

Article 93a – Prohibited Activities with Military Recruit or Trainee by Person in Position of Special Trust

10 U.S.C. § 893a

1. Summary of Proposal

This proposal would add a new provision, Article 93a, to the UCMJ. Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 93a.

2. Summary of the Current Statute

The proposed statute has not yet been enacted.

3. Historical Background

The existing Article 93 (Cruelty and Maltreatment) prohibits conduct that would be an “abuse of authority” by superior ranking military members toward persons subject to their orders. Under current law, however, a consensual sexual relationship between a subordinate and a superior, without more, does not constitute “maltreatment.”¹

The 2014 National Defense Authorization Act, § 1741 (“Enhanced Protections for Prospective Members and New Members of the Armed Forces During Entry-Level Processing and Training”), directed the DoD to take the following actions:

§ 1741(a): maintain policies defining and proscribing inappropriate and prohibited relationships, communications, conduct, and contact (including consensual interactions) between recruits and trainees and their respective recruiters and trainers;

§ 1741(b): ensure any military member engaging in conduct referenced in 1741 (a) be subject to prosecution.

According to the Report on Protections for Prospective Members and New Members of the Armed Forces During Entry-Level Processing and Training (May 2014), “statutes and regulations are in place to hold offenders appropriately accountable when prospective and new members of the military are victimized by servicemembers who exercise control over them.”²

¹ See, e.g., *United States v. Fuller*, 54 M.J. 107, 110-11 (C.A.A.F. 2000) (holding that E-3’s voluntary sexual acts with her E-5 training cadre did not constitute maltreatment).

² DEP’T OF DEFENSE, REPORT ON PROTECTIONS FOR PROSPECTIVE MEMBERS AND NEW MEMBERS OF THE ARMED FORCES DURING ENTRY-LEVEL PROCESSING AND TRAINING 1, 12-13 (May 2014).

4. Contemporary Practice

Currently, all of the services prohibit by regulation sexual relations between recruiters and recruits, and trainers and trainees.³ Accordingly, prohibited sexual relations can be punished under Article 92 (Failure to Obey Order or Regulation) with confinement for 2 years.

5. Relationship to Federal Civilian Practice

Federal law criminalizes sexual acts between prison guards and prisoners in a federal prison.⁴ A conviction for this offense requires sex offender registration.⁵

Thirty states criminalize sexual relations between teachers and students,⁶ with seven states prohibiting sex even if the student is over the age of 18.⁷ In all 30 states, a conviction for this offense requires sex offender registration.

³ **Air Force:** Air Force Instruction (AFI) 36-2909, *Professional and Unprofessional Relationships* (1 May 1999), para. 2.2; Air Education and Training Command (AETC) Supplement, AFI 36-2909, *Recruiting Education, and Training Standards of Conduct* (2 December 2013), para. 2.3.2, 2.3.3. **Army:** Army Training and Doctrine Command (TRADOC) Regulation 350-6, *Enlisted Initial Entry Training Policies and Administration*, para. 2-6; US Army Recruiting Command (USARC) Regulation 600-25, *Prohibited and Regulated Activities*, Ch. 2; Army Regulation (AR) 600-20, *Army Command Policy*, para. 4-14. **Coast Guard:** COMDTINST. M1600.2 (series) and ALCOAST 417/13 (301909Z SEP 13)) prohibits romantic relationships between instructors and recent graduates of recruit training for a period of one year after graduation. **Marines:** Navy Regulations § 1165 (1990); Marine Corps Recruit Depot (MCRD) Paris Island Depot Order 1100.5B; MCRD San Diego Depot Order 1100.4B; Marine Corps Training Command General Order 01-03; Marine Corps Order 1510.32F. **Navy:** Navy Regulations § 1165 (1990); Chief of Naval Operations Instruction (OPNAVINST) 5370.2C (26 April 2007); Navy Recruit Training Command Instructions (NACRUITRACOMINST) 1600.3 (19 March 2013); NAVCRUITRACOMINST 5370.3 (29 May 2013); Commander, Navy Recruiting Command Instruction (COMNAVCRUITCOM) 5370.1F (12 October 2011); Judge Advocate General Instruction (JAGINST) 5370 (6 December 2010); Commandant of the United States Naval Academy Instruction (COMDTMININST) 5400.6Q.

