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11. Services: Other than charging offenses under Article 120, how have offenses been charged in cases of a sexual nature that involved either a trainer or superior who abused their power? Please provide sample specifications illustrating how offenses have been charged according to other punitive articles of the UCMJ. Have the 2007 and 2012 amendments to Article 120 changed how these offenses have been charged?

USA	<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 http://www.apd.army.mil/pdf/epubs/mcm.pdf for the MCM and http://armypubs.army.mil/epubs/pdf/p27_9.pdf or http://www.apd.army.mil/pdf/epubs/p27_9.pdf for DA PAM 27-9.</p>
USAF	<p>Other than using Article 120, these offenses can be charged under Article 92 or Article 93, UCMJ.</p> <p>The following example from JBSA-Randolph illustrates one way to charge a sexual harassment specification. (Importantly, the touching offense listed in this specification was not only charged as sexual harassment, but was also included as a separate Article 120 offense). This specific case occurred outside the training environment.</p> <p style="padding-left: 40px;">In that CHIEF MASTER SERGEANT FREDERICK E. THOMAS I, United States Air Force, Headquarters, Air Force Personnel Center, Joint Base San Antonio-Randolph, Texas did at or near San Antonio, Texas, on divers occasions between on or about 1 August 2012 and on or about 6 February 2013, maltreat Staff Sergeant [X], a person subject to his orders, through sexual harassment, to wit: texting Staff Sergeant [X] on the weekends; making inappropriate comments about pictures of Staff Sergeant [X] posted on Facebook; holding Staff Sergeant [X's] hand and putting his hand on her leg; stating to Staff Sergeant [X], "do you need a hug?", "I'd really like to kiss you, it would be fun.", "It's a good thing there are people down here or I would take you into one of these rooms.", "I'd like to f*** you.", "I would f*** the s*** out of you. I would.", or words to that effect; and wrongfully touching Staff Sergeant [X's] groin, buttocks, and breasts.</p> <p>Article 92 can also be used to capture this conduct as shown below in a specification. As this case has not proceeded to findings, the accused's name, rank, and unit are redacted.</p> <p style="padding-left: 40px;">In that [Accused], United States Air Force, [X] Training Squadron, JBSA-Lackland, Texas, who knew of his duties at or near San Antonio, Texas, between on or about 1 June 2010 and on or about 31 August 2010, was derelict in the performance of those duties in that he willfully failed to refrain from developing and conducting a personal, intimate, and sexual relationship with [B], while she was a trainee, as it was his duty to do.</p>

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	<p>The 2007 and 2012 amendments to Article 120 have not changed how these offenses have been charged.</p>
<p>USN</p>	<p>In addition to specifications under Article 120, UCMJ, sexual acts or contact between trainer or trainee may be charged as a violation of Article 92, UCMJ. Specific regulations charged are listed in the Report on Protections for Prospective Members and New Members of the Armed Forces during Entry-Level Processing and Training cited in response to RFI 8. Improper relationships between senior/subordinates are charged as either an Article 92 violation or an Article 93 violation, Maltreatment, depending on the nature of the charges, evidence available and the conduct involved. In addition, certain conduct between seniors and subordinates can be charged under Article 133, Conduct Unbecoming an Officer. Navy uses sample specifications found in the Manual for Courts-Martial (MCM) and Department of the Army Pamphlet 27-9, Military Judge’s Benchbook. The MCM is found at: http://www.apd.army.mil/pdf/files/mcm.pdf.</p> <p>The Bench book is found at: https://www.jagcnet.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=80086608B92177D285257B48006924A1</p> <p>Specific examples of responsive redacted examples from specific cases are provided as follows:</p> <p>VUCMJ Art. 92 - Specification 1 (Sexual Harassment): In that Chief Culinary Specialist XXXX, U.S. Navy, Naval Submarine Support Command Pearl Harbor, on active duty, did, onboard USS Charlotte (SSN-766), on divers occasions between on or about August 2013 and on or about January 2014, fail to obey a lawful general order, to wit: paragraph 7(a) of SECNAVINST 5300.26D, dated 3 January 2006, by wrongfully sexually harassing LSSN M.J.H., U.S. Navy.</p> <p>VUCMJ Art. 134 - Specification 8 (Fraternization): In that Chief Culinary Specialist XXXXX, U.S. Navy, Naval Submarine Support Command Pearl Harbor, on active duty, did, onboard USS Charlotte (SSN-766) and on or near the Island of Oahu, between on or about August 2013 and on or about January 2014, fail to obey a lawful general order, to wit: OPNAVINST 5370.2c, dated 26 April 2007, by wrongfully engaging in an unduly familiar personal relationship with LSSN M.J.H., U.S. Navy, a member of the same command, that did not respect differences in grade or rank.</p> <p>Specification: In that Machinist’s Mate Chief XXX, United States Navy, USS IWO JIMA (LHD-7), on active duty, did, at or near Naval Station Great Lakes, Great Lakes, Illinois, on or about 5 June 2013, violate a lawful general order, to wit: OPNAVINST 5370.2C dated 26 April 2007, by wrongfully engaging in sexual activity with Fire Controlman Seaman Apprentice XXX, United States Navy, which was unduly familiar and to</p>

