an argument that it was not the bodily harm that "cause[d the victim] to engage in a sexual act," but her compliance with the verbal instructions, and verbal instructions do not constitute bodily harm.<sup>291</sup> Finally, the court could also interpret that these were not offensive touching beyond a reasonable doubt since the victim never manifested displeasure at the touching throughout the entirety of the sexual act. Either way the court decides on cases similar to these, they have wide latitude in their factual sufficiency analysis, and the case is much more likely to be upheld than under the pre-2007 Article 120.

## 2. *Effect of 2007 Article 120 on Unreliable Victim Cases*

Beyond, the compliant victim cases, the 2007 Article 120 would likely have little effect on the *unreliable victim* cases. In both *Parker*<sup>292</sup> and *Foster*,<sup>293</sup> the court focused on the lack of corroboration, the motive to fabricate, and the overall unreliability of the victims. In reversing the cases for a lack of factual sufficiency, the court did not rely on the inference of consent, but rather questioned whether the sexual act occurred at all.<sup>294</sup> With the court unconvinced that the sexual act occurred, it would be very unlikely that the service courts would uphold these convictions under any statutory scheme.<sup>295</sup>

---

<sup>289</sup> While this is a similar fact pattern to *Tollinchi*, the difference is that they were all reversed for a lack of factual sufficiency rather than legal sufficiency, so it would be a much closer call on whether they are upheld due to the higher standard of factual sufficiency over legal sufficiency.

<sup>290</sup> 2008 MCM, *supra* note 238, pt. IV, ¶ 45a(t)(8).

<sup>291</sup> *Id.* ¶ 45a(c)(2).

<sup>292</sup> *United States v. Parker*, 54 M.J. 700 (A. Ct. Crim. App. 2001).

<sup>293</sup> *United States v. Foster*, No. 200101955 (N-M. Ct. Crim. A. Feb. 17, 2009).

<sup>294</sup> *Parker*, 54 M.J. at 708; *Foster*, No. 200101955, at \*5.

<sup>295</sup> Both rape and aggravated sexual assault require the element that a sexual act occurred. 2008 MCM, *supra* note 238, pt. IV, ¶ 45a.(a), (c). It would be difficult to imagine any statutory scheme of charging rape or sexual assault would not require proof beyond a reasonable doubt that a sexual act occurred.

### 3. *Effect of 2007 Article 120 on Memoryless Victim Cases*

The 2007 Article 120 created uncertainty in the *memoryless victim* fact patterns. First, as discussed, CAAF held that it was unconstitutional to place the burden on the defense to prove consent by a preponderance of the evidence in substantial incapacity cases since the defense would have to affirmatively disprove one of the government's elements, capacity, in order to prove consent.<sup>296</sup>

Second, the 2007 Article 120 introduces the term "substantially incapacitated" to account for an unconscious or sleeping victim; however, the statute does not provide a definition of this term.<sup>297</sup> This leaves it to the judiciary to determine the definition and the members to interpret.<sup>298</sup> The result is that both the prosecution and the defense bring in toxicologists to explain the difference between a "passout" and a "blackout" and what is more likely under the given facts.<sup>299</sup> Looking at the observed blood alcohol content, the description of the number of drinks consumed, and the observed actions of the victim, the toxicologist usually comes to the conclusion that the person was not passed out, and that the described actions are consistent with being blacked out.<sup>300</sup>

This uncertainty is not new, but a continuance of the pre-2007 Article 120 when the government had to prove that the victim was "unable to resist because of the lack of mental or physical faculties."<sup>301</sup> Neither definition is a model of clarity, and both leave room for a toxicologist to inject reasonable doubt into a case through the description of a black out versus a pass out.

---

<sup>296</sup> See *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011).

<sup>297</sup> See 2008 MCM, *supra* note 238, pt. IV, ¶ 45a(c)(2).

<sup>298</sup> See *generally id.* pt. IV, ¶ 45a (leaving out any definition of "substantial incapacity").

<sup>299</sup> See *United States v. Collins*, No. 20100020 (N-M. Ct. Crim. App. Aug. 7, 2009); *United States v. Lamb*, No. 20100044 (N-M. Ct. Crim. App. June 19, 2009); *United States v. Peterson*, No. 200900688 (N-M. Ct. Crim. App. Sept. 21, 2010) (expert toxicologist opined in all three cases that the victim's blood alcohol content would be significantly below the level expected for a pass out and consistent with a black out).

