

“JUST THE FACTS, MA’AM”:¹
HOW MILITARY APPELLATE COURTS
RELY ON FACTUAL SUFFICIENCY
REVIEW TO OVERTURN SEXUAL
ASSAULT CASES WHEN VICTIMS ARE
“INCAPACITATED”

Lisa M. Schenck*

“SW’s segmented memories lacked significant details and she could provide no chronology of the events she did remember. . . . we simply are not convinced that the Government satisfied its burden of proving the appellant’s guilt to the charges of rape and forcible sodomy beyond a reasonable doubt. We therefore find the appellant’s convictions factually insufficient.”²

1. This phrase is attributed to Jack Webb, a character in the TV series, *Dragnet*, 1951—1959 and 1967—1970. See *Dragnet*, IMDB (TV Series 1951 – 1959), <http://www.imdb.com/title/tt0043194> (last visited Feb. 2, 2016); *Just the Facts Ma’am Idiom*, FREE DICTIONARY, <http://idioms.thefreedictionary.com/Just+the+facts,+Ma’am> (last visited Feb. 2, 2016); *Franchise/Dragnet*, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Franchise/Dragnet> (last visited Feb. 2, 2016).

* Associate Dean for Academic Affairs, Co-Director of the National Security Law LL.M. Program, Professorial Lecturer in Law, The George Washington University Law School. The author is a retired U.S. Army Judge Advocate General’s Corps colonel who served as an Associate and Senior Judge on the U.S. Army Court of Criminal Appeals (2002–2008); upon retirement, she served as the Senior Adviser to the Defense Task Force on Sexual Assault in the Military Services (2008–2009). B.A., Providence College; M.P.A., Fairleigh Dickinson University; J.D., Notre Dame Law School; LL.M., The Judge Advocate General’s Legal Center and School; LL.M., Yale Law School; J.S.D., Yale Law School. This article reflects the personal opinion of the author and does not represent the views of the University, Law School, Department of Defense, or Department of the Army. The author would like to thank Benjamin Christian, a dedicated research assistant, for his assistance and support.

2. *United States v. Clark*, NMCCA 201400232, 2015 CCA LEXIS 287 (N.M. Ct. Crim. App. July 14, 2015).

*“[W]e are not convinced beyond a reasonable doubt that the complainants were incapable of consenting—that is, that they lacked the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make and to communicate a decision about whether they agreed to the conduct.”*³

I. INTRODUCTION

The quotes above reflect a military appellate court exercising its unique authority—based on factual sufficiency—to overturn the guilty findings of courts-martial. Other federal courts do not have this same responsibility or power. Service criminal courts of appeals have been entrusted with this authority pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ),⁴ an authority often characterized as an “awesome, plenary *de novo* power of review.”⁵ This judicial “*de novo* review” of the factual sufficiency of the evidence at trial involves evaluating the weight and sufficiency of the evidence.⁶ “Such a review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency”⁷ In some cases, the courts of criminal appeals have determined that sex crime victims are not credible and have found this to be a pivotal factor when deciding to overturn a conviction.⁸ Military criminal

3. United States v. Pease, 74 M.J. 763, 770 (N.M. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 180 (C.A.A.F. 2016).

4. See Uniform Code of Military Justice (UCMJ) art. 66(c), 10 U.S.C. § 866(c) (West 1996) [hereinafter UCMJ].

5. United States v. Nerad, 69 M.J. 138, 144 (C.A.A.F. 2010) (citations omitted).

6. 10 U.S.C.A. § 866(c); see United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987).

7. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

8. See *e.g.*, Pease, 74 M.J. at 763; United States v. Bridenstine, NMCCA 201500041, 2015 CCA LEXIS 462 (N-M Ct. Crim. App. Oct. 29, 2015); United States v. Clark, NMCCA 201400232, 2015 CCA LEXIS 287 (N-M. Ct. Crim. App. 2015); United States v. Collins, NMCCA 201000020, 2011 CCA LEXIS 22 (N-M. Ct. Crim. App. Feb. 17, 2011); United States v. Lamb, NMCCA 201000044, 2010 CCA LEXIS 334 (N-M. Ct. Crim. App. Sept. 21, 2010); United States v. Peterson, NMCCA 200900688, 2010 CCA LEXIS 336 (N-M. Ct. Crim. App. Sept. 21, 2010); United States v. Wood, NMCCA 200900436, 2010 CCA LEXIS 24 (N-M. Ct. Crim. App. Jan. 25, 2010); United States v. House, ACCA 20061064, 2009 CCA LEXIS 192 (A. Ct. Crim. App. Mar. 30, 2009); United States v. Foster, NMCCA 200101955, 2009 CCA LEXIS 62 (N-M. Ct. Crim. App. Feb. 17, 2009); United States v. Parker, 54 M.J. 700 (A. Ct. Crim. App. Jan. 12, 2001). Some cases have withstood challenge; United States v. Brown, ACCA 20130177, 2014 WL 7237501, at *2 (A. Ct. Crim. App. Nov. 21, 2014), *pet. denied*, 74 M.J. 363 (C.A.A.F. 2015); United States v. Torres, NMCCA 201300396, 2014 CCA LEXIS 641 (N-M. Ct. Crim. App. Aug. 28, 2014); United States v. Redmon, NMCCA 201300077, 2014 CCA LEXIS 369 (N-M. Ct. Crim. App. June 26, 2014), *pet. denied*, 74 M.J. 77 (C.A.A.F. 2014); United States v.

appellate courts are making this determination even though Article 66(c), UCMJ, explicitly states the appellate judges should “recognize that the trial court saw and heard the witnesses.”⁹ This article contends that since sufficient protections are now in place in the military justice system, the military courts of criminal appeals no longer require factual sufficiency review authority to protect an accused tried by courts-martial, and furthermore, military criminal courts of appeals should have the same standard of review as other federal criminal courts, that is, a conviction should be tested for legal sufficiency.

The factual sufficiency standard for appellate review is an anachronism from an era when military justice was substantially different from what it is today. This standard has been employed to reverse hard-won sex offense convictions under Article 120, as appellate judges determine that intoxicated victims are not credible. Therefore, this article also contends that military criminal law should include a clear definition of incapacitation to assist the trier of fact in determining when a victim is incapacitated and impaired by alcohol or drugs, and to improve the probability that the case will withstand appellate review.

II. FACTUAL SUFFICIENCY REVIEW AUTHORITY OF MILITARY APPELLATE COURTS

As set forth in Article 66, UCMJ, the jurisdiction of Service courts of criminal appeals includes automatic review of cases (from within each Service) with sentences that include death, a punitive discharge, or at least a year of confinement.¹⁰ A Service court of criminal appeals is limited in approving the findings and sentences of courts-martial and

[M]ay affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and

Nicely, ACM 36730, 2007 CCA LEXIS 322 (A.F. Ct. Crim. App. Aug. 15, 2007); *see also* Mark D. Sameit, *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*, 216 MIL. L. REV. 77, 94-109 (2013).

9. UCMJ, *supra* note 4.

10. Service courts do not review cases when the accused withdraws his case from review or waives appellate review, except if an accused is sentenced to death since a person with a capital sentence is not permitted to waive appellate review. GREGORY MAGGS & LISA SCHENCK, *MODERN MILITARY JUSTICE: CASES AND MATERIALS* 417 (2d ed. 2015).

determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.¹¹

Although military appellate courts have the responsibility to review cases for both legal sufficiency¹² and factual sufficiency, factual sufficiency review has proven more controversial. Legal sufficiency review as exercised by most courts involves reviewing cases to ensure some evidence was admitted at trial to fulfill each required element of proof. In assessing factual sufficiency, unlike legal sufficiency review, military appellate judges may assess the quality and credibility of the trial evidence. Furthermore, the legal sufficiency standard of review is more deferential to the trial court's findings of guilty, requiring courts to view "the evidence in the light most favorable to the prosecution."¹³ In contrast, when reviewing courts-martial cases "[f]or factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the appellate military court is] convinced of [the appellant's] guilt beyond a reasonable doubt."¹⁴

11. UCMJ, *supra* note 4, art. 66(c) (West 1996).

12. Pursuant to 10 U.S.C. § 867, art. 67, the Court of Appeals for the Armed Forces (comprised of five civilian judges and sits as the superior court for the Service courts of criminal appeals) also conducts a legal sufficiency review of courts-martial cases within its jurisdiction. The Court of Appeals for the Armed Forces applies the same legal sufficiency standard of review applied in U.S. Circuit Courts of Appeals. *See* United States v. Gutierrez, 74 M.J. 61, 65 (C.A.A.F. 2015) (citing United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979))); United States v. Barner, 56 M.J. 131, 134 (C.A.A.F. 2001); *see also infra* notes 36-39 and accompanying text, for standard of review applied by the U.S. Circuit Courts of Appeals.

13. *Gutierrez*, 74 M.J. at 65.

14. *Turner*, 25 M.J. at 325. On December 28, 2015, the Department of Defense's Military Justice Review Group (MJRG) presented proposed legislation resulting from its comprehensive assessment of "the structure and operation of the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM)." MIL. JUST. REV. GROUP, <http://www.dod.gov/dodgc/mjrg.html>. The MJRG review recommended that Congress modify, but retain the factual sufficiency review authority of the Service courts of criminal appeals. The proposed factual sufficiency standard is as follows:

[T]he Court of Criminal Appeals, upon request of the accused, may consider the weight of the evidence upon a specific showing of deficiencies in proof by the accused. The Court may set aside and dismiss a finding if clearly convinced that the finding was against the weight of the evidence. The Court may affirm a lesser finding. A rehearing may not be ordered. . . . the Court may weigh the evidence and determine controverted questions of fact, subject to—(A) appropriate deference to the fact that the court-martial saw and heard the witnesses and other evidence; and (B) appropriate deference to findings of fact entered into the record by the military judge.

Title IX, Sec. 910(e)(1), http://www.dod.gov/dodgc/images/military_justice2016.pdf. In the Section-by-Section analysis, the MJRG explained the rationale for the change as follows:

Article 66(e) details the limited authorities of the Courts of Criminal Appeals to weigh and consider evidence. The Court's authority to set aside a finding that is contrary to

Military appellate courts were granted factual sufficiency review authority as one of many reforms in military justice identified as part of the complete reviews and substantial changes to military law that occurred after wars.¹⁵ The predecessors of the military appellate courts—the Boards of Review—were created after the outcry about a notorious World War I court-martial in which 63 African American soldiers were tried for the murder of 15 white men during a riot in Houston, Texas.¹⁶ The 63 soldiers were represented by a single non-lawyer officer, who had some legal experience, raising profound conflict-of-interest concerns; key soldier witnesses accused of murder testified after grants of immunity. Forty-one soldiers were sentenced to life in prison; 13 were sentenced to death; and the 13 executions were carried out two days after the accused soldiers were informed that they would be hung.¹⁷ The capital cases were not reviewed outside the local command holding the trials.¹⁸ In 1951, the Department of Defense responded to concerns by submitting its military justice legislative proposal to Congress, and the proposal briefly described the history of the military appellate process, noting the aftermath of the Houston riot cases as follows:

This was summary justice—but too summary for a citizen Army of the twentieth century. The summary disposition of the Houston riot case created quite a reaction among the public and also in the War Department. Very promptly thereafter the War Department promulgated General Order

the weight of the evidence would be retained, but would require the accused to identify deficiencies in the proof and would allow the Court to set aside such findings only if “clearly convinced that the finding was against the weight of the evidence.” This would channel the exercise of such authority through standards that are more deferential to the factfinder at trial and more reviewable by higher courts.

