



DEPARTMENT OF THE NAVY  
HEADQUARTERS UNITED STATES MARINE CORPS  
3000 MARINE CORPS PENTAGON  
WASHINGTON, DC 20350-3000

5861  
JMJ  
14 Jan 16

From: Deputy Director (Community Development and Military Justice),  
Judge Advocate Division  
To: Staff Director, Judicial Proceedings Panel

Subj: MARINE CORPS COMMENTS ON THE ARTICLE 120 SUBCOMMITTEE  
PROPOSAL

1. Thank you for the opportunity to address the December 2015 Subcommittee Report to the Judicial Proceedings Panel on Article 120 of the Uniform Code of Military Justice (UCMJ). The Marine Corps reiterates its position that Article 120, UCMJ, should be changed only where necessary. Minimizing changes will enhance the stability in the practice after years of numerous changes to Article 120 and should complement the Military Justice Review Group's legislative proposal to amend the article.

2. Concerning the subcommittee's specific proposals, the Marine Corps comments are as follows:

a. Proposed Article 120(b)(1)(B) – replacing “causing bodily harm to that other person” with “without the consent of the other person”: **Non-concur with proposed change.**

(1) It is not necessary to replace “causing bodily harm to that other person” with “without the consent of the other person.” Case law and instructions have defined the term “bodily harm,” and proper instructions from the military judge should alleviate the subcommittee members' concerns that panel members may be confused by the definition of bodily harm.

(2) The proposed change to replace “causing bodily harm to that other person” to “without the consent of the other person,” may cause fact finders to focus more on the actions of the victim than the actions of the accused, which the Marine Corps contends is undesirable.

b. Proposed Article 120(b)(1)(E) – “by using position, rank, or authority to secure compliance by the other person”: **Non-concur with proposal.**

(1) The Marine Corps reiterates its response from JPP RFI #1, Question #7, which states that trainer/trainee relationships may be properly charged under Article 92 for fraternization, sexual harassment or violation of an order issued by a recruiting or training command for example, Article 93 for cruelty and maltreatment of a subordinate, Article 133 for Conduct Unbecoming an Officer, or Article 134 for fraternization. The Marine Corps maintains that conduct beyond the existence of the relationship may be charged under Article 120 where the government may use the existence of the trainer/trainee or senior/subordinate relationship as evidence of “threatening or placing that other person in fear,” such as when charging rape or sexual assault. For example, in *United States v. Walker*, the Air Force Court of Criminal

Subj: MARINE CORPS COMMENTS ON THE ARTICLE 120 SUBCOMMITTEE PROPOSAL

Appeals found that the evidence was sufficient to show that the accused committed numerous acts of aggravated sexual assault where the accused used his rank and position as a training instructor to place the trainees in fear of an impact on their military careers through the use and abuse of his military rank, position, and authority. *United States v. Walker*, 2014 CCA LEXIS 306 (A.F.C.C.A. May 15, 2014).

(2) It is unclear what acts would be prohibited by Article 120(b)(1)(E) due to the lack of clarity with respect to the term “secure compliance” and because the clause lacks any requirement for the use of the position, rank, or authority to be coercive, abusive, or forceful. As a result, the proposed Article 120(b)(1)(E) would be difficult for practitioners to apply.

c. Article 120(g)(1) – Proposed definition of Sexual Act: Non-concur with proposed changes. The Marine Corps maintains that to ensure stability in the practice of law Article 120 should be changed only when necessary. However, if the Panel intends to modify the definition of “sexual act,” the Marine Corps proposes the following definition:

(1) Sexual act. The term “sexual act” means--

(A) The penetration, however slight, of the:

(i) vulva, anus, or mouth, by the penis; or

(ii) mouth of another by any part of the body or by any object, with an intent to arouse or gratify the sexual desire of any person; or

(iii) vulva or anus of another by any object with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(B) The touching, or causing another person to touch, the mouth with the penis, vulva, scrotum, or anus.

