

MEMORANDUM

TO: Judicial Proceedings Panel
FROM: Kirt Marsh, Judicial Proceedings Panel Staff Attorney
DATE: January 8, 2016
SUBJECT: Possible Revised “Indecent Conduct” Offense in Article 134

The Article 120 Subcommittee was presented with the issue of whether Indecent Acts should be added as an enumerated, statutory offense to the UCMJ. The Subcommittee answered that question in the negative but made no recommendation as to whether an Art. 134 offense addressing indecent acts should be added to the Manual for Courts-Martial by Executive Order.

The Subcommittee reviewed a draft proposed Executive Order developed by the Joint Service Committee that would establish an Article 134 offense titled “Indecent Conduct.” That draft is presented below as “**Version 1.**” While the Subcommittee made no recommendation regarding the proposal in its report to the JPP, some Subcommittee members expressed concerns about the proposed offense, primarily regarding potential overbreadth and vagueness.

The JPP is not obligated to consider the proposed Article 134 offense, but numerous presenters to the JPP and Subcommittee expressed that reestablishing an Article 134 indecent acts offense would be appropriate and would reach some conduct that cannot be addressed through other enumerated offenses or other specified offenses under Article 134. If the JPP chooses to recommend an alternative to the proposed “Indecent Conduct” offense, the JPP staff has drafted a revised version of the offense that addresses the concerns expressed by Subcommittee members. The staff’s alternative is presented below as “**Version 2,**” along with a narrative description of revisions to the JSC’s proposal.

Version 1 - DoD proposal developed by JSC and published in Federal Register / Vol. 77, No. 205 / Tuesday, October 23, 2012 / Notices, pgs. 64865-64866.

“90. Article 134—(Indecent Conduct)

a. *Text of Statute.* See paragraph 60.

b. *Elements.*

- (1) That the accused engaged in a certain conduct;
- (2) That the conduct was indecent; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

- (1) “Indecent” means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.
- (2) Indecent conduct includes offenses previously prescribed by “Indecent acts with another” except that the presence of another person is no longer required. For purposes of this offense, the words “conduct” and “act” are synonymous. For child offenses, some indecent conduct may be included in the definition of lewd act and preempted by Article 120b(c). See paragraph 60c(5)(a).

d. *Lesser included offense.* See paragraph 3 of this part and Appendix 12A.

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about (date), (wrongfully commit indecent conduct, to wit: _____), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).”

Version 2 - JPP staff's alternative proposal to address Subcommittee concerns about overbreadth and vagueness.

“90. Article 134—(Indecent Conduct)

a. *Text of Statute.* See paragraph 60.

b. *Elements.*

- (1) That the accused engaged in a certain conduct;
- (2) That the conduct was indecent; and
- (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.* Indecent conduct includes offenses previously proscribed by “Indecent acts with another.” However, the physical presence of another person is no longer required, as the offense may be committed through the use of a camera, a computer, or telecommunications technology. Examples of indecent conduct include, but are not limited to, a person publicly engaging in sexual acts with another person or a person publicly engaging in masturbation. For purposes of this offense, the words “conduct” and “act” are synonymous.

(2) *Indecent.* “Indecent” means conduct which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

(3) *Offenses involving children.* For child offenses, some indecent conduct may be included in the definition of “lewd act” and preempted by Article 120b(c). See paragraph 60c(5)(a).

(4) *Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.* To constitute an offense under the UCMJ, indecent conduct must either be directly prejudicial to good order and discipline or service discrediting. Indecent conduct that is directly prejudicial includes conduct that has an obvious and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a servicemember. Indecent conduct may also be service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. Discredit means to injure the reputation of the armed forces and includes indecent conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. Indecent conduct that is private and discreet in nature generally will not be service discrediting by this standard, though under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances when determining whether indecent conduct is prejudicial to good order and discipline or is of a nature to bring discredit upon the armed forces.

d. *Lesser included offense.* See paragraph 3 of this part and Appendix 12A.

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about (date), (wrongfully commit indecent conduct, to wit: _____), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).”

Notes on JPP Staff Draft:

- (1) Changes “prescribed” to “proscribed” in paragraph c.2. JSC version incorrectly uses the word “prescribed.” (“prescribe” definition: *state authoritatively or as a rule that (an action or procedure) should be carried out*; “proscribe” definition: *forbid, especially by law*.”). In this case, the previous Art. 134 Indecent Acts *proscribed* the conduct (i.e., it forbade Indecent Acts). To say it *prescribed* the conduct suggests that the previous Art. 134 offense recommended Indecent Acts.
- (2) Italicizes the word “see” in paragraph c.3 and paragraph d, in accordance with current MCM formatting.
- (3) Adds language to paragraph c.2 modeled on D.C. Code § 22-1312. “Lewd, indecent, or obscene acts.” Detail of how to criminalize transmitting indecent images, colloquially referred to as “sexting,” is unnecessary for the offense. The offense explicitly says it can be accomplished by the use of telecommunications technology, which should be enough guidance; commanders and practitioners can determine what kind of conduct meets the terminal element. A couple privately exchanging images with one another typically would not be prejudicial/discrediting. However a Service member sending indecent images without consent, to third parties, or in other scenarios could prejudice good order and discipline/discredit the service, and might constitute an offense.
- (4) Separates language about offenses involving children into its own paragraph, c.3.
- (5) Creates a new paragraph, c.4, modeled on the explanation section in Art. 134 (Adultery) in the 2012 MCM. The only significant difference from explanation for Adultery is the omission of various factors listed in the MCM to consider in adultery cases. This draft instead relies on the explanation of applying the terminal element of Art. 134 to the offense of indecent conduct.
- (6) Reorders the explanation and included subject headings in each subparagraph, consistent with other Article 134 offenses.
- (7) Slightly revises the definition of “Indecent” in paragraph c.2, which was discussed briefly by some Subcommittee members. Removes the phrase about “sexual impurity,” and revises the definition to parallel the current Art. 134 definition in Indecent Language.