



**DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL OPERATIONS AGENCY (AFLOA)**

1 September 2015

MEMORANDUM FOR: JUDICIAL PROCEEDINGS PANEL SUBCOMMITTEE

FROM: MAJOR MARY ELLEN PAYNE

SUBJECT: Written Commentary Concerning Trainer-trainee Relationships

I am Major Mary Ellen Payne and I have been a member of the United States Air Force Judge Advocate General Corps for the past eight years. I am currently serving as an Appellate Government Counsel. Prior to my current assignment, I served as a Senior Trial Counsel (Prosecutor), an Area Defense Counsel and a base level prosecutor.

The following opinions are my own, and not those of the Air Force JAG Corps, or any other member of the Air Force JAG Corps.

I would like to elaborate on my testimony before the Panel concerning a few of the topics discussed at the Judicial Proceedings Panel's subcommittee meeting on 27 August 2015.

Issue: Whether the current definition of “threatening or placing in fear” should be amended to ensure that coercive sexual relationships or those involving abuse of authority are covered.”

Yes. I believe that the definition should be made more explicit. It is not obvious from the face of the definition that it is meant to encompass situations where a superior is using his/her rank or authority to coerce sexual acts or contacts. Our military panel members are rule followers. For a lot of members it is important for them to receive explicit instructions. Otherwise, defense counsel could certainly successfully argue that since “use of rank” or “abuse of authority” are not expressly included in the definition of “threatening or placing in fear” that the court members cannot find the accused guilty.

I would also recommend that the definition of **consent** be amended to highlight that an individual cannot give consent when they are threatened or coerced through the use or abuses of military position, rank or authority.

I would support a decision to incorporate the language of the 2007 version of Article 120 into the definition of “threatening or placing in fear” – with one caveat. I have concerns about the language about “positively affecting” the military career of some persons. This seems like you would be able to charge a quid pro quo situation as a rape. While undoubtedly inappropriate, I do not believe this is the equivalent of rape or should be criminalized as a sex offense requiring registration. It certainly already is criminalized under other provisions the UCMJ.

I would caution, however, that changing back to the 2007 definition is not a panacea. There is only so much that a change in the law can do to make these type of cases easier to prosecute, so long as the government still has to establish proof beyond a reasonable doubt.

One of our Air Force MTI cases for which I recently served as Appellate Counsel, United States v. Leblanc, included a charge under Article 120 where the Appellant was charged with causing the victim to engage in vaginal intercourse “by placing her in fear of an impact on her military career through use and abuse of Appellant’s military rank, position and authority.” Despite the ability to charge the Appellant in that manner, he was nonetheless acquitted by the military judge who was sitting as the trier of fact. It was a difficult case for the government to prove beyond a reasonable doubt, because the victim testified that the accused never made any explicit or implied statements or threats to her that her career was in jeopardy if she did not have sex with him. Based on my experience, an expansion of the definition of “threatening and placing in fear,” in many cases, will still not help the government overcome the proof beyond a reasonable doubt standard.

Unfortunately, sexual assault is a crime that most often occurs without any other witnesses other than the victim and perpetrator. It comes down to a credibility contest between the victim and accused. Under these circumstances, it is extremely difficult to prove a case beyond a reasonable doubt.

This point provides a good transition to the discussion of whether there should be a strict liability standard for trainer-trainee type relationships.

Issue: Should sexual relationships between basic training instructors and trainees be treated as strict liability offenses under Article 120.

Those of us who have been involved in prosecuting sexual assault for a long time see many cases where the American criminal justice system simply cannot bring justice to the victims of sexual assault. This is very frustrating. Borne out of that frustration, the natural desire becomes to want to take action to make more convictions possible. Implementing a strict liability standard would be one way to accomplish that.

However, I am strongly opposed to a strict liability or *per se* standard for several reasons.

First, to me, it seems overly paternalistic to tell adults that they can *never* consent to sex in a military training environment. I find it counterintuitive to tell adults that they have the self-determination to accept the incredible responsibility of military service, but they do not have the self-determination to make a choice about sex in that military environment. For similar reasons, I also do not find trainer-trainee relationships to be exactly analogous to a parolee/parole officer or prisoner/prison guard dynamic. A trainee can leave basic training. While that certainly may not be an easy or desirable option, it is a quite different circumstance from a situation where an individual cannot leave prison or faces returning to prison.