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	<p>the prejudice of good order and discipline.</p> <p>Specification: In that Major XXX, U.S. Marine Corps, U.S. Naval Academy, Annapolis, Maryland, on active duty, did, at or near Annapolis, Maryland, from on or about 1 March 2011 to 30 May 2011, fraternize with then-Midshipman XXX, U.S. Navy, and then-Midshipman XXX, U.S. Navy, which act constituted conduct unbecoming an officer and a gentleman</p> <p>Specification: In that Commander XXX, U.S. Navy, Defense Logistics Agency, Fort Belvoir, VA, on active duty, a married man, did, at or near Fort Belvoir, VA, between about 4 October 2012 and 10 October 2012, make sexual advances toward XXX, a woman not his wife, which constituted conduct unbecoming an officer and a gentleman. (Note: What made it unbecoming was that he directly supervised her in addition to the fact that he was married.)</p>
<p>USMC</p>	<p>As discussed previously, the only “constructive force” available is the theory of a threat that requires a bona fide threat on some level. This theory requires evidence of a threat and fear that is both honest and reasonable. Thus, most prosecutors are simply charging the underlying sexual misconduct and utilizing other articles of the UCMJ to address the senior–subordinate relationship and/or abuse of authority/power. Depending on the facts of the case, commanders may also charge service members with violations of Article 93 for maltreatment, Article 92 for sexual harassment or fraternization, or Article 134 for adultery.</p> <p>The following examples provide an illustrative sample of our charging theories in sexual assault cases that involve a senior–subordinate relationship and abuse of power. The actual charge sheets are attached as enclosure (5).</p> <p>a. <u>U.S. v. T.S.</u> (2012): Male Sergeant sexually assaulted three junior male Marines, while they were substantially intoxicated. Charges:</p> <p>Article 92 (x2): Wrongfully providing alcohol to minor in violation of MCO 1700.22F, http://www.marines.mil/Portals/59/Publications/MCO%201700.22F.pdf, of 3 December 2009.</p> <p>Article 92 (x3): Fraternization in violation of US Navy Regulation 1165 of 14 September 1990, http://doni.daps.dla.mil/US%20Navy%20Regulations/Chapter%2011%20-%20General%20Regulations.pdf</p> <p>Article 92: Sexual harassment in violation of MCO 1000.9A of 30 May 2006. http://www.marines.mil/Portals/59/Publications/MCO%201000.9A.pdf</p> <p>Article 120 (x2): Sexual Assault (substantially incapacitated)</p>

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Article 125 (x3): Sodomy.

Article 134: Obstruction of Justice.

b. U.S. v. C.V. (2013): Male Sergeant kissed, fondled, and groped/grabbed three junior female Marines while on Temporary Active Duty in Las Vegas, Nevada. Charges:

Article 128: Assault (attempting to kiss lips).

Article 128: Assault (touching pubic region).

Article 128 (x2): Assault (touching the breast with his mouth, kissing her lips, and touching her buttocks and pelvic region through her clothing with his fingers).

Article 128 (x2): Assault (kissing her lips).

*Note: a third victim declined participation.

c. U.S. v. W.L. (2013): Male sergeant had sexual intercourse with a female E-1, USN. The E-1 was substantially intoxicated. Charges:

Article 92: Fraternalization in violation of US Navy Regulation 1165 of 14 September 1990.