This proposal (1) fixes the issue of using the term “contact” in the definition of “sexual act,” (2) separates out penetration and touching offenses, and (3) maintains the criminalization of penetrating the mouth if completed with the intent to arouse or gratify sexual desires.

d. Proposed Article 120(g)(1)(C) (former Article 120(g)(1)(B)) – proposed change to remove “mouth”: **Non-concur with proposed change.**

(1) The Subcommittee stated in its report that it received testimony that some acts covered by the current Article 120(g)(1)(B) “may be too broad because it could include placing an object like a toothbrush into someone’s mouth with the intent to abuse, humiliate, or degrade any person, regardless of whether there was any specific sexual intent.” However, by removing “mouth” from the proposed Article 120(g)(1)(C) in the manner proposed, many acts that would appropriately be criminalized by Article 120 would also be removed, namely, penetration of the mouth by any part of the body or by an object with the intent to arouse or gratify the sexual desire of any person.

(2) The Marine Corps maintains that Article 120 should only be modified where absolutely necessary. However, if the Panel decides to remove the term “mouth” from the current Article 120(g)(1)(B), Marine Corps proposes that the Panel consider inserting a new subparagraph

Subj: MARINE CORPS COMMENTS ON THE ARTICLE 120 SUBCOMMITTEE  
PROPOSAL

within the definition of “sexual act” that retains criminalizing penetration of the mouth with the intent to arouse or gratify the sexual desire of any person. The proposed language could read, “the penetration, however slight, of the mouth of another by any part of the body or by any object, with an intent to arouse or gratify the sexual desire of any person.” Retaining this aspect of “sexual act” would ensure that the current Article 120 remains unchanged as much as possible.

e. Proposed Article 120(g)(1)(C) (former Article 120(g)(1)(B)) – proposed addition of “penis”: **Non-concur with proposed change.** This change is not necessary and does not appear to address any circumstance that would appropriately be charged under rape or sexual assault. This behavior would appropriately be covered by the definition of “sexual contact.”

f. Article 120(g)(2) – removing “genitalia” and adding “vulva, penis, scrotum” to the definition of “sexual contact”: **Non-concur with proposed change.** This change is not necessary because the term “genitalia” is broad enough to encompass the areas of the body that should be included in the definition of “sexual contact.” The Court of Appeals for the Armed Forces in *United States v. Wilkins* used at the following definition for “genital” when making deciding the case: “‘Genital’ is defined as ‘of, relating to, or being a sexual organ.’ Merriam-Webster’s Collegiate Dictionary 521 (11th ed. 2008). ‘Genitalia’ is defined as ‘the organs of the reproductive system.’ *Id.*” *United States v. Wilkins*, 71 M.J. 410, 413 (C.A.A.F. 2012). By naming certain parts of the genital region in the definition of “sexual contact,” other parts of the genital region that should be included in the definition may be excluded.

g. Article 120(g)(2) – combining (A) and (B) and removing “any touching, or causing another to touch, either directly or through the clothing, any body part of any person, if done”: **Non-concur with proposed change.** This change would limit the areas touched to those areas listed in the current Article 120(g)(2)(A) and would exclude the touching of other potentially sensitive areas (for example, the neck, waist, and back) for cases where such touching occurs with the intent to arouse or gratify the sexual desire of any person. Such circumstances, which may appropriately be charged under Article 120 currently, would no longer be chargeable under Article 120.

h. Article 120(g)(2) – adding “or an object” to the definition of “sexual contact”: **Non-concur with proposed change.** This change is not necessary in light of *United States v. Schloff*, 74 M.J. 312 (C.A.A.F. 2015) where the Court of Appeals for the Armed Forces ruled that object-to-body contact constituted sexual contact as defined by the current Article 120(g)(2).

i. Proposed Article 120(g)(7)(A) – rewording the definition of the term “consent”: While the Marine Corps has no legal objection to this proposed change, this change is not necessary.

j. Proposed Article 120(g)(8) – Definition of “Incapable of consenting”: **Non-concur with proposed change.** The Marine Corps concurs with the rationale set forth in Enclosure 2 of the subcommittee’s report, “Supplemental and Dissenting Commentary Concerning Subcommittee Recommendations with Proposed New Article 120 Statute.”

Subj: MARINE CORPS COMMENTS ON THE ARTICLE 120 SUBCOMMITTEE  
PROPOSAL

3. The point of contact for this matter is Lieutenant Colonel Angela Wissman USMCR,  
available via email at [angela.wissman@usmc.mil](mailto:angela.wissman@usmc.mil), or phone at (703) 693-9005.

W.N. PIGOTT  
W. N. PIGOTT