

Trexler, Dale L CIV OSD OGC (US)

From: JACKSON, GARY M Col USAF AFGSC AFGSC/JA <[REDACTED]>
Sent: Monday, August 11, 2014 6:53 PM
To: Mcgovern, Kelly L LTC USARMY HQDA OTJAG (US); Trexler, Dale L CIV OSD OGC (US)
Subject: FW: Judicial Proceedings Panel
Signed By: [REDACTED]

All--fyi...I received an out of office message from Kyle (Green).

Regards

gmj

Colonel Gary M. Jackson

Staff Judge Advocate, Air Force Global Strike Command

245 Davis Avenue East, Suite 121

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Comm# [REDACTED]

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-----Original Message-----

From: JACKSON, GARY M Col USAF AFGSC AFGSC/JA
Sent: Monday, August 11, 2014 5:49 PM
To: 'Mcgrory, Kristin B CIV (US)'; GREEN, KYLE W Lt Col USAF HAF U S AIR FORCE HQ/JAA
Subject: RE: Judicial Proceedings Panel

Guys--Having given thought (I thought I was going to be testifying solely about the evolution of Article 120 and not asked to make recommendations) to potential reforms that could be made to make Article 120 more effective, please find the below recommendations:

(1) Redefine the phrase "threatening or placing that other person in fear," found under the definition section of Article 120(a), from an objective standard of reasonableness to a subjective standard of actual/honest fear. Currently to constitute a threat that would support a rape or sexual assault committed by a threat or placement of an alleged victim in fear, the alleged victim's fear must be both honest (subjective) and reasonable (objective). See MCM paragraph 45.a(g)(7). 18 USC 2241 and 18 USC 2242, statutes upon which our current rape and sexual assault laws are based, only require the alleged victim's fear be actual/honest not reasonable. See 18 USC 2241 (a)(2) and 18 USC 2242(1). We simply give the military accused more rights to which he is entitled on this issue and place an additional burden on the alleged victim and the prosecution. Redefining the definition of the phrase under Article 120 to align with 18 USC 2241 and 18 USC 2242 would place the military accused and alleged rape/sexual assault victims of the military accused on the

same standing with the civilian accused and alleged rape/sexual assault victims of the civilian accused and should make it easier to prosecute such cases. Note: Some states like Texas and New York only require actual fear by the alleged victim whereas other states like California and Illinois require reasonable fear of the victim;

(2) Modify Article 120(b)(2) and Article 120(b)(3) by eliminating the requirement that the Accused must know or reasonably should know the alleged victim was asleep, unconscious, unaware that the sexual act was occurring or otherwise incapable of consenting to the sexual act due to alcohol/drug impairment or a mental/physical defect. 18 USC 2242, the law upon which Article 120(b)(2) and Article 120(b)(3) are based, does not have this extra mens rea requirement. This extra mens rea requirement in Article 120(b)(2) and Article 120(b)(3) give the military accused more rights to which he is entitled on this issue and place an additional burden on the alleged victim and the prosecution; and

(3) Modify Article 120 by re-adding the affirmative defense of mistake of fact as to consent on rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. The second iteration of Article 120 (effective 1 October 2007 - 27 June 2012) specifically stated that mistake of fact as to consent was an affirmative defense to rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. However the new iteration of Article 120 (effective 29 June 2012 - presently) does not contain such language. The absence of this language may erroneously lead practitioners to believe that such an affirmative defense does not exist. It is only by reference to RCM 916(j)(3) does one realizes such an affirmative defense exists. To prevent practitioners from making a mistake in this area it is prudent to re-add the affirmative defense language back to the statute (Article 120). Moreover, by re-adding the affirmative defense back to the statute (Article 120) it would better ensure the military Accused has this important defense. It is easier to eliminate this defense as it exists in the RCMs; however it would be much more difficult to eliminate this defense if it exists in the statute (Article 120). Some thoughts...

Regards

gmj

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