

**JUDICIAL PROCEEDINGS PANEL  
REQUEST FOR INFORMATION SET # 1**

**10. Services: If available, please provide sample specifications illustrating how prosecutors have charged an offense where there was a sexual act or sexual contact that involved constructive force by a trainer against a trainee or a senior against a subordinate:**

**a. According to the pre-2007 version of Article 120?**

<b>USA</b>	<p>See the response to RFI 7.</p> <p>The Army uses sample specifications found in the 2012 MCM and DA PAM 27-9. See <a href="http://www.apd.army.mil/pdffiles/mcm.pdf">http://www.apd.army.mil/pdffiles/mcm.pdf</a> for the MCM and <a href="http://armypubs.army.mil/epubs/pdf/p27_9.pdf">http://armypubs.army.mil/epubs/pdf/p27_9.pdf</a> or <a href="http://www.apd.army.mil/pdffiles/p27_9.pdf">http://www.apd.army.mil/pdffiles/p27_9.pdf</a> for DA PAM 27-9.</p>
<b>USAF</b>	<p>Constructive force as a theory was not alleged specifically under the pre-2007 version of Article 120. However, the following specification illustrates a sexual offense committed by a senior against a subordinate. At the time of the offense, the accused was a Captain (O-3). He was convicted in 2014 for raping a Staff Sergeant under the pre-2007 statute.</p> <p style="padding-left: 40px;">In that LIEUTENANT COLONEL MICHAEL J. D. BRIGGS, United States Air Force, 52d Fighter Wing, Spangdahlem Air Base Germany, did at or near Mountain Home Air Force Base, Idaho, between on or about 1 May 2005 and on or about 30 June 2005, rape Staff Sergeant [A], formerly known as [B].</p>
<b>USN</b>	<p>No responsive documents have been located. The constructive force theory emerged from case law and would be instructed upon from case law or the Military Judge’s Benchbook if the facts supported it.</p>
<b>USMC</b>	<p>A sexual assault involving penetration (sexual intercourse/sodomy) was charged “by force and without consent.” If the theory involved constructive force (senior/subordinate), then counsel requested the instruction on constructive force. This instruction was given in addition to the general elemental instruction, which gave the members the ability to look at both “by force” and “constructive force.”</p> <p>U.S. v. Carroll - Marine sergeant instructor case out of a training command, the Non-Commissioned Officer-In-Charge (NCOIC) specifically ordered his Marine student, a Private First Class (PFC), to engage in sexual intercourse and other sexual acts with him. That case was charged as, “by force and without consent.” The government was granted the constructive force (abuse of military power) instruction.</p> <p>Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that “constructive force” has been applied, thus satisfying the requirement of force. Hence, when the accused’s actions</p>

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	and words (or conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim’s mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.
<b>USCG</b>	None to Report.

**b. According to the 2007-2012 version of Article 120?**

<b>USA</b>	<p>See the response to RFI 7.</p> <p>The Army uses sample specifications found in the 2012 MCM and DA PAM 27-9. See <a href="http://www.apd.army.mil/pdffiles/mcm.pdf">http://www.apd.army.mil/pdffiles/mcm.pdf</a> for the MCM and <a href="http://armypubs.army.mil/epubs/pdf/p27_9.pdf">http://armypubs.army.mil/epubs/pdf/p27_9.pdf</a> or <a href="http://www.apd.army.mil/pdffiles/p27_9.pdf">http://www.apd.army.mil/pdffiles/p27_9.pdf</a> for DA PAM 27-9.</p>
<b>USAF</b>	<p>This example specification is an example of charging a trainer/trainee case under a theory of fear under the 2007-2012 version of Article 120.</p> <p>In that STAFF SERGEANT LUIS A. WALKER, United States Air Force, 326<sup>th</sup> Training Squadron, Lackland Air Force Base, Texas, did, within the continental United States, between on or about 14 February 2011 and on or about 7 March 2011, cause Airman First Class [X] (then known as Trainee [X]) to engage in a sexual act, to wit: penetration of her vagina by the finger or fingers of Staff Sergeant Luis A. Walker, by placing her in fear of an impact on her military career through the use and abuse of Staff Sergeant Luis A. Walker's military rank, position, and authority.</p>
<b>USN</b>	<p>Charge Sheet ICO United States v. Wylie is attached in enclosure (5)</p> <p><b>ENCLOSURE 5:</b></p> <ul style="list-style-type: none"> <li>- U.S. v. Wylie – Charge Sheet</li> <li>- U.S. v. Averell – Results of Trial (Amended Report)</li> <li>- U.S. v. Purington – Sample Charge Sheet</li> <li>- U.S. v. Moss – Sample Specifications</li> </ul>
<b>USMC</b>	<p>U.S. v. Maza: Specification 1: In that Gunnery Sergeant Maza, USMC, on active duty, did, at or near Fort Leonard Wood, Missouri, on or about 21 October 2012, commit sexual acts upon Private First Class K.L., USMC, to wit: oral, vaginal, and anal sex, by placing PFC K.L. in fear that he would use the authority of his rank to negatively affect her Marine Corps career, and that physical resistance would precipitate a greater attack.</p>
<b>USCG</b>	<p>“In that [accused name and jurisdictional data], on active duty, did, on board Coast Guard Training Center Cape May, New Jersey, on [date] cause [victim] to engage in sexual acts, to wit: sexual intercourse, by placing her in fear that if she failed to comply or reported the incident, [accused] would use his military position to negatively influence her career.”</p>