Article 120: Rape.

Article 120: Sexual Assault (substantially incapable). *Note: contingency of proof.

Article 134: Adultery.

d. U.S. v. J.M. (2014): Junior Marine's Staff Non-Commissioned Officer (SNCOIC) and mentor invited her to a hotel room at site of the Marine Corps Ball, along with two junior male Marines. Both the junior male Marines and the victim were intoxicated. Accused observed and encouraged the two the junior male Marines to have sexual intercourse with victim while she was substantially intoxicated. The accused assisted her back to room due to her level of intoxication. Later, he solicited her to engage in the act of prostitution. Charges:

Article 92: Fraternalization in violation of US Navy Regulation 1165 of 14 September 1990.

Article 92: Wrongfully providing alcohol to minor in violation of MCO 1700.22F of 3 December 2009.

Article 120: Indecent Acts.

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Article 134: Solicit Prostitution.

e. U.S. v. M.B. (2014): Recruiter sexually assaulted an 18-year old poolee after he had provided her with alcohol and she became intoxicated. Charges:

Article 92 (x3): Fraternization in violation of US Navy Regulation 1165 of 14 September 1990.

Article 92: Wrongfully consuming alcohol inside Permanent Contact Station Bloomington in violation of MCO 1700.22F of 3 December 2009.

Article 92: Wrongfully providing alcohol to a member of the Delayed Entry Program in violation of Depot Order 1100.4B of 1 September 2004.

Article 92: Wrongfully providing alcohol to a prospective recruit applicant in violation of Depot Order 1100.4B of 1 September 2004.

Article 120 (x4): Sexual Assault.

Article 120 (x2): Abusive Sexual Contact.

Article 134: Adultery.

f. U.S. v. W.H. (2013): Recruiter sexually assaulted a 17-year old poolee repeatedly over an extended period of time, threatened to send nude photos of her (that he took) to her parents if she did not agree to his sexual demands. The accused stalked the victim after the “relationship” ended, and sent nude photos of her to her family and friends. Charges:

Article 92: Wrongfully engaging in a sexual relationship with prospective poolee in violation of Depot Order 1100.4B of 1 September 2004.

Article 120: Rape.

Article 134 (x2): Communicating a Threat.

Article 134 (x3): Child Pornography (produce/distribute).

g. U.S. v. J.D. (2013): Senior Staff Non-Commissioned Officer had sexual intercourse with his junior Marine. While the victim admitted to having an on-going sexual relationship with the accused, she reported that the first occasion was not consensual. Charges:

Article 92 (x6): Fraternization in violation of US Navy Regulation 1165 of 14 September 1990 (4 Victims).

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	<p>Article 120 (x2): Abusive Sexual Contact (touching vagina).</p> <p>Article 134 (x2): Adultery.</p> <p>Article 134 (x3): Obstruction of Justice.</p> <p>h. <u>U.S. v B.A.</u> (2014): Marine Staff Non-Commissioned Officer sexually harassed and assaulted a junior female Marine while on Temporary Active Duty in Las Vegas, NV. Charges:</p> <p>Article 92: Fraternalization in violation of US Navy Regulation 1165 of 14 September 1990.</p> <p>Article 92: Sexual Harassment in violation of Marine Corps Order 1000.9A of 30 May 2006.</p> <p>Article 120: Abusive Sexual Contact (touching bare abdomen).</p> <p>Article 120: Abusive Sexual Contact (hand inner thigh).</p> <p>Article 120: Abusive Sexual Contact (touching vagina with finger).</p> <p>Article 120: Abusive Sexual Contact (kissing cheek).</p> <p>Article 120: Abusive Sexual Contact (placing hands on buttocks).</p> <p>ENCLOSURE (5) Examples of Charging Theories in Sexual Assault Cases that Involve a Senior-Subordinate Relationship and Abuse of Power:</p> <p>a) <i>U.S. v. B.A.</i> – Charge Sheet b) <i>U.S. v. M.B.</i> – Charge Sheet c) <i>U.S. v. M.B.</i> – Charge Sheet, Additional Charges d) <i>U.S. v. W.H.</i> – Charge Sheet e) <i>U.S. v. J.M.</i> – Charge Sheet f) <i>U.S. v. C.V.</i> – Charge Sheet</p>
<p>USCG</p>	<p>Offenses involving a trainer or superior who abused their power have been charged under Articles 92, 93, 125, 133, and 134, UCMJ.</p> <p>Article 92(1): “In that [name of accused][jurisdictional data], did, on board Coast Guard Training Center Cape May, Cape May, New Jersey, from on or about October 2009 until on or about December 2009, violate a lawful general regulation, to wit: paragraph 8.H.2.g., Coast Guard Personnel Manual, COMDTINST M1000.6A, dated 08 January 1998, by wrongfully engaging in a prohibited personal relationship with then Seaman Recruit [victim], USCG, a recruit in his recruit Company, and having sexual intercourse with the same [victim] in a Coast Guard controlled work</p>