<sup>300</sup> *E.g.*, *Collins*, No. 20100020, at \*4 (testifying that a "passed out" person could not awaken, dress herself, and play video games a short time after the alleged assault).

<sup>301</sup> 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).

#### IV. The 2012 Reforms to Article 120 and the Likely Effect of Factual Sufficiency Review

##### A. The Structure of the 2012 Article 120

The 2012 Article 120 continued part of the statutory reform ideas of the 2007 Article 120; however, it also drew away from the unconstitutional portions of the statute.<sup>302</sup> The statute continued the subdivision of sexual crimes by creating an Article 120, 120a, 120b, and 120c with multiple theories of criminal culpability under each Article.<sup>303</sup> Additionally, the 2012 Article 120 steered away from the element of “lack of consent” in rape and most sexual assault theories; however, it reintroduced the element of consent into sexual assault by causing bodily harm.<sup>304</sup> Finally, the 2012 statute did not provide an inference of consent when the victim did not resist as called for by the circumstances.<sup>305</sup>

The largest difference between the 2007 Article 120 and the 2012 Article 120 is in how the 2012 statute deals with consent in rape and sexual assault offenses. The 2012 Article 120 eliminates the consent burden-shifting scheme created by the 2007 Article 120,<sup>306</sup> and instead, handles the issue of consent differently in each charging theory. First, for the offense of rape by “using force causing or likely to cause death or grievous bodily harm,” consent is neither an element of the crime, nor a defense.<sup>307</sup> The drafters removed consent as a defense in this theory by affirmatively stating in the definition of consent that a person cannot

---

<sup>302</sup> See *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011); *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011) (holding that placing the burden upon the accused to prove consent is unconstitutional in substantial incapacity cases since consent because the defense would have the burden to affirmatively disprove the government’s element of incapacity).

<sup>303</sup> Article 120 addresses “Rape and Sexual Assault Generally”; Article 120a continues to address “Stalking”; Article 120b now covers “Rape and Sexual Assault of a Child”; and Article 120c covers “Other Sexual Misconduct,” such as indecent viewing, indecent exposure, or pandering, or prostitution. 2012 NDAA, *supra* note 88, § 541. For purposes of portions of this article, “Article 120” will refer only to the first part of the statute including rape and sexual assault.

<sup>304</sup> *Id.* The 2012 statute defines bodily harm as “any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.” *Id.*

<sup>305</sup> Compare 2012 NDAA, *supra* note 88, § 541(b), with 2005 MCM, *supra* note 109, pt. IV, ¶ 45c(1)(b).

<sup>306</sup> See Hoegel, *supra* note 84 (describing the burden-shifting scheme of the 2007 Article 120).

<sup>307</sup> 2012 NDAA, *supra* note 88, § 541.

consent to force likely to cause grievous bodily harm.<sup>308</sup> Second, for the offense of rape by “using unlawful force,” the statute is silent on whether or not consent is a defense.<sup>309</sup> The statute does provide a definition of “unlawful force” as “an act of force done without legal justification or excuse.”<sup>310</sup> In interpreting this statute, military judges treat consent as evidence of whether or not the force was “unlawful,”<sup>311</sup> rather than treating it as an affirmative defense, similar to Article 128, with the prosecution bearing the burden of disproving it beyond a reasonable doubt.<sup>312</sup>

For the sexual assault offenses,<sup>313</sup> consent is not a defense since it is incorporated into the definitions of the crimes. As discussed, the definition of “bodily harm” now explicitly includes “any nonconsensual sexual act or nonconsensual sexual contact,” in its definition of “offensive touching.”<sup>314</sup> This means in a prosecution for sexual assault by causing bodily harm, the prosecution likely has to prove that the sexual act or contact was nonconsensual beyond a reasonable doubt since consent is built into the definition.<sup>315</sup> While the burden of proving “nonconsensual contact” is now on the government, the defense of mistake of fact as to consent is still open to the defense.<sup>316</sup>

---

<sup>308</sup> This is drawn from Article 128, assault, case law. See *United States v. Serrano*, 51 M.J. 622, 624 (N-M. Ct. Crim. App. 1999).

<sup>309</sup> 2012 NDAA, *supra* note 88, § 541.

<sup>310</sup> *Id.*

<sup>311</sup> See *Clark*, *supra* note 84, at 11 (arguing that evidence of consent should not be used as a defense, but as evidence of whether or not the prosecution proved the offense).

<sup>312</sup> “The general rule is that while consent may defeat a charge of simple assault and battery, it will not excuse assault that produces death or serious injury.” *United States v. Bygrave*, 40 M.J. 839, 842 (N-M. Ct. Crim. App. 1994), *aff’d* 46 M.J. 491 (C.A.A.F. 1997).