Article 66(e)(2) would address consideration of the entire case, including a finding of guilty and the sentence. The Court’s authority to weigh the evidence and to determine controverted questions of fact would be retained, but would channel the exercise of such authority through standards that are more deferential to the factfinder at trial. This change would enable application of differing standards of review tailored to widely varied matters, including rulings on pretrial motions, the findings and sentence adjudged by the court-martial, and sentences of death determined by members.

MJRG, Military Justice Act of 2016, Section-by-Section Analysis at 28, http://www.dod.gov/dodgc/images/military_justice_sectional.pdf.

15. See David A. Schlueter, *American Military Justice: Responding to the Siren Songs for Reform*, 73 A.F. L. REV. 193, 195 (2015) (“[C]alls for reform followed World War I, World War II, and the Vietnam conflict.”).

16. Fred L. Borch III, “*The Largest Murder Trial in the History of the United States*”: *The Houston Riots Courts-Martial of 1917*, ARMY LAW. 1-3 (2011).

17. *Id.* at 2.

18. *Id.* at 2-3; see also, Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109, 120 (1989).

No. 7, 1918, which required review by a board of review in the Office of the Judge Advocate General or in a branch office before any serious sentence by court-martial could be carried into execution. General Order No. 7 served as a pattern for appellate review in the Army. Its essential provisions became statutory in 1920 as Article of War 50 1/2. It was modified by Article of War 50 in the 1948 revision of the Articles of War which empowered the boards of review to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact. A judicial council for the further review of serious cases, with power to consider the propriety as well as the legality of sentences was also created.¹⁹

Accordingly, Congress, in the 1950 Uniform Code of Military Justice, included Article 66(c), granting military appellate courts (then known as Boards of Review) the power to review cases for factual sufficiency, the same standard of review as those courts have today.²⁰ Prior to 1950, the Boards of Review had limited authority, could not disapprove findings of guilt, and made non-binding recommendations based on legal sufficiency, not factual sufficiency.²¹ The 1950 UCMJ amendments were designed to curtail many of the abuses observed in the World War II-era courts-martial, especially unlawful command influence.²² During World War II, sixteen

19. *Legal and Legislative Basis for the Manual for Courts-Martial*, DEPT. ARMY 147 (1951), https://www.loc.gov/rr/frd/Military_Law/pdf/CM-1951.pdf.

20. UCMJ, *supra* note 4, art. 66(c) (1950) (“In a case referred to it, the board of review shall act only with respect to the findings and sentence as approved by proper authority. It shall affirm only such findings of guilty or such part of a finding of guilty as includes a lesser included offense, and the sentence or such part of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.”); see *Manual for Courts-Martial, United States*, ¶ 100 (May 31, 1951), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1951.pdf.

21. See 1921 MANUAL FOR COURTS-MARTIAL, UNITED STATES 1921, ¶ 399(a) (citing Article 50 ½ UCMJ and providing detailed responsibilities for Boards of Review and describing disposition when higher review authorities in the Executive Branch received the recommendations of the Board of Review).

22. See also *United States v. Norfleet*, 53 M.J. 262, 266-67 (C.A.A.F. 2000) (“The substantial criticism of the military justice system as it operated in World War II led to enactment of the Uniform Code of Military Justice, which contained a wide variety of reforms designed to minimize the influence of command over the court-martial process.”); Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953); H.R. REP. 491, 81st Cong., 1st Sess. 6-7 (1949); S. Rep. No. 486, 81st Cong., 1st Sess. 3 (1949), https://www.loc.gov/rr/frd/Military_Law/pdf/report_02.pdf (“At the conclusion of World War II, there was considerable discussion and criticism of the justice systems of the Army and the Navy which at that time embraced all of the military services. As a result of this criticism both departments created several independent boards and committees to review wartime courts-martial cases and also to study their court-martial systems.”); Matt C. Pinsker, *Ending the Military’s Courts of Criminal Appeals De Novo Review of Findings of Fact*, 47 SUFFOLK U. L. REV. 471,

million men and women served in the Armed Forces; 1.7 million courts-martial (mostly-low level summary courts-martial) were convened; 97 percent of those tried by courts-martial were convicted; and 45,000 were imprisoned. The Army carried out more than 100 executions of Army personnel during World War II.²³ Those World War II veterans returned to the United States and described a multitude of problems in the fairness and due process of courts-martial.²⁴ “One post-war study found that court-martial sentences were ‘fantastically’ severe; another board set aside or reduced about 85 percent of the 27,500 general court-martial convictions it reviewed.”²⁵

Congress’ enactment of the UCMJ was “prompted by a desire to meet objections and criticisms lodged against court-martial procedures in the aftermath of World War II.”²⁶ The UCMJ was not “a patchwork effort to

480 (2014) (citing Andrew S. Effron, *United States v. Dubai and the Evolution of Military Law*, 207 MIL. L. REV. 1, 5 (2011)); *Homcy v. Resor*, 455 F.2d 1345, 1352-57 (D.C. Cir. 1971) (describing convening authority’s improper communications to court members, and setting aside accused’s dishonorable discharge adjudged during World War II court-martial).

23. Effron, *supra* note 22, at 7 (citing JONATHAN LURIE, *ARMING MILITARY JUSTICE* 128 (1992)); Pinsker, *supra* note 22, at 480 (citing John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 39-41 (1972)).

24. ADVISORY COMMITTEE ON MILITARY JUSTICE, *THE ADMINISTRATION OF MILITARY JUSTICE* 21-23 (Comm. Print 1946), available at https://www.loc.gov/rr/frd/Military_Law/pdf/Vanderbilt-A_Summary.pdf (describing criticisms of courts-martial, particularly unlawful command influence and command abuses, and recommending various remedies including “Boards of Review should review all cases involving confinement for more than six months, instead of only those involving executed dishonorable discharges [and] Boards of Review should be permitted to consider issues of both law and fact . . .”); see also Pinsker, *supra* note 22, at 480-84.

25. *Calley v. Callaway*, 519 F.2d 184, 196 n.15 (5th Cir. 1975) (citing WILLIAM T. GENEROUS, *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 14-15, 17 (1973); Note, *Collateral Attack on Courts-Martial in the Federal Courts*, 57 YALE L.J. 483, 488 (1948)).

26. *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (citations omitted). The legislative history of the 1950 UCMJ includes several examples of courts-martial abuses during World War II including the following:

In *Shapiro v. United States* (69 F.Supp. 205 (Ct. Claims, 1947)), the plaintiff was appointed to defend before a court-martial an American soldier of Mexican descent who was charged with assault with intent to commit rape. In order to demonstrate the mistake in identification by the prosecuting witnesses, the plaintiff substituted for the accused at the court-martial trial another American soldier of Mexican descent. This substitute was identified by the prosecuting witnesses as the attacker and was convicted. The plaintiff thereupon informed the court of the deception he had practiced, whereupon the real defendant was brought to trial, was also identified as the attacker, and was convicted and sentenced. Several days later Lieutenant Shapiro, the plaintiff, was arrested. A day or two after at 12:40 p.m., he was served with charges of effecting a delay in the orderly progress of the general court-martial. He was then notified that he would be tried at 2 p.m. on the same day, . . . He was convicted at 3:30 that afternoon and was dismissed from the service. Judge Whitaker characterized the proceedings as follows (69 F. Supp. at 207): “A more flagrant case of military despotism would be hard to imagine.”

plug loopholes in the old system of military justice. The revised Articles and the new Code [were] the result of painstaking study; they reflect[ed] an effort to reform and modernize the system -- from top to bottom.”²⁷ Congress envisioned factual sufficiency review as one remedy to protect the rights of the accused.²⁸ Factual sufficiency review authority was designed to ensure that courts-martial were not subject to improper influences.²⁹ Allowing military appellate courts the ability to conduct a factual sufficiency review of courts-martial provided “an important check on a commander’s power to influence proceedings and outcomes,” and “their plenary power of review, would enable [military appellate courts] to make changes in the interests of justice if the trial record did not support the conviction or sentence.”³⁰ Today, the military justice system includes

H.R. Rep. S. 857 and H.R. 4080, 81st Cong., 1st Sess., at 65 n.21 (1949), https://www.loc.gov/frd/Military_Law/pdf/hearings_02.pdf (citing Arthur E. Farmer & Richard H. Wels, “Command Control-or Military Justice,” 24 N.Y.U. L.Q. REV. 263 (1949)).

27. *Burns*, 346 U.S. at 141.

28. See Pinsker, *supra* note 22, at 480-89.

29. Unlawful command influence can take many forms, and it can arise at any stage of a court-martial when a higher-level commander improperly influences a lower-level commander’s disposition decision, improperly acts as an accuser, has an inflexible attitude towards punishment, or when a convening authority or staff judge advocate employs improper methods of selection of court members, or improper influence on court members or witnesses occurs. Robert Burrell, *Recent Developments in Appellate Review of Unlawful Command Influence*, 2000 ARMY LAW. 1, 4-15 (May 2000) (citations omitted). Unlawful command influence analysis focuses on “the fairness of the proceeding.” *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006). UCMJ, article 37(a) prohibits unlawfully influencing the action of a court-martial:

No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

30. See Pinsker, *supra* note 22, at 486. Concerns regarding the fairness of the military justice system and trials by courts-martial persisted after 1950, and in 1969, the Supreme Court even limited courts-martial jurisdiction over offenses, declaring that, “courts-martial as an institution [were] singularly inept in dealing with the nice subtleties of constitutional law.” *O’Callahan v. Parker*, 395 U.S. 258, 265 (1969). With multiple procedural changes that civilianized military justice, in 1983 the Supreme Court subsequently “abandoned” the “service connection” limitation on courts-martial jurisdiction. *Solorio v. United States*, 483 U.S. 435, 441 (1987); Major General Jack L. Rives & Major Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213 (2002); see also R. Chuck Mason, *Military Justice: Courts-Martial, An Overview*, CONG. RES. SERV. R41739 (Aug. 12, 2013), <https://www.fas.org/sgp/crs/natsec/R41739.pdf> (providing a brief discussion on the military justice system, including a comparison of procedural safeguards in U.S. District Courts and courts-martial).

numerous protections to guard against unlawful command influence, including a prohibition on command influence (i.e., Article 37, UCMJ) and a punitive article to enforce this prohibition (i.e., Article 98, UCMJ).³¹ Also, commanders have much less control over the courts-martial proceedings because military judges are now part of a separate trial judiciary and at trial, they are bound by the Military Rules of Evidence and Rules for Courts-Martial. Military defense counsel at trial and appellate levels are provided at no expense to the accused or appellant in every case.³²

“At trial, the accused is entitled to virtually the same procedural protections he would have in a state or federal criminal court.”³³ Factual sufficiency review is no longer necessary to ensure the fairness of the military justice system, and, regardless, most courts do not have the authority to review criminal cases for factual sufficiency. While some states employ limited factual reviews in civil cases,³⁴ it seems that New York is the only state where criminal cases receive factual sufficiency review at the appellate level.³⁵

31. See Burrell, *supra* note 29, at 1, 4-5, 9, 14 (discussing application of UCMJ, article 37). See generally Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. Rev. 65 (1988); Larry A. Gaydos & Michael Warren, *What Commanders Need to Know About Unlawful Command Control*, ARMY LAW. 1, 9 (Oct. 1986); James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAVAL L. REV. 231 (1986).