The basic training environment affects individuals differently. For example, I hate being yelled at and tend to take criticism very personally. On the other hand, other individuals simple

let such things roll off their backs. My knowledge of human nature and ways of the world, and my own experience in the military tells me that many people absolutely have the capacity to consent to sex in a military training environment. A strict liability rule would inevitably sweep up with it individuals who engaged in completely consensual sex. I do not believe that sex with a willing adult partner in a military training environment should be classified a sex crime.

Second, labeling someone a sex offender for having a consensual sexual relationship with an adult is unjust. Having been a defense counsel, I've heard firsthand about how onerous sex offender registration is. It severely restricts one's ability to get a good job, a sex offender often cannot pick up his children from school (even if he offended against an adult), he cannot adopt his step kids. To paraphrase what I've been told, "it makes moving on with your life impossible."

Sex offender registration is undoubtedly a very good and necessary tool for certain perpetrators of sex crimes— but certainly not for sex that would have, in any other circumstance, been fully consensual. The punishment simply does not fit the crime. Ultimately, we are looking to find a balance for how to hold more perpetrators of sexual assault accountable for their crimes, while at the same time protecting and ensuring the rights of the accused. In my mind, being able to label more individuals as sex offenders – even though we could not prove force, coercion or lack of consent - does not outweigh the true danger that we would profoundly affect some individuals' lives for having consensual sex. As one of my colleagues mentioned at the panel meeting, if we cannot prove beyond a reasonable doubt that an individual used his power or authority to coerce someone into a sexual act or contact, we should not be saddling that person with the consequences of sex offender registration.

Third, there are already more appropriate ways to punish trainer-trainee relationships. These relationships are already criminalized by Service regulations and can be prosecuted under Article 92. The result can be jail and discharge from the service. If the JPP is concerned that charging such relationships under Article 92 does not expose a perpetrator to a severe enough maximum punishment, I believe that increasing the maximum punishment for Article 92 offenses would be a more appropriate solution than a strict liability or *per se* criminalization under Article 120. Based on my experience, however, I do not believe that an increase in the maximum punishment for Article 92 would result in panel members or military judges adjudging more confinement in most cases.

Finally, I believe a strict liability or *per se* standard represents such an overcorrection in sexual assault policy, that it risks losing the hearts and minds of military members when it comes to sexual assault. Many of my observations on these matters have been informed by the voir dire process, by the questions court members ask witnesses during trial, and also through post-trial court member feedback. My general sense from my observations is that our military members are currently over-saturated with trainings and briefings on sexual assault and, as often explored in voir dire, are well aware of the pressures being placed on the military by Congress. Some members have expressed in voir dire that they see the numbers put out by the DoD and believe there is an over-exaggeration of the problem or that it has been overly politicized. (Such statements would not always rise to the level where they would sustain a challenge for cause.)

The general sense I get from my own experiences (and from the experiences of some other JAGs I have spoken to), is that rather than changing hearts and minds, the intense focus the military has put on sexual assaults has caused some servicemembers to tune out the message and to become more cynical. People perceive that they are being told how to think, and this makes them dig in and cling even harder to their preexisting opinions and biases, which are often anti-victim or what some term “rape myths.” Many military members also believe that victims of sexual assault receive preferential treatment. These mentalities make sexual assault cases much more difficult to prosecute. As a prosecutor, I found this “backlash” to be one of the most difficult challenges that I faced. Earning and maintaining the trust of court members is essential for a prosecutor during trial. At times, I felt that the political atmosphere surrounding sexual assault made me, as a government representative, less trustworthy in the eyes of some court members.

As a further example, I believe some court members are not receptive to expert testimony on “victim counterintuitive behaviors” because they simply view such testimony as coming from individuals with a political agenda. It is very difficult to “educate” panel members on such subjects if their minds are already closed. In my opinion, military members would consider a strict liability or *per se* standard for trainer-trainee relationships to be an overreaction to the problem, and it will likely perpetuate further cynicism, which I see as an enormous barrier to sexual assault prosecutions. As with everything related to sexual assault, there are no easy answers and a delicate balance must be achieved. A strict liability or *per se* standard would tip the balance too far in the wrong direction.

Thank you for your time and consideration of my submissions. Should the Panel have any questions, my contact information is located in my signature block below.

Very respectfully submitted,

A handwritten signature in black ink that reads "Mary Ellen Payne". The signature is written in a cursive, flowing style.

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