<sup>313</sup> The term “sexual assault offenses” refers to the most likely charged offenses of sexual assault by causing bodily harm, and the two incapacitation theories of sexual assault. 2012 NDAA, *supra* note 88, § 541.

<sup>314</sup> *Id.*

<sup>315</sup> Looking at the term “offensive touching,” it seems to imply an element of nonconsent to it. If a person consents to a touching, then it would not be offensive. *Id.* The two exceptions commonly seen in case law are when a sexual act was consensual at the time, but later became an offensive touching is when the accused does not disclose that he has a sexually transmitted disease, such as HIV. This fits under the same exception mentioned in the crime of rape by force likely to cause death or grievous bodily harm, so consent would not be at issue. See *United States v. Dumford*, 28 M.J. 836 (A.F.C.M.R. 1989), *aff’d*, 30 M.J. 137 (C.M.A. 1990). The second exception would be when the accused exceeds the boundaries of consent. See *United States v. Arab*, 55 M.J. 508 (A. Ct. Crim. App. 2001) (sadoomasochistic activities caused extreme pain and injury).

<sup>316</sup> 2008 MCM, *supra* note 238, R.C.M. 917(j).

Additionally, for the incapacitation sexual assaults, the statute explicitly states in the definition of consent that “[a] sleeping, unconscious, or incompetent person cannot consent.”<sup>317</sup> This places the burden on the government to prove beyond a reasonable doubt that the victim was sleeping or otherwise unconscious and leaves consent as evidence that the victim was not unconscious or sleeping. The second charging theory under the incapacitation fact pattern is when an accused “commits a sexual act upon another person when the other person is incapable of consenting . . . due to . . . drug, intoxicant, or . . . a mental disease or defect.”<sup>318</sup> This theory seems to best cover sexual assaults where the government has strong toxicological evidence that the victim was not competent to consent. It explicitly places the burden on the prosecution to prove that the victim was incapable of consenting due to one of several delineated factors.<sup>319</sup> The incapacitation sexual assault theories also place the burden upon the prosecution to prove that there was no mistake of fact as to consent by requiring the government to prove the accused “knew or reasonably should have known” the victim’s incapacitated state.<sup>320</sup> By placing the burden on the government to prove the victim was asleep or otherwise could not consent and that the accused “knew or should have known” this fact, the incapacitation sexual assaults eliminate the affirmative defenses of consent and mistake of fact as to consent and place the burden upon the government to prove in its case in chief that the victim did not provide competent consent.

#### B. Likely Effect of the 2012 Revision on Factual and Legal Sufficiency Review

The 2012 revision of Article 120 is less likely than the 2007 Article 120 to uphold *compliant victim* cases; however, it will be more likely to uphold *memoryless victim* cases for factual sufficiency analysis. While the 2012 statute is not as effective as the 2007 statute at upholding *compliant victim* cases, it is more effective than the pre-2007 Article 120. The primary improvement over the pre-2007 statute is the continued elimination of the “inference of consent” if the victim does not resist as the circumstances warrant.<sup>321</sup>

---

<sup>317</sup> 2012 NDAA, *supra* note 88, § 541.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> This is the government’s counter to a mistake of fact defense that the accused knew or should have known the actual fact. 2008 MCM, *supra* note 238, R.C.M. 917(j).

<sup>321</sup> See discussion *supra* Part III.D.1.

First, looking at the *compliant victim* fact patterns, the 2012 statute is more likely to uphold cases than is the pre-2007 statute. As discussed, the most likely theory for charging an accused under a compliant victim fact pattern is as sexual assault by causing bodily harm.<sup>322</sup> This is due to general compliant nature of the victims and the minimal force found in these cases. Cases where the victim physically resists, such as *Leak*<sup>323</sup> and *Inlow*,<sup>324</sup> would almost certainly be upheld without the inference of consent provided in the pre-2007 statute. In both of these cases, the court acknowledged there was clear evidence of prior physical resistance demonstrating the advances were unwanted; however, the court relied on the inference of consent in determining that the resistance was not reasonable.<sup>325</sup> If the court changed its analysis to determine whether or not the touching was “an offensive touching . . . however slight,”<sup>326</sup> not whether the resistance was reasonable, it seems fairly certain the cases would pass factual sufficiency analysis.