32. Bower, *supra* note 31, at 68-69.

33. Schlueter, *supra* note 15, at 202; see David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 7-14 (2013) (listing pretrial, trial, and post-trial court-martial procedures).

34. Pinsker, *supra* note 22, at 478-79 (citations omitted).

35. See Jason Hanna, Comment, *Brooks v. State, the Standard Was Raised, but the Bar Was Lowered: If Texas Appellate Courts Cannot Protect the Accused, Who Will?*, 55 S. TEX. L. REV. 373, 387 (2013) (noting that Florida ended factual sufficiency appellate reviews for convictions in 1981 and Texas ended factual sufficiency review in 2010); Elizabeth A. Ryan, Comment, *The 13th Juror: Re-evaluating the Need for a Factual Sufficiency Review in Criminal Cases*, 37 TEX. TECH L. REV. 1291, 1316-17 (2005); see also *Brooks v. State*, 323 S.W.3d 893, 926 (Tex. Crim. App. 2010) (plurality opinion); *Tibbs v. Florida*, 397 So. 2d 1120, 1125 (1981), *aff'd*, 457 U.S. 31 (1982). The only state that continues to have factual sufficiency review for appeal of criminal cases is New York. See N.Y. CRIM. L. SERV., CRIM. PROC. L., art. 470.15 (2015) (stating in part, “3. A reversal or a modification of a judgment, sentence or order must be based upon a determination made: (a) Upon the law; or (b) Upon the facts; or (c) As a matter of discretion in the interest of justice; or (d) Upon any two or all three of the bases specified in paragraphs (a), (b) and (c). . . . 5. The kinds of determinations of reversal or modification deemed to be on the facts include, but are not limited to, a determination that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence.”); *People v Cannon*, 300 A.D.2d 407, 408 (N.Y. App. Div. 2d 2002) (“Moreover, upon the exercise of our factual review power, we are satisfied that the verdict of guilt was not against the weight of the evidence (see CRIM. PROC. L., art 470.15[5]).”).

Similar to the military courts of criminal appeals, in appeals of U.S. District Court decisions, federal circuit courts review the sufficiency of the evidence *de novo*.³⁶ However, military courts of criminal appeals view the evidence much differently than the federal circuit courts that are required to view the “evidence in the light most favorable to the government, resolving conflicts in the government’s favor, and accepting all reasonable inferences that support the verdict.”³⁷ In U.S. District Courts, credibility determinations are left to the judge or jury, and appellate courts will not second guess those determinations.³⁸ Federal circuit courts will reverse a criminal conviction “only if no reasonable jury could have found guilt beyond a reasonable doubt.”³⁹

III. “INCAPACITATED” UNDER ARTICLE 120, UNIFORM CODE OF MILITARY JUSTICE (UCMJ)

Rather than using factual sufficiency review authority to correct unlawful command influence issues, Service courts of criminal appeals recently have used this review authority to overturn sexual assault cases. This may be, in part, due to the Article 120, UCMJ statute itself.

36. *United States v. Bruguier*, 735 F.3d 754, 763 (8th Cir. 2013) (citing *United States v. Gray*, 700 F.3d 377, 378 (8th Cir. 2012)).

37. *Id.* (citing *Gray*, 700 F.3d at 378).

38. *United States v. Papakee*, 573 F.3d 569 (8th Cir. 2009) (declining to discount testimony of victim who was intoxicated at time of offense because of inconsistencies in her statements); *United States v. Ramirez*, 635 F.3d 249, 255-56 (6th Cir. 2011) (“Because the issue is one of legal sufficiency, the court ‘neither independently weighs the evidence, nor judges the credibility of witnesses who testified at trial.’”); *United States v. Talley*, 164 F.3d 989, 996 (6th Cir. 1999). An appellate court cannot substitute its judgment for that of the jury. *United States v. Hilliard*, 11 F.3d 618, 620 (6th Cir. 1993). “[C]ircumstantial evidence alone can sustain a guilty verdict and . . . [such] evidence need not remove every reasonable hypothesis except that of guilt.” *United States v. Stone*, 748 F.2d 361, 362 (6th Cir. 1984). This standard is a great obstacle to overcome, *United States v. Winkle*, 477 F.3d 407, 413 (6th Cir. 2007), and presents the appellant in a criminal case with a “very heavy burden.” *United States v. Jackson*, 473 F.3d 660, 669 (6th Cir. 2007).

39. *Bruguier*, 735 F.3d at 763 (citing *Gray*, 700 F.3d at 378); *see also* *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Gutierrez*, 74 M.J. 61, 65 (C.A.A.F. 2015) (“[I]n reviewing for legal sufficiency of the evidence, the relevant question an appellate court must answer 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.’”); *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Carter*, 776 F.3d 1309, 1322 n.10 (11th Cir. 2015) (citation omitted) (“We review *de novo* a district court’s denial of a motion for judgment of acquittal on sufficiency of the evidence grounds and look at the record in the light most favorable to the jury verdict, drawing all reasonable inferences and credibility choices in its favor.”); *United States v. Keys*, 721 F.3d 512, 518-19 (8th Cir. 2013) (sufficiency of the evidence is reviewed *de novo*; evidence is viewed in the light most favorable to the prosecution; conflicts are resolved in the prosecution’s favor; and all reasonable inferences that support the verdict are accepted).

A. *Sexual Assault Offenses in the Military: Article 120, UCMJ*

Substantive military criminal law is provided in the punitive articles in the UCMJ.⁴⁰ Originally, sexual assault offenses were set forth in two enumerated articles, “Rape and Carnal Knowledge” (Article 120), and “Sodomy” (Article 125); the general article further established a category of sex offenses under “Indecent Assault,” “Indecent Acts or Liberties with a Child,” “Indecent Exposure,” and “Indecent Acts with Another” (Article 134). Subsequent statutory changes have revised and combined these punitive articles, including the offense of rape, under Article 120, UCMJ.⁴¹

40. See UCMJ, *supra* note 4, §§ 877–934 (West 2006). The UCMJ punitive articles are listed in Appendix 2 of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012), https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf [hereinafter 2012 MCM]. Presidential executive orders and various Service regulations provide important *substantive* military criminal law; see 2012 MCM; U.S. DEP’T OF ARMY, Reg. 27–10 (2011). On June 30, 1775, the Second Continental Congress established sixty-nine Articles of War, governing the conduct of the Continental Army. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 21–22 (2d ed. 1920). In 1789, Article I, Section 8 of the U.S. Constitution granted Congress the power to regulate the land and naval forces; in 1806, Congress used this authority and enacted 101 Articles of War, superseding the Revolutionary War articles, providing the Army punitive articles. *Id.* at 23. The Articles for the Government of the United States Navy provided the Navy with its disciplinary framework. See DEPARTMENT OF THE NAVY—NAVAL HISTORICAL CENTER, <http://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/a/articles-government-united-states-navy-1930.html> (last visited Feb. 1, 2016). In 1950 (effective on May 31, 1951), Congress passed, and President Harry S. Truman signed, the Uniform Code of Military Justice unifying the disciplinary framework for the Services. UNIFORM CODE OF MIL. JUST., <http://www.ucmj.us/history-of-the-ucm> (last visited Feb 1, 2016).

41. Prior to these changes, rape under the UCMJ reflected the common law, as “an act of sexual intercourse, by force and without consent[.]” UCMJ, *supra* note 4, art. 120(a) (2006) (codified at 10 U.S.C. § 920(a) (West 2006)). This definition was widely criticized because of the lack of an “obvious or plain” definition of “force” and the focus on the victim’s conduct rather than the accused’s conduct along with the absence of culpability-based gradations of conduct and punishments (that may be more effective in deterring crime). Major Timothy W. Murphy, U.S.A.F., *A Matter of Force: The Redefinition of Rape*, 39 A.F.L. REV. 19, 19–23 (1996); see also MARK HARVEY, SEX CRIMES AND THE UCMJ: A REPORT FOR THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (Feb. 2005) [hereinafter 2005 SEX CRIMES REPORT TO JSC]; DEP’T OF DEF. OFFICE OF THE GEN. COUNCIL, *Comparison of Title 18 Sexual Offenses and UCMJ Sexual Offenses*, (May 2005), http://www.dod.gov/dodgc/php/docs/comparison_with_Title18_3-2-05.pdf (describing courts-martial jurisdiction over offenses and the jurisprudence of military rape prosecutions over the past hundred years). As the Court of Appeals for the Armed Forces decided in 2005, UCMJ, Article 120 failed to “reflect the more recent trend for rape statutes to recognize gradations in the offense based on context. . . . [and] its elements [did] not easily fit the range of circumstances now generally recognized as ‘rape,’ including date rape, acquaintance rape, statutory rape, as well as stranger-on-stranger rape.” *United States v. Leak*, 61 M.J. 234, 246 (C.A.A.F. 2005) (internal citations omitted) (focusing on rape by compulsive influence due to holding an authoritative position and citing *United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003) (“drill instructor’s coercive influence over recruits”)); *United States v. Palmer*, 33 M.J. 7, 9 (C.M.A. 1991) (parental compulsion found to be a form of constructive force); *United States v. Henderson*, 4 C.M.A. 268, 273, 15 C.M.R. 268 (1954) (concept of constructive force recognized

Congress has changed military sex offenses and applicable burdens of proof twice in the past ten years.⁴² In 2005, Congress required the Secretary of Defense to propose changes to the existing military sex offenses, “to conform . . . more closely to other [f]ederal laws and regulations that address [sexual assault].”⁴³ Accordingly, based on those proposals, in 2006, Congress, created a “new” Article 120 (effective October 2007)⁴⁴ (“2007 Article 120”) providing a gradation of sexual assault offenses. In 2011, Congress provided additional changes to Article 120 (effective June 2012)⁴⁵ and available defenses (“2012 Article 120”). This article contends that

as applicable to military). In 2005, the Defense Task Force on Sexual Harassment & Violence at the Military Service Academies also found that “a key obstacle to increasing accountability for rape and sexual assault is that current statutes, though flexible, [did] not reflect the full spectrum of criminal sexual behaviors encountered at the military service academies and society at large” and recommended “Congress revise the current sexual misconduct statutes to more clearly and comprehensively address the full range of sexual misconduct.” REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES ES-2 (2005), http://www.sapr.mil/public/docs/research/high_gpo_rrc_tx.pdf.

42. The 2012 MCM, *supra* note 40, contains the punitive articles, elements of offenses, and some definitions applicable to sex offenses committed before October 1, 2007 at Appendix 27; committed between October 1, 2007, through June 27, 2012, at Appendix 28; and committed after June 27, 2012 at pt. IV, ¶ 45.

43. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 1920 (2004). Today’s UCMJ, art. 120 (2012) [hereinafter 2012 Article 120] is similar to Title 18, but the latter does not have definitions and the offenses include the term “knowingly.” The term, “knowingly,” is used in many Title 18 offenses to indicate the requisite acts were not done inadvertently. For the sex offenses in 18 U.S.C. §§ 2241-44 (2006), the Government need not prove touching the victim was for sexual gratification. Under military law, mistake is an affirmative defense. Most Title 18 offenses include the word “knowingly” but “knowingly” is not in most military offenses; rather, “knowingly” is automatically incorporated into UCMJ offenses. *See, e.g.*, 2012 MCM, *supra* note 40, at pt. IV, ¶ 1.b(2)(a). The definitions in 2012 Article 120 and 18 U.S.C. § 2246 (2006) of “sexual act” require a sexual penetration of the body of the victim (which is more aggravating) versus “sexual contact,” only requiring a sexual touching of the victim’s body. Existing federal sexual assault statutes are seldom applied and primarily used to prosecute cases on Indian reservations; therefore, federal sex offense cases are rarely reviewed on appeal. In FY 2009, the nation’s tribes Uniform Crime Report indicated there were 882 forcible rapes, and in FY 2010, they reported 852 rapes. Steven W. Perry, *Tribal Crime Data Collection Activities, 2012*, 9 DEP’T OF JUSTICE (Oct. 2012), <http://bjs.gov/content/pub/pdf/tcdca12.pdf>. Convictions for sexual abuse of adults from 2007 to 2012 varied from 87 to 137 per year in U.S. District Courts. *See* Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 629 n.226 (2014) (citations omitted). Furthermore, in 2009 and 2011, ninety-seven percent of trials in U.S. district courts were guilty pleas. Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3602, 3611 (2013).