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- c. According to the current version of Article 120? If charged differently, please provide separate draft specifications for cases involving a trainer and trainee and a superior and subordinate.

<b>USA</b>	<p>See the response to RFI 7. In addition attached is a copy of the Result of Trial from a recent trainer/trainee Court-Martial showing how constructive force is charged under the current version of Article 120. See Enclosure 6.</p> <p>The Army uses sample specifications found in the 2012 MCM and DA PAM 27-9. See <a href="http://www.apd.army.mil/pdffiles/mcm.pdf">http://www.apd.army.mil/pdffiles/mcm.pdf</a> for the MCM and <a href="http://armypubs.army.mil/epubs/pdf/p27_9.pdf">http://armypubs.army.mil/epubs/pdf/p27_9.pdf</a> or <a href="http://www.apd.army.mil/pdffiles/p27_9.pdf">http://www.apd.army.mil/pdffiles/p27_9.pdf</a> for DA PAM 27-9.</p> <p><b>ENCLOSURE 6: U.S. v. Sanchez – Result of Trial</b></p>
<b>USAF</b>	<p>Constructive force as a theory has not been alleged specifically under the current version of Article 120. However, the following specification illustrates a sexual offense committed by a senior against a subordinate. In this example the accused, a MSgt (E-7) and Section Chief for a female Senior Airman (E-4), sexually assaulted her while she was incapable of consent due to being asleep.</p> <p style="padding-left: 40px;">In that, MASTER SERGEANT THOMAS J. FRY, United States Air Force, 375<sup>th</sup> Communications Support Squadron, Scott Air Force Base, Illinois, did, at or near Scott Air Force Base, Illinois, on or about 19 October 2013, commit a sexual act upon Senior Airman [R], by causing penetration of Senior Airman [R's] vulva with MASTER SERGEANT THOMAS J. FRY'S penis when Senior Airman [R] was incapable of consenting to the sexual act because she was asleep, a condition that was known or reasonably should have been known by MASTER SERGEANT THOMAS J. FRY.</p>
<b>USN</b>	<p>Copies of responsive documents are attached in enclosure (5)</p> <p><b>ENCLOSURE 5:</b></p> <ul style="list-style-type: none"> <li>- U.S. v. Wylie – Charge Sheet</li> <li>- U.S. v. Averell – Results of Trial (Amended Report)</li> <li>- U.S. v. Purington – Sample Charge Sheet</li> <li>- U.S. v. Moss – Sample Specifications</li> </ul>
<b>USMC</b>	<p>Below is a sample specification using a sexual assault by threat or fear theory, with the threat being NJP.</p> <p style="padding-left: 40px;">A sample specification from a Marine case: “In that Staff Sergeant, U.S. Marine Corps, did, at or near Camp Lejeune, North Carolina, on or about 20 March 2013, commit sexual contact upon Lance Corporal _____, U.S. Marine Corps, to wit: touching her vagina with his hand, by placing the said Lance Corporal _____ in fear that she would receive nonjudicial punishment.”</p>
<b>USCG</b>	<p>None to report.</p>