However, *compliant victim* cases are less likely to pass factual sufficiency analysis under the 2012 statute than they were under the 2007 statute. Unlike the burden-shifting of the 2007 statute, the government must disprove the defense of mistake of fact as to bodily harm if raised by the defense, including the language of any “nonconsensual contact.”<sup>327</sup> Since the burden of disproving mistake of fact as to bodily harm is on the government, it becomes an essential element subject to legal sufficiency review.<sup>328</sup> In *Tollinchi*, the CAAF cited mistake of fact

---

<sup>322</sup> See discussion, *supra* note 297.

<sup>323</sup> *United States v. Leak*, 58 M.J. 869 (A. Ct. Crim. App. 2003) (victim physically resisted, but the courts did not believe she overcame the inference of consent because she demonstrated on a previous occasion that she could resist physically resist the accused’s sexual advances).

<sup>324</sup> *United States v. Inlow*, No. 20070239 (A. Ct. Crim. App. June 15, 2009) (court did not believe that sexual intercourse the morning after a rape occurred was rape because the victim previously fought off the accused when she was drunk).

<sup>325</sup> *Leak*, 58 M.J. at 871; *Inlow*, No. 20070239, at \*4.

<sup>326</sup> This is the standard for sexual assault by causing bodily harm from the 2012 statute. 2012 NDAA, *supra* note 88, § 541.

<sup>327</sup> The 2007 statute placed the burden of proving mistake of fact as to consent on the defense; therefore, it was not part of the essential elements subject to legal sufficiency review. See 2008 MCM, *supra* note 238, R.C.M. 916(j). With this burden no longer on the defense, it will again be an essential element for the government to disprove if reasonably raised by the facts in sexual assault by causing bodily harm cases. See *United States v. Tollinchi*, 54 M.J. 80, 83 (C.A.A.F. 2000) (holding the government failed to disprove mistake of fact as to consent in addition to not overcoming the inference of consent).

<sup>328</sup> *Tollinchi*, 54 M.J. at 83.

as to consent as a secondary basis for reversing the case for legal insufficiency, since the victim complied without objection to all of Sergeant Tollinchi's instructions.<sup>329</sup> The cases of *Spicer*,<sup>330</sup> *Simpson*,<sup>331</sup> and *Bell*<sup>332</sup> also involved victims who complied with the accused's instructions and did not physically or verbally resist. The service courts relied on the inference of consent in reversing these cases initially; however, it is also possible that the service courts could have reversed because of a mistake of fact as to consent defense because the victims were all compliant and did not resist. Alternatively, it is possible that the service courts would not believe that it is not reasonable for individuals in powerful position to believe their subordinates would silently consent to their sexual advances under the given circumstances.<sup>333</sup>

Looking at the *memoryless victim* cases, the 2012 statute is more likely to uphold these cases than the 2007 statute or the pre-2007 statute. The 2007 Article 120 required the prosecution to prove that the victim was "substantially incapacitated" or "substantially incapable of . . . appraising the nature of the sexual act . . . declining participation . . . or communicating unwillingness."<sup>334</sup> In practice, this has been charged as the victim being "substantially incapacitated" and has led to the courts to spend a lot of time analyzing the victim's blood alcohol content, her ability to walk after the event, and her ability to communicate and complete other tasks after the event.<sup>335</sup> As discussed, the 2012 Article 120 allows the prosecution to charge sexual assault upon a person who is "asleep, unconscious, or otherwise unaware."<sup>336</sup> If the victim's blood alcohol content and actions are not consistent with unconsciousness, the government can proceed on a theory that she was asleep and introduce experts to talk about alcohol's effect on sleep and responsiveness.<sup>337</sup> By

---

<sup>329</sup> *Id.*

<sup>330</sup> United States v. Spicer, No. 20100241 (N-M. Ct. Crim. App. 2009).

<sup>331</sup> United States v. Simpson, 55 M.J. 674 (A. Ct. Crim. App. 2001).

<sup>332</sup> United States v. Bell, No. 20060845 (A. Ct. Crim. App. Dec. 31, 2008).

<sup>333</sup> *Spicer*, No. 20100241, at \*5–6 (stepchild does not resist step father's advances); *Simpson* 55 M.J. at 699–710 (Soldier under instruction does not resist ordnance instructor's advances); *Bell*, No. 20060845, at \*2–5 (junior Soldier does not resist advances of her first sergeant).

<sup>334</sup> 2008 MCM, *supra* note 238, ¶ 45a(c)(2).