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

45. 2012 MCM, *supra* note 40, at Appendix 28, ¶ 45.

some of these changes are beneficial, but a definition of incapacitation should be included in the sexual assault punitive article.

B. 2007 Article 120

Using Title 18 sexual assault offenses as the framework, Congress’ “new” 2007 Article 120 included the most significant statutory changes to military substantive criminal offenses since the establishment of the 1950 UCMJ. This new Article 120 set forth a gradation of sex offenses based on aggravating factors, establishing the following categories:

(a) rape; (b) rape of a child; (c) aggravated sexual assault; (d) aggravated sexual assault of a child; (e) aggravated sexual contact; (f) aggravated sexual abuse of a child; (g) aggravated sexual contact with a child; (h) abusive sexual contact; (i) abusive sexual contact with a child; (j) indecent liberty with a child; (k) indecent act; (l) forcible pandering; (m) wrongful sexual contact; and (n) indecent exposure.⁴⁶

Additionally, the 2007 Article 120 included numerous definitions⁴⁷ and limitations on the two most common affirmative defenses, consent and mistake of fact as to consent—defenses that were not specifically included in the UCMJ sex offenses or in Title 18. These definitions filled a widening gap created due to appellate decisions—decisions that provided constant changes to the offenses and instructions military trial judges were required to provide to panel members.⁴⁸

46. 2007 Article 120, *supra* note 44; *see also* Lt. Col. Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, 2006 ARMY LAW 23, 27 (June 2006).

47. Definitions included in the 2007 Article 120 included: (1) sexual act; (2) sexual contact; (3) grievous bodily harm; (4) dangerous weapon or object; (5) force; (6) threatening or placing that other person in fear for rape and aggravated sexual contact; (7) threatening or placing that other person in fear for aggravated sexual assault and abusive sexual contact; (8) bodily harm; (9) child; (10) lewd act; (11) indecent liberty; (12) indecent conduct; (13) act of prostitution; (14) consent; (15) mistake of fact as to consent; and (16) affirmative defense. 2012 MCM, App.28.

48. The 2007 Article 120 moved Article 134 sex offenses “Indecent Assault,” “Indecent Acts or Liberties with a Child,” “Indecent Exposure,” and “Indecent Acts with Another,” to Article 120, and amended Article 134, “Indecent Language” communicated to another. UCMJ, art. 134, 2012 MCM, *supra* note 40, at pt. IV, at ¶¶ 61–113 [hereinafter Article 134]. Article 134 criminalizes “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital,” and Article 134 clause 3 incorporates the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (2006). 2012 MCM, *supra* note 40, at pt. IV, at ¶ 60c(3–4).

C. 2012 Article 120

The statutory changes to Article 120, effective June 28, 2012, included providing separate provisions for adult victims (Article 120(a)), child victims (Article 120(b)), and other sex offenses (Article 120(c)); Congress further divided the first two categories into the following offenses: (a) rape; (b) sexual assault; (c) aggravated sexual contact; and (d) abusive sexual contact. Statutory changes⁴⁹ included shifting the focus to the accused's perception of the victim's behavior and whether the accused knew or reasonably should have known whether the victim was consenting.

Specifically, the 2012 Article 120(b)(2–3) modified the 2007 Article 120 definition of “aggravated sexual assault” as follows (underlined provisions were added and strike through portions deleted):

~~(e)~~ (b) ~~Aggravated~~ Sexual Assault—Any person subject to this chapter who—

~~(1) causes~~ commits a sexual act upon another person ~~of any age to engage in a~~

~~sexual act~~ by—

(A) threatening or placing that other person in fear; ~~or~~

(B) causing bodily harm to that other person; ~~or~~

(C) making a fraudulent representation that the sexual act served a professional purpose; or

(D) inducing a belief by any artifice, pretense, or concealment that the person is another person;

~~(2) engages in a sexual act with another person of any age, if that other person is substantially incapacitated or substantially incapable of~~

~~(A) appraising the nature of the sexual act;~~

~~(B) declining participating in the sexual act; or~~

~~(C) communicating unwillingness to engage in the sexual act;~~

(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

49. The changes also eliminated the burden shift for the affirmative defenses of consent and mistake of fact as to consent. See Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-Traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 448, 456-57 (2014).

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person; is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.⁵⁰

Not only did the 2012 Article 120 replace “[t]he term substantially incapacitated . . . with ‘asleep, unconscious, or otherwise unaware that the sexual act is occurring,’ or situations in which a drug or intoxicant renders the victim incapable of consenting[.]”⁵¹ the 2012 statute also redefined “consent” as follows:

~~(14)~~(8) Consent.

(A) The term ‘consent’ means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent. A person cannot consent to sexual activity if—

~~(A) under 16 years of age; or~~

~~(B) substantially incapable of—~~

~~(i) appraising the nature of the sexual conduct at issue due to—~~

~~(I) mental impairment or unconsciousness resulting from consumption of alcohol;~~

~~drugs, a similar substance, or otherwise; or~~

~~(II) mental disease or defect that renders the person unable to understand the nature of the sexual conduct at issue;~~

~~(ii) physically declining participation in the sexual conduct at issue; or~~

50. 2012 Article 120(b)(2–3), 2012 MCM, *supra* note 40, pt. IV, at ¶ 45 (emphasis added).

51. Lindsay L. Rodman, *Fostering Constructive Dialogue on Military Sexual Assault*, JOINT FORCE Q., NAT’L DEF. U., 25, 31 (2nd Quarter, 2013).

~~(iii) physically communicating unwillingness to engage in the sexual conduct at issue.~~

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).

(C) Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.⁵²

For cases tried by panels, prior to findings deliberations, military judges instruct court members or military juries on elements of the offenses and affirmative defenses. Military judges also provide further instructions including definitions that are derived from statutes, executive orders, and case law, and compiled by military justice experts and assembled in the Military Judges' Benchbook.⁵³ When relevant to the sexual assault charges and specifications, for offenses occurring on or after *October 1, 2007 and before June 28, 2012*, the military judge may provide court-martial panel members with the following September 2014 Benchbook definition of the terms "substantially incapacitated" and "substantially incapable:"

[These terms mean] that level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, or otherwise unable to make or communicate competent decisions.⁵⁴

52. 2012 Article 120a(g)(8), 2012 MCM, *supra* note 40, pt. IV, at ¶ 45.

53. The current official Military Judges' Benchbook, Dept. of the Army Pam. 27-9, was published September 10, 2014. The Benchbook is frequently changed to reflect the latest court decisions as well as statutory and Manual for Courts-Martial changes. A September 1, 2015 "unofficial" version is also available at <https://www.jagcnet.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=80086608B92177D285257B48006924A1>.

54. MILITARY JUDGES' BENCHBOOK, Dept. of the Army Pam., 27-9, 523, 525 (Sept. 10, 2014) [hereinafter 2014 Benchbook].

The statute, rather than the Benchbook, should include the definition of “substantially incapacitated” and the word “substantially” should be inserted before the word “unable” each time “unable” appears in the quoted passage, to ensure that the required legal standard for a finding of guilty may require less than a victim’s complete intoxication or total incapacitation. Essentially, the statute should include specific examples, such as those listed in the 2007 Article 120 defining consent and substantial incapacitation, which clarified for the fact finder when a victim was incapable of consenting and what specific circumstances satisfied the elements of proof.

The importance of definitions in panel instructions is reflected in military appellate court opinions. For example, in *United States v. Brown*,⁵⁵ the Army Court of Criminal Appeals upheld a conviction where the military judge used a modified instruction (modifications bolded and underlined below) defining the term “substantially incapacitated” as follows:

“Substantially incapacitated” means that level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim unable to appraise the nature of the sexual conduct at issue, unable to physically communicate unwillingness to engage in the sexual conduct at issue, **unable to decline participation in the sexual act**, or otherwise unable to make or communicate competent decisions.⁵⁶

Under this definition, it is easy to envision cases that can arise when the victim is either passed out or blacked out. The Army Court did note that there was no explanation for the change in language from Article 120’s “competent” in relation to a person, to the term “competent” used to modify “decisions” in the Military Judges’ Benchbook.⁵⁷ In *United States v. Redmon*, the Navy-Marine Corps Court of Criminal Appeals found factual

55. *United States v. Brown*, ACCA 20130177, 2014 WL 7237501, at *2 (A. Ct. Crim. App. Nov. 21, 2014), *pet. denied*, 74 M.J. 363 (C.A.A.F. 2015). The offense occurred on June 3, 2012, *id.* at *1, and the statute in effect between October 1, 2007 and before June 28, 2012 was in effect for the *Brown* case.

56. *Id.* at *2. The current Military Judges’ Benchbook, includes this definition of “substantially incapacitated” or “substantially incapable,” except the phrase, “unable to decline participation in the sexual act” is not included, apparently because it is redundant with other parts of the definition. 2014 Benchbook, *supra* note 54.

57. *Brown*, *supra* note 8, at *2. “Since ‘substantial incapacitation’ is a condition under which a person is incapable of giving legal consent, the underlying, determinative finding is whether consent was or was not given. Here, the panel was properly instructed regarding consent and they were charged that the government had the burden to prove beyond a reasonable doubt that AB did not consent.” *Id.* at *3.

sufficiency for “incapacitation” in a case where the expert findings were that the victim was “blacked out” as opposed to passed out, but was still unlikely to be able to consent.⁵⁸ That case also involved the military judge’s use of the instruction on incapacitation as it appears in the Benchbook.⁵⁹

The most recent Military Judges’ Benchbook (published in 2014) *does not define* the 2012 Article 120 terms “incapacitated,” or “incapable of consenting to the sexual conduct due to impairment by a drug, intoxicant, or other similar substance.” Since panel members are not provided a specific definition for these terms,⁶⁰ the 2012 Article 120 makes it more difficult to convict an accused, and more difficult for a conviction to survive appellate factual sufficiency review when the victim experienced a blackout or was substantially impaired from excessive alcohol consumption.

The UCMJ punitive article 120 (i.e., the military’s statutory criminal provision) should be modified to once again include within the definition of consent the “substantial incapacitation” definition included in 2007, which will eliminate the requirement that the victim be completely incapacitated before an accused may be found guilty of a sexual assault. The statute should define “substantial incapacitation” as follows:

“Substantially incapacitated” means that level of mental impairment due to consumption of alcohol, drugs, or similar substance; while asleep or unconscious; or for other reasons; which rendered the alleged victim substantially unable to appraise the nature of the sexual conduct at issue, substantially unable to physically communicate unwillingness to engage in the sexual conduct at issue, substantially unable to decline participation in the sexual act, or otherwise substantially unable to make or communicate competent decisions.