⁴ 18 U.S.C. §§ 2243 & 2244.

⁵ 42 U.S.C. § 16911(3)(A)(ii); (4)(A)(ii). 18 U.S.C. § 2243 is a Tier II offense (25-year registration); 18 U.S.C. § 2244 is a Tier III offense (15-year registration).

⁶ **Alabama:** AL CODE 13A-6-81; 13A-6-82; **Alaska:** ALASKA STAT. § 11.41.434(a)(3)(B); **Arkansas:** ARK CODE ANN. 5-14-125(a)(6); 5-14-126(a)(1)(C); **California:** WEST'S ANN. CAL. PENAL CODE § 261.5; **Colorado:** COL REV. STAT. 18-3-405.3; **Connecticut:** CT GEN STAT § 53a-71; **Delaware:** 11 DEL. CODE ANN. § 761, 770-773; **Florida:** FL. CODE ANN. § 775.0862; **Illinois:** 720 Ill. Comp. Stat. 5/11-9.2 (2001); **Iowa:** IOWA CODE ANN. § 709.15; **Kansas:** KANS. STAT. ANN. § 21-3520; **Maryland:** MD. CODE § 3-308; **Michigan:** Mich. Comp. Laws Ann. 750.520b; **Minnesota:** Minn. Stat. Ann. 609.344(1); **Maine:** 17-A MAINE REV. STAT. ANN. § 255-A; **Massachusetts:** MASS. GEN. LAWS ANN. § 23A; **Montana:** MONTANA CODE ANN. 45-5-502(5)(a)(iii), (iv); **New Hampshire:** N.H. REV. STAT. § 632-A:3; **New Jersey:** N.J. REV. STAT. § 2C 14-2; **New York:** NY PENAL LAW, § 130.25; **North Carolina:** N.C. GEN. STAT. ANN. § 14-27.7; 14-202.4(a); **Oklahoma:** 21 OKLA. STAT. ANN. § 1111, 1114; **Ohio:** OHIO REV. CODE § 2907.03; 2907.05(A)(1)-(3), (5); 2907.07; **South Carolina:** SC CODE § 16-3-755; **Tennessee:** TENN. CODE ANN. § 39-13-527; **Texas:** TX PENAL CODE § 21.12; **Utah:** U.C.A. § 76-5-413; **Virginia:** VA CODE ANN. § 18.2-64.1, 18-2.370.1; **Vermont:** 13 VT. REV. STAT. ANN. §3252; **Washington:** WASH. REV. CODE § 9A.44.093; § 9A.44.096; **Wisconsin:** W.S.A. 948.095(b).

6. Recommendation and Justification

Recommendation 93a: Enact new Article 93a.

This proposal provides enhanced accountability for sexual misconduct committed by recruiters and trainers in the recruiting and basic military training environments.

7. Relationship to Objectives and Related Provisions

This proposal supports the GC Terms of Reference and MJRG Operational Guidance by enacting a unique punitive article that promotes the military's interest in ensuring a qualified, effective armed force.

The Judicial Proceedings Panel decided to study whether Article 120 should provide for a strict liability offense (which necessarily would qualify as a sex offender registration offense) or whether non-Art. 120 offenses would be appropriate for this misconduct, and if so, whether they should be sex offender registration offenses.⁸

8. Legislative Proposal

SEC. 1010. PROHIBITED ACTIVITIES WITH MILITARY RECRUIT OR TRAINEE BY PERSON IN POSITION OF SPECIAL TRUST.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 893 (article 93 of the Uniform Code of Military Justice), the following new section (article):

“§893a. Art. 93a. Prohibited activities with military recruit or trainee by person in position of special trust

“(a) ABUSE OF TRAINING LEADERSHIP POSITION.—Any person subject to this chapter—

⁷ Those seven states include *Alabama* (19 years old); *Arkansas* (21 years old); *Connecticut* (high school students); *Michigan* (high school students over 18 years old); *North Carolina*; *Washington* (students over 18, but teacher must be at least 5 years older); *Utah* (persons under the age of 21 receiving state services).