<sup>335</sup> See United States v. Collins, No. 20100020 (N-M. Ct. Crim. App. Aug. 7, 2009); United States v. Lamb, No. 20100044 (N-M. Ct. Crim. App. June 19, 2009); United States v. Peterson, No. 200900688 (N-M. Ct. Crim. App. Sept. 21, 2010).

<sup>336</sup> 2012 NDAA, *supra* note 88, § 541(b).

<sup>337</sup> See, e.g., Timothy Roehrs & Thomas Roth, *Sleep, Sleepiness, and Alcohol Use*, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, <http://pubs.niaaa.nih.gov/publica->

changing the tenor of the argument from unconsciousness to alcohol-induced deeper sleep, it is certainly possible that it could change the court's analysis in the *memoryless victim* cases.<sup>338</sup>

Finally, as discussed in both the pre-2007 Article 120 and the 2007 revision, cases such as *Foster*<sup>339</sup> and *Parker*<sup>340</sup> will likely continue to be overturned, no matter the statute. In both cases the court focused on the lack of corroboration, the motive to fabricate, and the overall unreliability of the victims. In reversing the cases for a lack of factual sufficiency, the court did not rely on the inference of consent, but rather questioned whether the sexual act occurred at all.<sup>341</sup> With the court unconvinced that the sexual act occurred, there is simply no manner that these cases could be upheld under the 2012 Article 120 without removing the service court's ability to review cases for factual sufficiency.<sup>342</sup>

## V. Conclusion

By its very nature, Article 120 is going to continue to be a controversial statute with a delicate balance between the rights of the victim and the accused.<sup>343</sup> Historically, the balance fell heavily in the accused's favor with numerous presumptions falling against the victim.<sup>344</sup> Over the past sixty years, the balance has begun to shift with the Executive Branch implementing numerous rules of evidence in the victim's favor and Congress twice changing the statute to encompass

---

ions/arh25-2/101-109.htm (describing how alcohol has a sedative effect and initially causes a person to fall asleep faster, but disturbs the second half of the person's sleep period).

<sup>338</sup> Of course, the defense still has a strong argument that the victim was in "black time" and this accounts for the lack of memory and was not disproven beyond a reasonable doubt. Only time and future case law will tell the effectiveness of this modification in the statute.

<sup>339</sup> *United States v. Foster*, No. 200101955 (N-M. Ct. Crim. App. Feb. 17, 2009).

<sup>340</sup> *United States v. Parker*, 54 M.J. 700 (A. Ct. Crim. App. 2001).

<sup>341</sup> *Parker*, 54 M.J. at 708; *Foster*, No. 200101955, at \*5.

<sup>342</sup> Both rape and sexual assault require the element of a sexual act. 2012 NDAA, *supra* note 88, § 541.

<sup>343</sup> Michael Doyle & Marissa Taylor, *Bureaucracy has Blossomed in Military's War on Rape*, MCCLATCHY NEWSPAPERS, Nov. 28, 2011, available at <http://www.mcclatchydc.com/2011/11/28/131524/bureaucracy-has-blossomed-in-militarys.html> (describing how the military has taken a lot of action "[u]nder the political gun" and that "[s]ome works" and "[s]ome falls short")

<sup>344</sup> See discussion *supra* Part II.

significantly more crimes as sexual crimes and taking away a presumption of consent. These changes, coupled with an increase in the percentage of women in the military, and increased congressional scrutiny, have led to a significant increase in the number of Article 120 convictions and appeals.

While the 2007 modification of Article 120 created constitutional due process problems in certain circumstances, it also decreased the likelihood a case will be reversed for a lack of factual sufficiency. This is due primarily to Congress removing the presumption of consent from the statute when the victim does not resist and instead placing the burden of proving consent on the accused.

As of the writing of this article, the 2012 modification of Article 120 has yet to be tested on appeal, but it appears to solve the significant due process issues of the 2007 version. It deals with consent in numerous different fashions throughout the statute, making it inapplicable in some situations and part of the definition of the offense in other situations. Like the 2007 statute, there is no presumption of consent if the victim does not resist, so the *compliant victims* cases will withstand factual sufficiency analysis much better than under the pre-2007 statute. Additionally, the 2012 modification allows the government to charge the *memoryless victim* fact patterns as asleep rather than “substantially incapacitated,” which could make them much more likely to withstand appeal for factual sufficiency. Overall, while the 2007 modification of Article 120 created constitutional due process issues, it also made Article 120 much more likely to withstand factual sufficiency review. The 2012 amendments likely cure the due process issues, while also continuing the trend of making Article 120 convictions more likely to withstand factual sufficiency review.