

Article 120

UCMJ (as enacted in 1950)

- 110-word statute covering rape and “carnal knowledge” (statutory rape).
- Rape defined as “an act of sexual intercourse with a female not [the person’s] wife, by force and without her consent.”
- Death an authorized sentence for rape.

UCMJ (as enacted in 1950)

Other forms of sexual assault tried as violations of:

- other specified UCMJ articles (Article 125, sodomy; Art. 128, assault; Art. 80, attempts) or
- Article 134 (*e.g.*, assault with intent to commit rape or sodomy; indecent assault; indecent acts with a child under the age of 16 years).

Article 120
has been amended
six times since
enactment

Article 120 Amendments

- **1956 – Nonsubstantive changes in** wording as part of codification of Title 10.
- 1992 – Rape made gender-neutral and marital exception eliminated.
- 1996 – Carnal knowledge made gender-neutral and mistake of fact provisions added.

Article 120 Amendments

- **2006 – Article 120 substantially** rewritten.
- 2011 – Article 120 again substantially rewritten.
- 2013 – Article 120 amended to correct typographical error.
- Because rape and rape of a child have no statute of limitations, three different versions of Article 120 remain in effect depending on date of the offense: 2011 version, 2006 version, and pre-2006 version.

2006 Amendment

- FY 2005 NDAA required Secretary of Defense to review the UCMJ and MCM provisions concerning sexual assault.
- Joint Service Committee subcommittee produced 809-page report presenting six options.
- Report recommended no change.
- If reforms were to be made, report recommended revision ("Option 5") based on modified federal civilian statutes.

2006 Amendment

FY 2006 NDAA amendments to Article 120 were almost identical to Option 5.

Article 120 became 2,830 word article.

The revised Article 120 included 14 separate offenses, only one of which (wrongful sexual contact) retained a lack of consent element.

2006 Amendment

Offenses under 2006 amendment:

1. Rape
2. Rape of a child
3. Aggravated sexual assault
4. Aggravated sexual assault of a child
5. Aggravated sexual contact
6. Aggravated sexual abuse of a child
7. Aggravated sexual contact of a child
8. Abusive sexual contact
9. Abusive sexual contact of a child
10. Indecent liberty with a child
11. Indecent act
12. Forcible pandering
13. Wrongful sexual contact
14. Indecent exposure

2006 Amendment

A rape conviction could be based on 5 different theories of liability.

[Similar 5 theories of liability are recognized by the 2011 version of Article 120.]

2006 Amendment

5 theories of liability for rape:

1. Use of force against the victim;
2. Causing grievous bodily injury to any person;
3. Threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
4. Rendering another person unconscious; or
5. Administering to another person by force or threat of force or without the person's knowledge or permission a drug, intoxicant, or similar substance that substantially impairs the ability of that other person to appraise or control conduct.

2006 Amendment

- Applied to acts committed on or after October 1, 2007 through June 27, 2012.
- Trial judges soon ruled portions unconstitutional.
- USAF military judge stated in a ruling:

“Article 120 on its face is almost incomprehensible and is probably the most poorly drafted and poorly enacted Article in the UCMJ – probably in the history of the UCMJ.”

2006 Amendment

- 2010: CAAF rejected constitutional challenge to consent burden shift in forcible sexual assault case (United States v. Neal).
- 2011: CAAF held consent burden shift unconstitutional in substantial incapacity sexual assault case (United States v. Prather). CAAF also held that Article 120's double burden shift was a "legal impossibility."
- 2012: Navy-Marine Corps Court of Criminal Appeals held that 2006 amendments abrogated parental compulsion theory of rape of a child (United States v. Valentin).

2011 Amendment

- Article 120 amended by NDAA for FY 2012 on December 31, 2011, effective June 28, 2012.
- 10 offenses spread over three articles: revised Article 120 and new Articles 120b and 120c.

2011 Amendment

- Revised Article 120 covers rape, sexual assault, aggravated sexual assault, and abusive sexual contact.
- New Article 120b covers rape of a child, sexual assault of a child, and sexual abuse of a child.
- New Article 120c covers indecent viewing, visual recording, or broadcasting; forcible pandering; and indecent exposure.

2011 Amendment

- Burden shift eliminated.
- Death penalty no longer authorized for rape or rape of a child.

2011 Amendment

Four Article 120 offenses:

1. Rape
2. Sexual assault
3. Aggravated sexual contact
4. Abusive sexual contact

2011 Amendment

Rape defined as:

- penetration of the vulva, anus, or mouth by the penis; or

penetration of the vulva, anus, or mouth by any part of another person's body or by an object with the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person

- accomplished through any of 5 theories of liability.

2011 Amendment

5 theories of liability for rape

1. Use of unlawful force against the victim;
2. Use of force causing or likely to cause grievous bodily injury to any person;
3. Threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;
4. Rendering the victim unconscious; or
5. Administering to the victim by force or threat of force or without the victim's knowledge or permission a drug, intoxicant, or similar substance that substantially impairs the victim's ability to appraise or control conduct.

2011 Amendment

Sexual assault defined as:

- penetration of the vulva, anus, or mouth by the penis; or

penetration of the vulva, anus, or mouth by any part of another person's body or by an object with the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person

- accomplished through any of 7 theories of liability.

2011 Amendment

7 theories of liability for sexual assault

1. Threatening or placing the victim in fear
2. Causing bodily harm to the victim
3. Making a fraudulent representation that the sexual act serves a professional purpose
4. Inducing a belief that the perpetrator is another person
5. The victim is asleep, unconscious, or otherwise unaware the sexual act is occurring
6. The victim is incapable of consenting due to impairment by any drug, intoxicant, or similar substance and that condition is known or reasonably should be known by the perpetrator
7. The victim is incapable of consenting due to a mental disease or defect or physical disability and that condition is known or reasonably should be known by the perpetrator

2011 Amendment

Two “sexual contact” offenses:

1. Aggravated sexual contact; and
2. Abusive sexual contact.

2011 Amendment

“Sexual contact” defined as:

touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with the intent to abuse, humiliate, or degrade any person

OR

2011 Amendment

touching, "either directly or through the clothing, **any body part** of any person, if done with an intent to arouse or gratify the sexual desire of any person."

2011 Amendment

- Aggravated sexual contact is sexual contact accomplished by one of the 5 theories of liability for rape.
- Abusive sexual contact is sexual contact accomplished by one of the 7 theories of liability for sexual assault.

2011 Amendment

Maximum punishments for new
Articles 120, 120b, and 120c
prescribed by Executive Order on May
15, 2013. 78 Fed. Reg. 29559, 29606
(2013).

2011 Amendment

Maximum punishments for Article 120 offenses:

Dishonorable discharge, forfeiture of all pay and allowances, and:

1. Rape: confinement for life without eligibility for parole
2. Sexual assault: confinement for 30 years
3. Aggravated sexual contact: confinement for 20 years
4. Abusive sexual contact: confinement for 7 years

2011 Amendment

Maximum punishments for Article 120 offenses committed on or after June 24, 2014:

Dishonorable discharge or dismissal mandatory for rape, sexual assault, rape of a child, sexual assault of a child, forcible sodomy, and attempts.

2011 Amendment

Draft sample specifications and supporting MCM provisions published in Federal Register on October 23, 2012. 77 Fed. Reg. 64854 (2012). Not yet promulgated by Executive Order.