

Article 120

Written Statement to Judicial Proceedings Panel

Good afternoon distinguished panel members. I am Col Mike Lewis, Chief of the Military Justice Division, Air Force Legal Operations Agency. The Military Justice Division is responsible for providing opinions and advice to the Secretary of the Air Force, Chief of Staff and The Judge Advocate General. We respond to White House, Congressional and other high level inquiries regarding military justice policies, procedures and actions, implement Air Force-wide military justice policy, and perform liaison with the Departments of Justice and Defense. As Chief of the Military Justice Division, I am the Air Force JAG voting group representative to the Joint Service Committee on Military Justice. The Air Force currently also has responsibility to serve as the Chair for the JSC. My two immediate prior positions in the JAG Corps were most recently serving as the Deputy Chief Trial Judge of the Air Force and prior to that I spent three years as the Staff Judge Advocate at the 27th Special Operations Wing at Cannon AFB, NM.

Today I am here to give you my perspective on potential changes to Article 120 and my view of the Air Force's current capability to prosecute abuse of power offenses and those involving chain of command relationships.

My overall message is one that you've heard before – I do not recommend changes to the statutory language of Article 120 unless you find them absolutely necessary to fill an identified gap in military justice practice. Statutory changes and reorganizations have historically caused confusion in charging and most of the issues can be dealt with through alternative means such as charging other offenses under the UCMJ, letting case law develop, and providing advanced training to our trial and defense practitioners.

Article 120 Changes - Penetrative vs. Contact Offenses

I'm aware that some have suggested you recommend separating penetrative sexual assault offenses from sexual contact offenses in the UCMJ. Two main reasons are offered for separating the offenses – ease of use for trial counsel and helping shape public perception that not every case charged under Article 120 is a rape or sexual assault offense. While I understand the justifications put forth, I do not find them sufficient to warrant statutory changes to Article 120.

In an ideal world by separating out the offenses, our least experienced trial counsel would benefit as they'd see one article of the UCMJ would be for rape and sexual assault and another article would be for aggravated sexual contact and abusive sexual contact. The trial counsel could focus solely on the offenses and definitions within that specific article rather than scanning through a longer, consolidated Article 120 to find the appropriate offense to charge.

Second, by breaking the offenses into two separate articles, it would provide further insight to members of the public and the media to understand that not every Article 120 case is investigated or charged as a penetrative offense such as rape. There might even be a small advantage to more easily count each type of sexual assault offense as the breakdown between penetrative and contact offenses would be more evident.

These reasons would be persuasive to me if we were starting with a blank slate and building an Article 120 statutory framework from scratch for the first time. However, we all know that is not the case. Practically speaking, if we were to do this, we would likely not be able to separate them out into different “numbered” articles due to the way the UCMJ and punitive articles are numbered 78-134. Rather, aggravated and abusive sexual contact offenses would become Article 120d. While this would be a new UCMJ article (just like Articles 106a, 112a, and 119a are separate articles), some would still confuse it as a subset of Article 120 as the

current abusive sexual contact offense is codified at Article 120(d). Such a fix could actually confuse lawyers and non-lawyers alike even more. Consider, for example, a scenario in which an accused is alleged to have committed multiple abusive sexual contact offenses during the course of a New Year's Eve party – perhaps one before midnight and the other after. If we were to break out the abusive sexual contact offenses into Article 120d starting 1 January 2015, trial counsel would have to charge the same conduct in two different ways -- one charge for the abusive sexual contact under Article 120(d) on 31 December 2014 and another for the abusive sexual contact offense on 1 January 2015 under Article 120d. Then, at trial, the military judge would have to instruct panel members using two different statutes. If the statutory definitions changed in the least, the judge would have to so instruct the members accordingly. I've had to instruct court members that there were two definitions of the word "consent" during findings instructions where the offenses charged included sexual assault under the current statute and abusive sexual contact under the 2007-2012 version of Article 120. This is far from ideal. Ultimately, the confusion that would be created after separating out these offenses would actually outweigh the value gained. I would personally prefer that we instead continue our focus on training and education of our practitioners and the public.

Abuse of Power as a Sub-Offense

We follow very closely any accusation of sexual assault and unprofessional relationship stemming from military training instructor (MTI) misconduct with trainees.

I am comfortable with the current regulatory framework the Air Force has to ensure that criminal behavior involving MTIs is adequately criminalized so those that violate the law can held appropriately accountable. There are several ways in which these sexual assaults or unprofessional relationships can be charged depending on the evidence in the case.

First, many of these relationships are charged as violations of a lawful general regulation based upon Air Education and Training Command (AETC) instructions currently in place. These AETC instructions criminalize consensual sexual relationships and unprofessional relationships between MTIs and trainees as a violation of Article 92 under the UCMJ. In AETC Instruction 36-2909, faculty, staff and recruiters are prohibited from engaging in consensual but unprofessional relationships with trainees, cadets, students, recruits, recruiters' assistants, and Airmen in entry-level status. This prohibition continues throughout all periods of accession, training, and instruction; including periods where personnel are awaiting basic military or initial skills training, and periods where personnel have been eliminated from basic military or initial skills training and are awaiting discharge or reclassification.

The UCMJ covers sexual harassment under Article 93, cruelty and maltreatment. As of right now, the maximum punishment for a violation of Article 93 is a Dishonorable Discharge and 1 year in confinement. However, the Joint Services Committee (JSC) has voted to recommend to the President to increase the maximum confinement from 1 to 2 years. Sexual harassment is also covered in AETCI 36-2909 as a type of trainee abuse that is specifically prohibited. Any violation of that regulation can be prosecuted under Article 92. Certainly, all four of the current Article 120 offenses can be prosecuted alleging a theory of threatening or placing another person in fear under the current version of the statute. In some cases involving MTIs this would be an appropriate charge if the evidence warranted it.

In my opinion, abuse of power is adequately criminalized within both the UCMJ and Air Force regulations and as such, there is no need to make any statutory changes to explicitly create an abuse of power offense as a subsection of Article 120.

Thank you for your time this afternoon. I look forward to your questions.