IV. MILITARY COURTS OVERTURNING CASES WITH PROBLEMATIC FACTS: “BLACKED OUT” VERSUS “PASSED OUT”

A. *Alcohol Consumption as a Factor: “Blacked Out” versus “Passed Out”*

The absence of a clear definition of “incapable of consenting” accompanying the 2012 Article 120 provisions has become problematic

58. See *United States v. Redmon*, NMCCA 201300077, 2014 CCA LEXIS 369 (N-M. Ct. Crim. App. June 26, 2014), *pet. denied*, 74 M.J. 77 (C.A.A.F. 2014), at *4.

59. *Id.* at *4-5.

60. See 2014 Benchbook, *supra* note 54, at 523-25, ¶ 3-45-5.

since military appellate courts have overturned several sexual assault cases involving victims impaired by alcohol based on “factual insufficiency.” With clear definitions (2007 Article 120) or without clear definitions (2012 Article 120) regarding the degree of a victim’s impairment, case facts themselves may encourage appellate courts to further engage in “arm chair quarterbacking” and find factual bases to overturn sexual assault cases.

Moreover, alcohol seems to play a role in many military sexual assault cases. The Department of Defense (DOD) generates elaborate annual reports exceeding 1,000 pages discussing sexual assaults and efforts to reduce their occurrence.⁶¹ The prevalence of the role that alcohol consumption plays in sexual assaults is not specifically summarized for the DOD as a whole in any one report.

For example, in Fiscal Year (FY) 2014, only one Service—the Marine Corps—provided a summary indicating the percentage of alcohol-related sexual assaults.⁶² The Marine Corps reported that alcohol consumption “continued to be a contributing factor for sexual assault reports. For the 868 reports of sexual assault, 44.8% (389) involved alcohol use by the victim, subject, or both.”⁶³ The Marine Corps report did not include specific relevant information such as how many victims were under the influence of alcohol, degree of impairment, or results of any adverse action against the alleged perpetrator of the assault when the victim was impaired by alcohol. Nevertheless, the FY 2014 RAND Corporation survey of DOD personnel did find that “25 percent of men and 41 percent of women had been drinking at the time of the assault.”⁶⁴ Specifically, 47 percent of female victims provided an affirmative response to the RAND survey question, “They did it when you were so drunk, high, or drugged that you could not understand what was happening or could not show them that you were unwilling.”⁶⁵ Forty-one percent replied affirmatively to the survey question

61. See Fiscal Year 2014 Annual Report on Sexual Assault in the Military, http://sapr.mil/public/docs/reports/FY14_Annual/FY14_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

62. See Fiscal Year 2014 Annual Report on Sexual Assault in the Military, Encl. 2: Department of the Navy, Fiscal Year (FY) 2014 Sexual Assault Statistical Report Data Call for Sexual Assault in the Military: United States Marine Corps, http://sapr.mil/public/docs/reports/FY14_Annual/FY14_Annual_Report_Enclosure_2_Navy.pdf.

63. *Id.* at 6. “It is important to acknowledge that alcohol and drug use, as reported here, is not derived through empirical evidence such as toxicology reports but rather through self-reporting and therefore may reflect a reporting bias on behalf of the victim, subject, and collateral witnesses.” *Id.*

64. Annex 1, Sexual Assault and Sexual Harassment in the Military, Vol. 2, Estimates for Department of Defense Service Members from the 2014 RAND Military Workplace Study, at xix, http://sapr.mil/public/docs/reports/FY14_Annual/FY14_Annual_Report_Annex_1_RAND.pdf.

65. *Id.* at tbl. 3.8 at 17.

indicating, “They did it when you were passed out, asleep, or unconscious.”⁶⁶

In addition, a victim’s level of intoxication clearly has become a factor in cases where military courts have overturned sexual assault convictions based on factual insufficiency. At trial, one expert, Dr. Kim Fromme,⁶⁷ Ph.D., described levels of alcohol intoxication and the impact on human behavior, cognitive abilities, and memory in the court-martial *United States v. Pease*. Dr. Fromme explained that “[a]t higher doses of alcohol as people become progressively more intoxicated, they might begin to act in reckless, aggressive or even sexually provocative ways.”⁶⁸ Dr. Fromme further identified another effect of alcohol as “alcohol myopia”—when after a person who consumes alcohol focuses on immediate effects and risks and fails to consider “long-term consequences of [his or her] behavior.”⁶⁹ During an *alcohol-related blackout*, a person:

[I]s still fully conscious. They’re moving around, acting, engaging, talking, dancing, driving, engaging in all kinds of behavior, but because of alcohol’s inhibition of the transfer of information from short-term memory to long-term memory, they simply will be unable to remember those decisions or actions they made while in the blackout.⁷⁰

Furthermore, a person who is in a blacked out state may still “engage in voluntary behavior and thought processes. ‘They might make decisions, for example, to drive home from a bar, or [engage in other] . . . activities which require complex cognitive abilities, but the individual might not remember the next day and might, in fact, regret it.’”⁷¹ In contrast, a person will usually *pass out* at blood alcohol content (BAC) alcohol levels of 0.30 or higher, when the BAC reaches a high enough level “‘that the part of the brain that controls consciousness has literally shut down, so those individuals have lost consciousness’ and would not easily be roused.”⁷²

66. *Id.*

67. Dr. Fromme, a University of Texas professor of clinical psychology, specializes in alcohol-related studies, especially pertaining to college-aged drinkers. *See* Kim Fromme, UNIV. TEXAS AUSTIN, DEP’T OF PSYCH., <http://www.utexas.edu/cola/psychology/faculty/frommek>.

68. *United States v. Pease*, 74 M.J. 763, 769 (N-M. Ct. Crim. App. 2015).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* (footnote omitted).

B. Military Case Law Regarding “Incapacitated”

Military appellate courts assessing the factual sufficiency of courts-martial involving sexual assault crimes consider a myriad of facts, including events before and after the offense, the credibility of the witnesses,⁷³ expert witness opinions, conflicting testimonies, and corroboration. The court reviews the totality of the circumstances presented in the record of trial.⁷⁴

Most sexual activity occurs in private, where the only witnesses are the complainant (or victim) and the accused. When the accused claims the sexual activity is consensual or claims an honest and reasonable belief that the victim consented and there are no eyewitnesses to the sexual assault, the military appellate court may meticulously scrutinize the record to assess the victim’s credibility.⁷⁵ Military appellate courts apply a myriad of factors in assessing the credibility of victims and witnesses that may adversely impact the factual sufficiency determination, including when a case involves evidence that the victim: (1) failed to disclose a prior sexual relationship with the accused; (2) acts or speaks positively or complimentary toward the accused before or after the sexual assault; (3) makes a statement inconsistent with his/her trial testimony or testimony during the Article 32 pre-trial hearing; (4) makes a statement that conflicts with other witnesses’ statements regarding such matters as alcohol consumption or comments about the accused before or after the sexual assault; (5) fails to make a timely report of the sexual assault; (6) might be biased because of the possibility of military discipline for fraternization, adultery, or underage alcohol consumption; or (7) displays any “complex” behavior, such as

73. *United States v. Torres*, NMCCA 201300396, 2014 CCA LEXIS 641, at *10 (N-M. Ct. Crim. App. Aug. 28, 2014), *pet. denied*, 74 M.J. 169 (C.A.A.F. 2014).

74. *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996).

75. *United States v. House*, ACCA 20061064, 2009 CCA LEXIS 192, at *18 (A. Ct. Crim. App. Mar. 30, 2009). In *United States v. House*, the court describes numerous details that impeached the victim’s credibility, resulting in the military appellate court’s decision to reverse the accused’s rape conviction. In *House*, the victim consumed “three beers, four mixed drinks, and a shot of tequila over approximately five and one-half hours.” *Id.* at *5. The victim engaged in sexual activity with a lieutenant and then went to sleep. The accused entered the victim’s hotel room in the middle of the night and got into bed with her. She said she believed the lieutenant had returned for more sexual activity, and she consented to the sexual activity. *Id.* at *9-10, *20-21. Sexual intercourse with the accused lasted five to ten seconds. *Id.* at *9. In a conversation with the accused after the sexual intercourse, she realized it was actually the accused and not the lieutenant. *Id.* at *9-10. Despite this startling revelation, she fell asleep, and the accused left her room. *Id.* at *10. The victim awoke before 0345 and reported the rape early in the morning after the rape. *Id.* at *10-11. The appellate court did not discuss any expert witness testimony about the effects of alcohol consumption, and her alcohol consumption could have explained her failure to recognize differences between her lieutenant lover and the accused and falling asleep shortly after the sexual intercourse.

walking without staggering, that might reflect sufficient capacity to consent. The following summary of the military case law illustrates the facts appellate courts consider and the conclusions those courts drew in either affirming or reversing the court-martial conviction for sexual assault.

1. 2007 Article 120 “Substantially Incapacitated” Case Law

a. *United States v. Peterson*⁷⁶ and *United States v. Lamb*⁷⁷ 2010

The factual scenarios in *United States v. Peterson* and *United States v. Lamb* are not uncommon and illustrate the interplay between intoxication to the extent the victim has a memory “blackout” versus “passes out.” In the *Peterson* case, the appellant, Private (PVT) Peterson invited the female victim, a fellow Marine, to his barracks room to “hang out” and drink with him and the co-accused, PVT Lamb. The victim said she drank “two or three shots of Jack Daniels and six or seven shots or ‘mouthfuls’ of Jaegermeister, listened to music, played with iTunes, and spoke telephonically with several friends” who testified that she sounded giddy and intoxicated during the telephone conversations.⁷⁸ A noncommissioned officer found the victim asleep in the appellant’s bed and described her as impaired but not intoxicated.⁷⁹ Shortly after being awakened, the victim was able to dress without assistance, and she sent a text message to her ex-boyfriend indicating she was raped. Approximately six hours later, the victim’s blood was drawn and the toxicology results indicated the absence of any drugs and a blood alcohol concentration (BAC) below the threshold level for detection (<.02).⁸⁰ The victim had “little to no memory of the events that took place” when she was in the appellant’s room, and “no recollection of [PVT Peterson] engaging in any sexual contact with her.”⁸¹

A forensic toxicology expert found the victim’s testimony regarding her alcohol consumption inconsistent with the laboratory results, as he would have expected a higher BAC level.⁸² The expert opined that the victim’s BAC was between .10 and .15 at the time of the alleged sexual assault and that “blacking out” below a .18 is observed only in 10% of the

76. *United States v. Peterson*, NMCCA 200900688, 2010 CCA LEXIS 336 (N-M. Ct. Crim. App. Sept. 21, 2010).

77. *United States v. Lamb*, NMCCA 201000044, 2010 CCA LEXIS 334 (N-M. Ct. Crim. App. Sept. 21, 2010).

78. *Id.* at *2-3.

79. *Id.* at *3.

80. *Id.*

81. *Id.* at *3-4.

