

Article 120 – Rape and Sexual Assault Generally

10 U.S.C. § 920

1. Summary of Proposal

This proposal would conform the definition of “sexual act” in Article 120(g)(1) to the definition of “sexual act” in the comparable Title 18 provision, 18 U.S.C. § 2246(2). Part II of the Report will address changes in the Manual for Courts-Martial provisions necessitated by this statutory amendment.

Any changes in addition to the definition of "sexual act" should await further recommendations of the Judicial Proceedings Panel. The Judicial Proceedings Panel is conducting an extensive examination of whether further changes to Article 120 are warranted and recommended the Secretary of Defense establish a subcommittee of experts for that purpose.¹ The Judicial Proceedings Panel is also examining whether the definitions of rape and sexual assault should be amended to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.² Part II of the Report will address changes in the Manual provisions necessitated by this statutory amendment.

2. Summary of the Current Statute

Article 120 prohibits rape, sexual assault, aggravated sexual contact, and abusive sexual contact on another person.

Article 120(g)(1)(B) defines “sexual act”, in pertinent part, as “(b) penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

3. Historical Background

Until 1916, courts-martial exercised jurisdiction over “rape” only when the rape occurred in wartime or under the General Article (*i.e.* “conduct prejudicial to good order and discipline”).³ In 1916, Congress amended the Articles of War to provide jurisdiction over

¹ JUDICIAL PROCEEDINGS PANEL INITIAL REPORT 14-15 (February 4, 2015) [hereinafter JPP INITIAL REPORT].

² NDAA FY 2014, Pub. L. No. 113-66, 127, Div. A, Title XVII, Subtitle D, § 1731(b)(1)(A), 127 Stat. 672, 974 (2013).

³ See WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 666-67, 670-71 (1920 photo reprint) (2d ed. 1896). Under the Articles of War, outside of wartime, prosecution of “common law” offenses like murder was permissible only under the “general article” dependent upon a showing that the underlying common law

murder and rape anytime the offense occurred outside of the territorial boundaries of the United States.⁴ In the UCMJ as enacted in 1950,⁵ Congress provided for worldwide applicability of all offenses under the Code.⁶ The current Article 120 applies anywhere, anytime, and was derived from Article 92 of the 1948 Articles of War and Article 22 of the 1930 Articles for the Government of the Navy.⁷ The statute was amended in 1992⁸, in 1996,⁹ in 2006,¹⁰ in 2011,¹¹ and in 2013.¹²

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishments for the offense of “Rape and Sexual Assault Generally” under Article 120: for rape, dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole; for sexual assault, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years; for aggravated sexual contact, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years; and for abusive sexual contact, dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.¹³

5. Relationship to Federal Civilian Practice

18 U.S.C. § 2241 (Aggravated sexual abuse) and § 2441 (War crimes) set forth similar offenses to Article 120.

crime was prejudicial to good order and discipline under the circumstances. *Id.* at 671 (discussing Articles 58 and 62 (the General Article) of the 1874 Articles of War).

⁴ AW 92 of 1916.

⁵ Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 108 (1950).

⁶ Article 5 of the UCMJ provides: “This chapter applies in all places.”

⁷ *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1226-27 (1949).

⁸ NDAA FY 1993, Pub. L. No. 102-484, Div. A, Title X, § 1066(c), 106 Stat. 2315, 2506 (1992).

⁹ NDAA FY 1996, Pub. L. No. 104-106, Div. A, Title XI, § 1113, 110 Stat. 186, 462 (1996).

¹⁰ NDAA FY 2006, Pub. L. No. 109-163, Div. A, Title V, § 552(a)(1), 119 Stat. 3136, 3257-63 (2006).

¹¹ NDAA FY 2012 Pub. L. No. 112-81, Div. A, Title V, § 541(a), 125 Stat. 1298, 1404-10 (2011).

¹² NDAA FY 2013, Pub. L. No. 112-239, Div. A, Title X, § 1076(f)(9), 126 Stat. 1632, 1952 (2013).

¹³ Exec. Order 13643 of May 15, 2013. The current version of the MCM (2012) does not yet contain the President’s maximum punishment designations for Article 120.

The current definition of “sexual act” in Article 120(g)(1)(B) includes non-sexual acts. Specifically, the definition extends to “the penetration, however slight of the vulva or anus or mouth of another *by any part of the body or by any object.*”¹⁴

18 U.S.C. § 2246(2), the comparable provision in Title 18, defines the term “sexual act” in a similar context to mean “the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse, or gratify the sexual desire of any person.”

6. Recommendation and Justification

Recommendation 120: Amend the definition of “sexual act” in Article 120(g)(1) to conform it to 18 U.S.C. § 2246(2)(c).

As there are no military specific reasons for having a unique military definition for “sexual act,” this report conforms Article 120 to its civilian counterpart.¹⁵

7. Relationship to Objectives and Related Provisions

This proposal is consistent with MJRG Terms of Reference to employ the standards and procedures applicable to federal criminal law in the civilian sector insofar as practicable in military criminal practice.

Any changes in addition to amending the definition of “sexual act” should await further recommendations of the Judicial Proceedings Panel, which is conducting an extensive examination of whether further changes to Article 120 are warranted, and has recommended the Secretary of Defense establish a subcommittee of experts for that purpose.¹⁶

The Judicial Proceedings Panel is also examining whether the definitions of rape and sexual assault should be amended to expressly cover a situation in which a person subject to the UCMJ commits a sexual act by abusing their position in the chain of command to gain access to or coerce the other person.¹⁷ This Report proposes a new statute, Article 93a, to prohibit improper acts with recruits and trainees, addressing a specific category of abuse of position in the chain of command.

¹⁴ Article 120(g)(1)(B) (emphasis added).

¹⁵ The Judicial Proceedings Panel, a Federal Advisory Committee established by Congress (see NDAA FY 2014, Pub. L. No. 113–66, 127, Div. A, Title XVII, Subtitle D, § 1731(b)(1)(A), 127 Stat. 672, 974 (2013)) is conducting an extensive examination of whether further changes to Article 120 are warranted, and has recommended the Secretary of Defense establish a subcommittee of experts for that purpose. JPP INITIAL REPORT at 14-15. In that context, this report recommends no further amendments to Article 120, beyond the conforming changes recommended herein.

¹⁶ JPP INITIAL REPORT at 14-15.

¹⁷ *Id.* at 15, 37-42.

8. Legislative Proposal

SEC. 1030. DEFINITION OF SEXUAL ACT FOR RAPE AND SEXUAL ASSAULT OFFENSES.

(a) RAPE AND SEXUAL ASSAULT GENERALLY.—Paragraph (1) of section 920(g) of title 10, United States Code (article 120(g) of the Uniform Code of Military Justice), is amended to read as follows:

“(1) SEXUAL ACT.—The term ‘sexual act’ means—

“(A) contact between the penis and the vulva or the penis and the anus, and for purpose of this subparagraph contact involving the penis occurs upon penetration, however slight;

“(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

“(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”.

(b) [Omitted. *See* Article 120b.]

9. Sectional Analysis

Section 1030 would amend the definition of “sexual act” in both Article 120 (Rape and sexual assault generally) and Article 120b (Rape and sexual assault of a child) to conform to the definition of that term in 18 U.S.C. § 2246(2)(A)-(C). The current definition of “sexual act” under Articles 120 and 120b is both overly broad (it captures non-sexual acts) and unduly narrow (it does not include all of the prohibited acts involving children listed in 18 U.S.C. § 2246(2)(D)).