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place.”

Article 92(2): “In that [name of accused][jurisdictional data], having knowledge of a lawful order issued by Commanding Officer, Coast Guard Training Center Cape May, to wit: Chapter 2.D, Standard Operating Procedures for Recruit Training, TRACENCMINST 1500.1I, an order which it was his duty to obey, did, at or near Cape May, NJ, on or about May 2012, fail to obey the same by wrongfully dating [victim], then a recent graduate of recruit training.”

Article 92(2): “In that [name of accused][jurisdictional data], having knowledge of a lawful order issued by Commanding Officer, Coast Guard Training Center Petaluma, to wit: paragraphs 7 and 8 of CG TRACENPETINST 1610.1G, dated 29 July 2013, an order which it was her duty to obey, did at or near Petaluma, California, on or about November 2013, fail to obey the same by having wrongful personal communication with her student, then Seaman [victim] on divers occasions and wrongfully having sexual intercourse with then-Seaman [victim] on divers occasions.”

Article 93: “In that [name of accused][jurisdictional data], did, on board Coast Guard Training Center Cape May, Cape May, New Jersey, on divers occasions, from on or about October 2009 until on or about December 2009, maltreat then Seaman Recruit [victim], a person subject to his orders, by wrongfully engaging in sexual acts with [victim].”

Article 125: “In that [name of accused][jurisdictional data], did onboard USCG Training Center Cape May, on or about December 2008, commit sodomy with Seaman Recruit [victim].”

Article 133: “In that [name of accused][jurisdictional data], did, at or near CG Base Miami Beach, Florida, on or about May 2013, kiss [victim] and place her right hand on his penis, which act constitutes conduct unbecoming an officer and a gentleman.”

Article 134: “In that [name of accused][victim], a married woman, did, at or near Petaluma, California, on divers occasions on or about November 2013, wrongfully have sexually intercourse with Seaman [victim], a man not her husband, and that under the circumstances such conduct was to the prejudice of good order and discipline in the armed forces.”

The National Defense Authorization Act for Fiscal Year 2014 eliminated consensual sodomy as an offense under the UCMJ. This may have a negative effect on the ability of the Coast Guard to prosecute senior/subordinate or trainer/trainee relationships. In 2003, the Supreme Court recognized a constitutional liberty interest under the Due Process Clause to engage in consensual, private, adult sexual behavior. *Lawrence v.*

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<p><i>Texas</i>, 539 U.S. 558 (2003). The Court assigned that liberty interest to those adults “with full and mutual consent from each other” and did not extend that interest to cases involving “minors, public conduct, prostitution, persons who might be injured or coerced, and persons who are situated in relationships where consent might not easily be refused.” There are scenarios where an instructor or superior might convince a recruit or subordinate to engage in sexual behavior that is, by the legal definition, consensual but yet falls within the category of situations identified by the Supreme Court as those in which “consent might not easily be refused.” While the victim may say that the act was consensual and that he or she outwardly displayed signs of agreeing to the activity, that conduct, prior to the recent amendment to Article 125, could be charged as sodomy and carried with it the possibility of five years’ confinement. Because Article 125 has been amended to remove consensual sodomy, the services are no longer able to charge conduct that is consensual but yet coercive as a result of the status of the individuals. The Coast Guard did successfully prosecute a drill instructor for engaging in consensual sodomy with a recent graduate of recruit training under this theory in 2009. The member was convicted of the charge at trial, although it was later set aside on appeal due to a deficiency in the providency inquiry.</p>
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