82. *Id.* at *5.

population and that “passing out” with a BAC below .20 is not possible.⁸³ Further, he found that the victim could have suffered an inability to record memory and exercise good judgment due to her alcohol consumption, but that she did not consume enough alcohol to enter a sedated or “passed out” state.⁸⁴

Although the jury concluded the victim was “substantially impaired,” convicting PVT Peterson of aggravated sexual assault, the Navy-Marine Corps Court of Criminal Appeals reversed the appellant’s conviction, finding “reasonable doubt as to whether she was substantially incapacitated.”⁸⁵ The appellate court cited the victim’s “memory loss due to her alcohol consumption, [that she] became sick and went to sleep after the sexual contact” with the appellant, the testimony of the expert witness and noncommissioned officer regarding her level of impairment, and the appellant’s statement to a criminal investigator that the victim was “flirtatious and a willing and active participant in the sexual contact.”⁸⁶ The Navy-Marine Corps Court of Criminal Appeals overturned the conviction, despite as one of the concurring judges cited, the testimony of PVT Hansen, who entered the appellant’s barracks room “and observed the alleged victim lying stripped on the bed, partially covered by a blanket, armed with ‘a thousand yard stare’.” According to PVT Hansen, she was not blinking and presented absolutely no movement. PVT Hansen testified that he became so concerned that he shook the alleged victim by the jaw, and after realizing no response, checked her pulse.⁸⁷

*b. United States v. Wood*⁸⁸ 2010

Private First Class (PFC) Wood (the appellant) and the victim (a female college student) attended a party in the barracks.⁸⁹ The victim said she had three or four drinks and felt mildly intoxicated (but was not drunk) but lost her memory regarding much of the night.⁹⁰ She awoke to discover the appellant on top of her, engaging in intercourse with her; so, she pushed

83. *Id.* at *5-6.

84. *Id.* at *6.

85. *Id.*

86. *Id.*

87. *Id.* at *9 (Maksym, S.J., concurring in the result); *see also* United States v. Peterson, NMCCA 200900688, 2010 CCA LEXIS 336, at *8-9 (N-M. Ct. Crim. App. Sept. 21, 2010).

88. United States v. Wood, NMCCA 200900436, 2010 CCA LEXIS 24 (N-M. Ct. Crim. App. Jan. 25, 2010).

89. *Id.* at *3.

90. *Id.* at *2-3.

him off, and he immediately left the room.⁹¹ PFC M, an occupant of the room, provided key information, observing the victim getting sick during the night; however, after vomiting, and using the bathroom, the victim and the appellant talked and flirted in a bed, left the room together, and the victim was walking without assistance.⁹²

Lieutenant Colonel (LTC) Lyons, an expert in forensic toxicology, “testified that getting sick, blacking out, and then passing out would not be consistent with [the victim’s] testimony of how much she drank.”⁹³ The victim’s description of her alcohol consumption would “not produce an inability to record memory (black out), much less cause someone to experience alcohol induced unconsciousness (pass out).”⁹⁴ Moreover, “LTC Lyons indicated that while unable to record memory or exercise good judgment, a person in an alcohol-induced black out is nonetheless capable of various tasks, including consenting to sex.”⁹⁵

The Navy-Marine Corps Court of Criminal Appeals, in *Wood*, reversed the case for a lack of factual sufficiency, noting 1) the victim’s willingness to return to bed with the appellant after using the restroom and 2) the fact that both the appellant and the victim agree that the appellant immediately terminated the intercourse as soon as the victim pushed him away.⁹⁶

*c. United States v. Collins*⁹⁷ 2011

In *United States v. Collins*, the victim, Lance Corporal (LCpl) S became drunk when she attended a barracks party with her friend and subsequent roommate, PFC D.⁹⁸ PFC D helped LCpl S get to her barracks room, “placed her on her bed fully clothed, and checked on her periodically. The third time PFC D checked on LCpl S, she saw that [LCpl Collins, the appellant] was in bed with her, in a spooning position, and both were stripped to the waist.”⁹⁹ PFC D “left the room, but the sight of [LCpl Collins] in bed with her friend brought back PFC D’s own memories of being sexually assaulted amidst a drinking binge. Two Marines testified that

91. *Id.* at *1.

92. *Id.* at *3.

93. *Id.* at *2.

94. *Id.*

95. *Id.*

96. *Id.* at *1, *3.

97. *United States v. Collins*, NMCCA 201000020, 2011 CCA LEXIS 22 (N-M. Ct. Crim. App. Feb. 17, 2011).

98. *Id.* at *1.

99. *Id.*

PFC D then became hysterical and inconsolable.”¹⁰⁰ Determined to get the appellant out of LCpl S’s room, PFC D, with the assistance of another Marine, chased the surprised appellant out of LCpl S’s room.¹⁰¹ The appellant exclaimed, “It’s not my fault that I woke up to her sucking my [penis].”¹⁰² PFC D testified that LCpl S was awake and alert and said “that she felt like a slut, that she never hooked up with guys and stated, ‘I don’t ever do this. I don’t ever do this.’ Shortly after the appellant was removed from her room, LCpl S got dressed and tried to physically attack her assailant.”¹⁰³ At a pretrial hearing pursuant to Article 32, UCMJ, LCpl S admitted she lied about her underage drinking to a military police woman.¹⁰⁴

A prosecution toxicology expert, Jon Jemiomek, reviewing LCpl S’s blood test results estimated her BAC was approximately 0.18 to 0.23 percent at the time of the alleged sexual assault. This expert opined that a person with that BAC level may experience “a fragmentary blackout,” which involves forgetting some events in full or in part and the sequence of actions.”¹⁰⁵ A person is able to “interact with others, appear conscious, and appear to be making active decisions,” while in a blackout state.¹⁰⁶ A person interacting with another person while in a blackout state may not be able to recognize that “the drinker was experiencing a blackout.”¹⁰⁷ He concluded that passing out occurs at a BAC of 0.28 to 0.35 percent.¹⁰⁸ “[A] person with that amount of alcohol would not be able to dress quickly and play a video game, both of which LCpl S was able to do shortly after PFC D chased the appellant out from her room.”¹⁰⁹

The appellant said in a pretrial statement that he went to LCpl S’s room to retrieve a shirt and “[w]hile there, he noticed LCpl S was sleeping on top of her blankets, so he took the shirt to the person who wanted it, then returned to the room to cover her, and that was when she pulled him down

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at *2.

105. *Id.*

106. *Id.* at *3.

107. *Id.*

108. *Id.*

109. *Id.*

on top of her.”¹¹⁰ He claimed that they then engaged in consensual sexual intercourse.¹¹¹

The defense contended that LCpl S—“to avoid embarrassment in front of her peers”—falsely reported the sexual assault in response to PFC D’s reaction to finding the appellant and LCpl S naked in bed together.¹¹² On appeal, the court exercising its factual sufficiency review authority concluded, “LCpl S’s disregard of her oath at the Article 32 hearing makes her an unreliable witness.”¹¹³ The court further found that the prosecution failed to prove “beyond a reasonable doubt that LCpl S was incapacitated at the time she and the appellant engaged in sexual intercourse,” and set aside LCpl Collin’s conviction for sexual assault.¹¹⁴

2. 2012 Article 120 “Incapacitated” Case Law

a. *United States v. Pease*¹¹⁵ 2015

The *Pease* case involved two complainants who also could not recall some details of a sexual interaction with Information Systems Technician Second Class (IT2) Pease, the appellant.¹¹⁶ A court-martial panel composed of officers and at least one-third enlisted members convicted the appellant of sexually assaulting two complainants and fraternization and sentenced the appellant to six years confinement and a dishonorable discharge.¹¹⁷ The complainants, two female enlisted women, Information Systems Technician Seaman (ITSN) S.K., and IT2 B.S. alleged that, in separate incidents, the appellant sexually assaulted them. ITSN S.K., IT2 B.S., and IT2 Pease were all assigned to the same division of the same ship, which was in port overseas.¹¹⁸

After ITSN S.K. engaged in an evening of heavy drinking, the appellant escorted her back to the ship.¹¹⁹ She was “able to walk on her own without falling or stumbling” and could “negotiate the ladder well, request and obtain permission to come aboard [her ship], and scan her identification

110. *Id.*

111. *Id.*

112. *Id.* at *5.

113. *Id.*

114. *Id.*

115. *United States v. Pease*, 74 M.J. 763, 770 (N.M. Ct. Crim. App. 2015), *aff’d*, 75 M.J. 180 (C.A.A.F. 2016).

116. *Pease*, 74 M.J. at 764-68.

117. *Id.* at 764.

118. *Id.*

119. *Id.* at 765-66.

without any issue.”¹²⁰ She remembered walking on the ship and described her recollections of the incident with the appellant as follows:

She recalled being on the smoke deck smoking a cigarette, telling [IT2 Pease] she thought “he was cute” and that they kissed. The next thing ITSN S.K. remembered was being “in the [ship’s joint operations center] having sex.” ITSN S.K. recalled that she was lying back on a table and holding her weight up by propping her elbows on the table. [IT2 Pease] was standing in front of her while they engaged in vaginal intercourse. She testified at trial—although she had not reported this in previous statements or testimony—that afterward, “he smacked my face and kept hold of it and like focused my attention on him and said, ‘Don’t tell – don’t ever tell anyone.’” Her next memory was waking up in the morning in her rack in berthing.¹²¹

The next day, ITSN S.K. told a shipmate that “she had sex with [IT2 Pease] the night before . . . she also said, ‘What’s wrong with me?’ and ‘Why did I do that?’ A few days later, ITSN S.K. [said] that she had sex with [IT2 Pease] and thought he was cute.”¹²²

Fifty days after the incident with ITSN S.K., IT2 B.S. drank heavily at bars and clubs and although she could still walk, the appellant volunteered to walk with her or escort her back to the ship.¹²³ The military appellate court described her recollection of the events that followed and her mental state in detail. IT2 B.S. remembered walking towards her ship and passing a café she recognized.¹²⁴

The next thing IT2 B.S. recalled [was the appellant] engaging in anal sex with her. She felt pain and told him to stop, which he did. B.S. then became sick, vomiting on the bed, and got up to clean herself off and go to the bathroom. As she did this, she recognized the apartment she was in as one she had visited prior to that evening. She went to the bathroom and turned on the shower to rinse herself off. Her next memory was being on the floor of the bathroom naked with [the appellant] banging on the hatch. She recalled feeling very cold and sick and returned to the bed to get under the covers. She recalled that at some point she got out of bed and went to the kitchen to get water.

120. *Id.* at 766.

121. *Id.*

122. *Id.*

123. *Id.* at 767.

124. *Id.*

IT2 B.S. reported various fragmented memories following the shower. She remembered engaging in vaginal sexual intercourse and sexual conduct in various positions, including being on top of [IT2 Pease], lying on her side, and being on her hands and knees with [IT2 Pease] entering her from behind. She reported at one point while she was on top, [IT2 Pease] bit her nipple. This caused her pain, so she told him to stop, which he did. She also recalled performing fellatio on [IT2 Pease] while he lay on his back.

IT2 B.S. admitted she enjoyed certain portions of the sex, stating, “I recall telling [the Naval Criminal Investigative Service] about the doggie style and it was vaginal and I — I do recall telling them that I enjoyed it and that I — I did for the moment that I — I woke up or, you know, had the next memory I did enjoy it for that.” After being asked, “Does that mean it felt good?” she responded, “That night, yes, for those moments, yes, after the next day, no.”¹²⁵

The day after the incident involving the appellant and IT2 B.S., ITSN S.K. and IT2 B.S. exchanged information about the incidents involving the appellant, and decided to report him for sexual assault.¹²⁶

At trial, two expert witnesses expounded on “the distinction between blackout—memory loss—versus pass out—unconsciousness. The higher a person’s BAC, the more likely he will experience blackout. A person experiencing blackout could, however, still be functioning and responsive to others; their brain just is not recording memories.”¹²⁷ Another expert witness discussed behavior during an alcohol-related blackout and noted the “individual: is still fully conscious. They’re moving around, acting, engaging, talking, dancing, driving, engaging in all kinds of behavior, but because of alcohol’s inhibition of the transfer of information from short-term memory to long-term memory,” they are unable to remember the events that occurred while intoxicated.¹²⁸ Dr. Fromme testified that as people become intoxicated they may also become reckless . . . or even sexually provocative” and when they pass out, on the other hand, at BACs of 0.30 or higher individuals lose consciousness “and would not easily be roused.”¹²⁹

125. *Id.* at 767-68.