⁸ JUDICIAL PROCEEDINGS PANEL—INITIAL REPORT 15, 37-43 (February 4, 2015), (“[T]he 2012 version of Article 120 does not sufficiently criminalize sexual relationships between senior and subordinates when force or the threat of force is not overt.”).

“(1) who is an officer, a noncommissioned officer, or a petty officer;

“(2) who is in a training leadership position with respect to a specially protected junior member of the armed forces; and

“(3) who engages in prohibited sexual activity with such specially protected junior member of the armed forces;

shall be punished as a court-martial may direct.

“(b) ABUSE OF POSITION AS MILITARY RECRUITER.—Any person subject to this chapter—

“(1) who is a military recruiter and engages in prohibited sexual activity with an applicant for military service; or

“(2) who is a military recruiter and engages in prohibited sexual activity with a specially protected junior member of the armed forces who is enlisted under a delayed entry program;

shall be punished as a court-martial may direct.

“(c) CONSENT.—Consent is not a defense for any conduct at issue in a prosecution under this section (article).

“(d) DEFINITIONS.—In this section (article):

“(1) SPECIALLY PROTECTED JUNIOR MEMBER OF THE ARMED FORCES.—The term ‘specially protected junior member of the armed forces’ means—

“(A) a member of the armed forces who is assigned to, or is awaiting assignment to, basic training or other initial active duty for training, including a member who is enlisted under a delayed entry program;

“(B) a member of the armed forces who is a cadet, a midshipman, an officer candidate, or a student in any other officer qualification program; and

“(C) a member of the armed forces in any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

“(2) TRAINING LEADERSHIP POSITION.—The term ‘training leadership position’ means, with respect to a specially protected junior member of the armed forces, any of the following:

“(A) Any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officers’ training corps unit, a training program for entry into the armed forces, or any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

“(B) Faculty and staff of the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the United States Coast Guard Academy.

“(3) APPLICANT FOR MILITARY SERVICE.—The term ‘applicant for military service’ means a person who, under regulations prescribed by the Secretary concerned, is an applicant for original enlistment or appointment in the armed forces.

“(4) PROHIBITED SEXUAL ACTIVITY.—The term ‘prohibited sexual activity’ means, as specified in regulations prescribed by the Secretary concerned, inappropriate physical intimacy under circumstances described in such regulations.”.

9. Sectional Analysis

Section 1010 would create a new section, Article 93a (Prohibited activities with military recruit or trainee by person in position of special trust). The new section would provide enhanced accountability for sexual misconduct committed by recruiters and trainers during the various phases within the recruiting and basic military training environments. The term “officer” as used in subsection (a)(1) of this statute would have the same meaning ascribed to it as in 10 U.S.C. § 101(b)(1). The term “applicant for military service” would include persons in the process of applying for an original enlistment or appointment in the armed services as defined in applicable service regulations. The primary focus of the new statute is on recruiting and initial entry training. Because of the unique nature of military training and the different training environments among the services, the statute would authorize the Service Secretaries to publish regulations designating the types of physical intimacy that would constitute a “prohibited sexual activity” under subsections (a) and (b) of the new statute.

Article 93a would cover military recruiters and trainers who knowingly engage in prohibited sexual activity with prospective recruits or junior members of the armed forces in initial training environments. Consent would not be a defense to this offense.

Article 93a is intended to address specific conduct and is not intended to supersede or preempt service regulations governing professional conduct by staff involved in recruiting, entry level training, or other follow on training programs. The Secretary concerned could prescribe by regulation any additional initial career qualification training programs related to servicemembers they determine should fall under this statute. Implementing rules will address appropriate maximum punishments for the new offense.