126. *Id.* at 768.

127. *Id.* at 769.

128. *Id.*

129. *Id.*

The Navy-Marine Corps Court of Criminal Appeals reversed IT2 Pease’s convictions for sexually assaulting ITSN S.K. and IT2 B.S., holding that the evidence did not establish the two women “were ‘incapable of consenting,’ [IT2 Pease] reasonably may have believed that they were willing partners in sexual activity [; and the evidence did not establish] . . . that the appellant knew or reasonably should have known that [they were] incapable of consenting.”¹³⁰

*b. United States v. Clark*¹³¹ 2015

In *Clark*, the Navy-Marine Corps Court of Criminal Appeals reversed the appellant’s convictions for forcible rape and forcible sodomy because the court—exercising its factual sufficiency review authority—deemed the victim, SW, to lack credibility.¹³² SW and the appellant engaged in mutual kissing on a couch at the appellant’s residence; the victim was too intoxicated to drive home; and the appellant and victim went upstairs together to spend the night.¹³³ SW initially related “that the next morning she awoke in an upstairs room, completely naked and on the floor, next to the appellant who was also naked. SW testified that at this point her last clear memory was of going upstairs with the appellant.”¹³⁴ Later, SW regained fragmented memories of the sexual activity with the appellant, and her descriptions albeit fragmentary, if believed, established the appellant’s use of some force.¹³⁵ The appellant provided inconsistent statements about the sexual activity and claimed that he too suffered from an alcohol-induced blackout.¹³⁶

130. *Id.* at 771. In *United States v. Pease*, 75 M.J. 180 (C.A.A.F. 2016), the Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Corps Court of Criminal Appeals to set aside some of the appellant’s convictions for lack of factual sufficiency. The Court of Appeals for the Armed Forces concluded that the lower court applied the proper standard of review for incapacity, that is, the victim be incompetent due to intoxication, which is lacking “the mental or physical ability to consent,” and “incapable of consenting” including “the ability to make or to communicate a decision.” *Id.* At *12-13.

131. *United States v. Clark*, NMCCA 201400232, 2015 CCA LEXIS 287 (N.M. Ct. Crim. App. July 14, 2015).

132. *Id.* at *7-8; “The military judge acquitted the appellant of one specification of aggravated sexual assault for engaging in a sexual act with a person who was substantially incapacitated. The rape and aggravated assault specifications were pled in the alternative.” *Id.* at *8 n.1.

133. *Id.* at *1.

134. *Id.*

135. *Id.* at *2.

136. *Id.* at *7-8.

One expert witness explained that SW's statement that she recovered some fragmentary memories of the sexual activity with the appellant about her lack of consent was not possible as memories lost during an "en bloc" alcohol-induced blackout cannot be recovered.¹³⁷ Another expert witness indicated SW's description was consistent with a "fragmentary blackout" and confused memories can surface in the days following an episode of heavy alcohol consumption.¹³⁸

In *Clark*, the appellant "was convicted of causing SW to engage in sexual intercourse 'by using strength, sufficient that she could not avoid or escape the sexual contact' and committing sodomy with SW 'by force and without [her] consent' . . . under the version of Article 120, UCMJ, in effect from 1 October 2007 to 27 June 2012."¹³⁹ The appellate court found SW's description of events that took place upstairs in the appellant's residence to be too incomplete to support the element of force, and the appellant's convictions were not established beyond a reasonable doubt.¹⁴⁰

3. 2014 Cases Addressing the 2012 Article 120's Absence of a Definition of "Incapacitated," but Affirming Convictions: *United States v. Torres*¹⁴¹ and *United States v. Redmon*¹⁴²

In *Torres*, the victim, AM, described her substantial alcohol consumption and subsequent state of intoxication as follows:

[AM] told her husband she was not feeling well. She staggered down the hallway using the walls for support and went into the bathroom. Both [AM's husband] and the appellant saw AM stagger down that hall and into the bathroom. She knelt next to the toilet and started "dry heaving." After a few minutes, AM fell asleep in the bathroom at approximately 0130. At approximately the same time, [AM's husband], highly intoxicated himself, went outside on the concrete patio to smoke a cigarette. While smoking, he was sitting on a table but soon fell asleep on top of the table. The next thing AM remembered was waking up in the spare bedroom on the air mattress. She had no memory how she got there and was disoriented and in discomfort; she then realized that someone was having sexual

137. *Id.* at *3-5.

138. *Id.* at *3, *5-6.

139. *Id.* at *7.

140. *Id.*

141. *United States v. Torres*, NMCCA 201300396, 2014 CCA LEXIS 641 (U.S. Navy-Marine Crim. App. Aug. 28, 2014), *pet. denied*, 74 M.J. 169 (C.A.A.F. 2014).

142. *United States v. Redmon*, NMCCA 201300077, 2014 CCA LEXIS 369 (N-M. Crim. App. June 26, 2014), *pet. denied*, 74 M.J. 77 (C.A.A.F. 2014).

intercourse with her. As she started to wake up, she realized that she was wearing only a bikini top. The tank top, shorts, and underwear that she had worn while asleep in the bathroom had been removed. By the time she regained her senses, AM saw the appellant, naked, lying next to her. She rolled off the air mattress, grabbed some clothes that were on top of her red suitcase, and went to look for her husband.

* * *

Upset, disoriented, and scared, AM called 911 between 0240 and 0245. When speaking with the 911 operator, AM was emotional and was having difficulty orienting herself in the house. Having never before been in the house, AM did not know the address, but eventually was able to find some mail with the house address. While her primary concern was her husband’s condition, she told the dispatcher that she had been raped by the appellant and that the appellant was still in the house.¹⁴³

The court “conclude[d] that one who engages in sexual intercourse with another who is unconscious due to alcohol intoxication could be prosecuted if the individual who initiated the sexual act knew, or should have known, that the other person was unconscious.”¹⁴⁴ Moreover, these facts were sufficient to establish the accused’s guilt of sexual assault beyond a reasonable doubt.¹⁴⁵

In *United States v. Redmon*,¹⁴⁶ the court described the victim’s (IT3 S) state of intoxication and conduct as follows:

The party ended somewhere around 0300 and IT3 S was intoxicated to the extent that she had difficulty walking. The appellant and others helped IT3 S back to her apartment, a 10-minute walk away. Once in her apartment, IT3 S undressed and sat on the floor of the shower with the water running over her for approximately 45 minutes. After [IT3 S’s friend] experienced difficulty extracting IT3 S from the shower, the appellant assisted him in retrieving her from the shower and helping dress her. During the course of dressing her, IT3 S began to vomit in the toilet.

* * *

143. *Torres*, 2014 CCA LEXIS 641, at *5-7.

144. *Id.* at *25-26. (citing *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003)).

145. *Id.* at *16-17.

146. *Redmon*, 2014 CCA LEXIS 369, at *1.

IT3 S indicated that after she fell asleep, the next thing she remembers is waking up, naked from the waist down, and the appellant on top of her, penetrating her vagina with his penis. IT3 S began to cry, pushed appellant aside, put on a pair of sweatpants, and went to sleep in her bed.¹⁴⁷

IT3 made a timely report of the sexual assault to authorities a few hours after the assault.¹⁴⁸ Based on a factual foundation provided by multiple witnesses, a forensic toxicologist, Colonel Lyons, “stated that he would have put [IT3 S’s] blood alcohol content (BAC) [at the time of the sexual activity at] between .19 and .22.”¹⁴⁹ The court was satisfied that IT3 was “substantially incapacitated” when the accused engaged in sexual activity with her.¹⁵⁰

V. COMPARISON TO CIVILIAN CASE LAW

A. “Incapacitation” in the Federal Sector

In comparison, federal law, pursuant to 18 U.S.C. §§ 2241-2246, sets forth the substantive criminal provisions that prohibit various sex offenses. Subsection two of 18 U.S.C. 2242, sexual abuse, addresses cases where the victim lacks the capacity to consent; that provision provides that an offense is committed when the defendant “engages in a sexual act with another person if that other person is—(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.” Title 18 U.S.C. § 2246 provides the definitions for Section 2242, and Section 2246 does not further define the degree of a victim’s incapability.

Federal circuit courts, however, do not have the authority to review district court cases for factual sufficiency. Rather, these appellate courts conduct a legal sufficiency review, defined by the Supreme Court as whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.¹⁵¹ Limited federal circuit court case law exists that discusses the legal sufficiency of Title 18

147. *Id.* at *1-2.

148. *Id.* at *3.

149. *Id.* at *5.

150. *Id.* at *5-6.

151. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

sex offense cases regarding the complainant’s incapacity due to alcohol consumption.¹⁵²

In delineating the level of intoxication at which a person becomes substantially incapacitated and, for purposes of the statute, unable to consent to sexual acts, some federal courts have upheld findings in instances where individuals were “passed out” as well as “blacked out.” The Eighth Circuit has established a knowledge requirement, and the Government must prove “that the Defendant . . . knew that [the victim] was physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.”¹⁵³

Nevertheless, in *United States v. Marrowbone*,¹⁵⁴ the Eighth Circuit Court upheld a conviction of sexual assault under the federal statute when the complaining witness had stated to tribal police that he was “passed out” when the accused sexually assaulted him.¹⁵⁵ In *Marrowbone*, the Eighth Circuit affirmed a conviction of sexual abuse, in violation of 18 U.S.C. § 2242(2)(B), where the victim testified that he got drunk on alcohol the defendant supplied, passed out, and awoke to find the accused engaging in anal sex with him.¹⁵⁶ The Ninth Circuit Court in *United States v. Stamper*,¹⁵⁷ upheld the district court’s denial of a motion for acquittal, finding that the government had made sufficient showing that the victim was “blacked out” during the assault. The Ninth Circuit affirmed this conviction where the victim woke up to find the accused having sex with her, and she did not consent to the sexual activity, and the court rejected the accused’s claim of consent.¹⁵⁸ However, the Seventh Circuit in *United States v. Peters* reversed a conviction for sexual abuse because of insufficient evidence that the intoxicated victim “was incapable of declining participation in the sexual act” even though she drank 12 beers, she passed out, and could not

152. See Jill M. Marks, Annotation, *Construction and Application of 18 U.S.C.A. § 2242(2), Proscribing Sexual Abuse of Person Incapable of Appraising Nature of Conduct, Declining Participation, or Communicating Unwillingness to Participate in Sexual Act*, 83 A.L.R. Fed. 2d. 1, §§ 6-7 (2014).

153. 3-61 MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL, ¶ 61.04 (Matthew Bender 2015) (citing *United States v. Bruguier*, 735 F.3d 754 (8th Cir. 2013) (en banc)); see also *United States v. Peters*, 277 F.3d 963 (7th Cir. 2002).

154. 211 F.3d. 452, 454 (8th Cir. 2000).

155. *Id.* at 456; see also *United States v. Mariner*, No. 4:09-cr-101, 2012 WL 6082720, at *3 (D.N.D. Dec. 4, 2012) (finding that victim was “passed out” according to accused’s own statement).

156. *Marrowbone*, 211 F.3d at 454.

157. 507 F.App’x. 723, 724 (9th Cir. 2013).

158. *United States v. Fasthorse*, 639 F.3d 1182 (9th Cir. 2011).

remember how she got into her bedroom or the sex act by the accused.¹⁵⁹ The victim in *Peters* did “not remember consenting to have sex with Peters, and [she said] that she would never have consented to having sex with Peters.”¹⁶⁰ The victim’s family found her partially undressed in her bed and called the police; the victim was difficult to awaken, and the accused was found hiding in the victim’s closet; however, the accused, who was the only witness to the sex act, claimed it was consensual.¹⁶¹

B. “Incapacitation” in the State Sector

In the state sector, “[t]he prevailing view is that ‘voluntary consumption of drugs or alcohol does not, without more, render consent involuntary.’”¹⁶² Confusion of the victim’s judgment or reduced inhibitions through the voluntary consumption of alcohol or drugs is insufficient to render consent involuntary.¹⁶³ The victim must be “unable to give a knowing and voluntary consent, and—in order to charge defendant with criminal responsibility—that the inability to consent was known or apparent to the defendant.”¹⁶⁴ Typically, states do not recognize the victim’s partial or substantial lack of capacity due to the voluntary consumption of alcohol or drugs as rendering a victim’s consent involuntary.¹⁶⁵

The “substantially incapacitated or substantially incapable” term in the 2007 Article 120 was drawn from the state criminal codes of Michigan,¹⁶⁶

159. United States v. Peters, 277 F.3d 963, 967 (7th Cir. 2002).

160. *Id.* at 965.

161. *Id.* at 965-66.

162. Coley v. State, 616 So. 2d 1017, 1023 (Fla. Dist. Ct. App. 1993).

163. *Id.*

164. *Id.* (citing Rollin M. Perkins & Ronald N. Boyce, CRIMINAL LAW 212-13 (3d ed. 1982)). WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.11 (1986), MODEL PENAL CODE § 2.11 (1985); MODEL PENAL CODE § 213.1 cmt. 3, 5 (1980); 3 FRANCIS WHARTON & CHARLES TORCIA, WHARTON’S CRIMINAL LAW § 289 (14th ed. 1980)).

165. *See, e.g.*, FLA. STAT. ANN. § 794.011(1)(a) (West 2014) (defining consent as “intelligent, knowing, and voluntary consent and does not include coerced submission. ‘Consent’ shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.” The term “mentally incapacitated” is defined as “temporarily incapable of appraising or controlling a person’s own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance administered without his or her consent or due to any other act committed upon that person without his or her consent.” FLA. STAT. ANN. § 794.011(1)(c) (West 2014)).

166. 2005 SEX CRIMES REPORT TO JSC, *supra* note 41, at 256-57. The “substantial capacity” test was drawn from the Michigan Compiled Laws, which included the following definition, “(h) ‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.” *Id.* (quoting MICH. COMP. LAWS § 750.520a(h) (2004)).

Maine,¹⁶⁷ Maryland,¹⁶⁸ and Ohio.¹⁶⁹ Under the 2007 Article 120 provision, the victim could testify that she lacked capacity or was intoxicated to the extent where she was incapable of resisting the defendant’s advances or consenting to the sexual activity because she was asleep, passed out from alcohol, or too impaired to communicate lack of consent.

Under Ohio law, an accused may be convicted when “[t]he other person’s ability to resist or consent is *substantially impaired* because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.”¹⁷⁰ An Ohio appellate court addressed the situation where a victim was intoxicated but not unconscious from alcohol consumption stating as follows:

[T]here can be a fine, fuzzy, and subjective line between intoxication and impairment. Every alcohol consumption does not lead to a substantial impairment. Additionally, the waters become even murkier when reviewing whether a defendant knew, or should have known, that someone was impaired rather than merely intoxicated. Of course, there are times when it would be apparent to all onlookers that an individual is substantially impaired, such as intoxication to the point of unconsciousness. On the other hand, “a person who is experiencing [an

167. *Id.* at 605-06 (quoting Title 17-A, Maine Criminal Code, Part 2, Ch. 11 § 255-A(1)G and A(1)H, unlawful sexual contact which includes “substantially incapable” as follows:

G. The other person suffers from a mental disability that is reasonably apparent or known to the actor that in fact renders the other person *substantially incapable* of appraising the nature of the contact involved or of understanding that the other person has the right to deny or withdraw consent. Violation of this paragraph is a Class D crime;

H. The other person suffers from a mental disability that is reasonably apparent or known to the actor that in fact renders the other person *substantially incapable* of appraising the nature of the contact involved or of understanding that the other person has the right to deny or withdraw consent and the sexual contact includes penetration. Violation of this paragraph is a Class C crime.

(emphasis added).

168. *Id.* at 610-11. Maryland Sexual Offenses in Title 3, Subtitle 3, § 3-301(c) provides the following definition:

(c) Mentally incapacitated individual. – “Mentally incapacitated individual” means an individual who, because of the influence of a drug, narcotic, or intoxicating substance, or because of an act committed on the individual without the individual’s consent or awareness, is rendered substantially incapable of:

(1) appraising the nature of the individual’s conduct; or
 (2) resisting vaginal intercourse, a sexual act, or sexual contact.

MD. CODE ANN., CRIM. LAW § 3-301 (West 2007). This provision is unchanged in the current Maryland Criminal Code. MD. CODE ANN., CRIM. LAW § 3-301 (West 2015).

169. 2005 SEX CRIMES REPORT TO JSC, *supra* note 41, at 688-89; OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (West 2004).

170. OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (West 2015) (emphasis added).

alcohol induced] blackout may walk, talk, and fully perform ordinary functions without others being able to tell that he is ‘blacked out.’”¹⁷¹

Under Ohio case law, a victim who has an alcohol-related blackout may nevertheless consent to sexual activity when the impairment is not to a sufficient level.¹⁷² However, as mentioned earlier, state criminal appellate courts do not have the authority to exercise a factual sufficiency review of cases.

VI. OTHER RECOMMENDATIONS FOR CHANGE

In addition to modifying the definition of consent to include a definition of “substantially incapacitated,” as recommended previously,¹⁷³ the criminal provision regarding victim impairment within the aggravated sexual assault provision also should be returned to UCMJ, Article 120. Unlike the 2012 Article 120, the 2007 version of UCMJ art. 120(t)(14) limited the consent defense and an accused could be convicted of a sex crime if he or she engaged in a sex act with a victim who was *substantially incapable* of “physically declining participation in the sexual conduct at issue; or physically communicating unwillingness to engage in the sexual conduct at issue.”¹⁷⁴ Furthermore, the Air Force Court of Criminal Appeals and the Navy-Marine Corps Court of Criminal Appeals found factual sufficiency in cases involving the 2007 version of Article 120 in cases where the victims were blacked out.¹⁷⁵

171. *State v. Doss*, 8th Dist. Cuyahoga No. 88443, 2008-Ohio-449, ¶18 (Ohio Ct. App. 2008) (citing Peter Westin, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203, 1231).

172. *See id.* at ¶¶ 25, 26 (reversing rape and kidnapping conviction for lack of legal sufficiency when victim had no memory of departing bar, going to accused’s residence, and having sex with accused because accused may not have known of her degree of impairment and noting trial court did not err in failing to expressly define the phrase substantial impairment for the jury); *see also State v. Rivera*, 8th Dist. Cuyahoga No. 97091, 2012-Ohio-2060 (May 10, 2012). *But see State v. Jones*, 8th Dist. Cuyahoga No. 98151, 2012-Ohio-5737, ¶¶ 29, 34 (Dec. 6, 2012) (affirming rape conviction and citing victim’s description of her degree of alcohol-related impairment and corroboration by her friend); *Ohio v. Jordan*, 7th Dist. Harrison No. 06 HA 586, 2007-Ohio-3333, ¶¶ 29-34 (June 22, 2007) (affirming conviction under OHIO REV. CODE § 2907.02(A)(1)(c) and noting victim’s statement of degree of alcohol-related impairment was corroborated by other witnesses).

173. *See supra* notes 60-61 and accompanying text describing the recommendation to include a definition of “substantially incapacitated” within the definition of consent in the UCMJ; UCMJ, *supra* note 4, § 920 (West 2012).

174. UCMJ, *supra* note 4, § 920(t)(14) (West 2007).

175. *See United States v. Nicely*, ACM 36730, 2007 WL2506432 (A.F. Ct. Crim. App. Aug. 15, 2007). *United States v. Redmon*, NMCCA 201300077, 2014 CCA LEXIS 369 (U.S. Navy-

To further protect victims, that provision, as reflected in the following language from the 2007 Article 120(c), offense of *aggravated sexual assault*¹⁷⁶ should be imported into Article 120, UCMJ:

Any person . . . who—(2) engages in a sexual act with another person of any age, if that other person is substantially incapacitated or substantially incapable of—(A) appraising the nature of the sexual act; (B) declining participating in the sexual act; or (C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault.¹⁷⁷

This 2007 Article 120 provision primarily reflected the Title 18 offense of sexual abuse,¹⁷⁸ with the addition of the word “substantially,” which was added to reduce the possibility that the fact finder might acquit an accused based on the belief that the victim might need to be completely incapable of appraising the nature of the conduct or communicating unwillingness to engage in the sex act.

VII. CONCLUSION

UCMJ art. 120(b)(3) that states the accused “commits a sexual act upon another person when the other person *is incapable* of consenting to the sexual act due to—(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person,” should be amended to reinstate the 2007 version of the statute. The 2007 UCMJ art. 120(t)(14) limited the consent defense and did not permit the consent defense for an accused who engages in a sex act with a victim who is *substantially incapable* of “physically declining participation in the sexual conduct at issue; or physically communicating unwillingness to engage in the sexual conduct at issue.” (emphasis added). The decision that victims be completely incapable of declining sexual conduct, as

Marine Crim. App. June 26, 2014), *pet. denied*, 74 M.J. 77 (C.A.A.F. 2014); *see also* Sameit, *supra* note 8, at 121.

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

177. UCMJ, *supra* note 4, § 920(c)(2) (West 2007).

178. 18 U.S.C. § 2242 (West 2007). The Eighth Circuit determined the defense was entitled to an instruction that the accused had to *know* that the victim was “incapable of appraising the nature of the conduct; or physically incapable of declining participation in, or communicating unwillingness to engage in” the sex act in order to be found guilty of a violation of 18 U.S.C. § 2242. *United States v. Rouillard*, 740 F.3d 1170, 1171-72 (8th Cir. 2014).

opposed to substantially incapable, allows an accused to take advantage of victims who are extremely intoxicated but still conscious.

The Court of Appeals for the Armed Forces has described the military appellate courts as “something like the proverbial 800-pound gorilla when it comes to their ability to protect an accused” under Article 66(c), UCMJ.¹⁷⁹ Military courts of criminal appeals should join the other federal appellate courts and only apply the legal sufficiency standard in their review of courts-martial convictions. There is no reason for this protective anachronism to continue to be used to reverse courts-martial convictions when accused service members have essentially all the rights and protections as other American citizens, in addition to some rights and protections that other American citizens do not have.¹⁸⁰

179. *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993).

180. DAVID M. KENNEDY, *THE MODERN AMERICAN MILITARY* 246 (Oxford University Press 2013) (citing R. Chuck Mason, *Military Justice: Courts-Martial, an Overview*, CONGRESSIONAL RESEARCH SERVICE (Aug. 12, 2013), <http://www.fas.org/sgp/crs/natsec/R41739.pdf>; Jack L. Rives & Stephen J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F.L. REV. 213 (2002)).

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