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Analysis of Crimes and Defenses 2012 UCMJ Article 120, effective 28 June 2012

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The newest (2012) UCMJ Article 120 – Adult Sex Crimes

Congress defines military sexual crimes in Article 120 of the Uniform Code of Military Justice (UCMJ). 10 U.S.C.S. § 920 et.seq. For decades, the sole codified adult sexual offense was Rape by force and without consent. In 2007, Congress completely revamped and expanded the scope of Article 120.

One major goal of the 2007 amendment was to shift the focus from the victim to the offender by removing the element of lack of consent. The new Article 120 successfully criminalized a broader range of offensive sexual activity, but was not otherwise a rousing success. The Hon. John Maksym, judge of the Navy-Marine Corps Court of Appeal, described the statute as a "poorly written, confusing and arguably absurdly structured and articulated act of Congress." *United States v. Medina*, 68 M.J. 587, 595 (N-M.C.C.A. 2009). Congress' inclusion of defenses of consent and mistake of fact as to consent in the revised law created an unconstitutional conflict in the law, and also returned the victim to the center of many prosecutions.

In 2011, Congress recognized that the flawed 2007 Article 120 was not working well, and drafted a replacement, which takes effect on 28 June 2012. The newest version of military sexual crimes more successfully shifts the focus to the offender, but is not without its problems. This article explores the changes effected by the new, new Article 120.

I. Elements of Rape and Sexual Assault

A. 2012 Article 120(a): Rape

A person who commits a Sexual Act upon another is guilty of Rape if the person does so in one of five ways.

1. 2012 Article 120(a)(1): Force. The 2012 law completely rewrote the definition of force to remove its victim-centric language, focusing instead on the acts of the offender. 2007 Article 120 defined force as "action to compel submission of another or to overcome or prevent another's resistance" by use or suggestion of a dangerous weapon, or by "physical violence, strength, power or restraint . . . *sufficient that the other person could not avoid or escape the sexual conduct.*" This phrasing required the victim to resist the assault, an antiquated concept in rape law. No other assaultive statute requires the victim of the crime to resist the assault. The 2012 law repudiates the victim-centric language to look at offender behavior from an objective viewpoint. Force now means "(A) use of a weapon; (B) the use of such physical strength or violence *sufficient to overcome, restrain, or injure a person*; or (C) inflicting physical harm *sufficient to coerce or compel submission by the victim.*" 2012 Art. 120(g)(5).

The linguistic differences in the new law are subtle but profound. No longer are all forms of force predicated on overcoming or preventing resistance. In subsection (A), committing a sexual act by using any weapon (an undefined term) is criminal. In subsection (B) the offender's use of physical strength or violence is measured by an objective ("reasonable person") standard, looking to see if the action is "sufficient" to overcome, or restrain, or injure "a person." The fact-finder determines if the offender's acts would have overcome an ordinary person under the circumstances, rather than the particular victim in the case. Subsection (C) does look at the particular victim in the case, but does not place the burden of resistance on that person. Rather, this section anticipates the "vulnerable victim," including a person in a subordinate position or with a disability that makes him/her more easily coerced than the average person. The use of "coerce" fully foresees pressures caused by rank or greatly superior physical strength.

In addition to shifting the focus to the offender, the 2012 law also requires that force be "unlawful." "Unlawful" means "without legal justification or excuse." 2012 Art. 120 (g)(6). Unfortunately, no definitions accompany this change, and legal disputes about its meaning are sure to arise. "Without legal justification or excuse" appears as an element in several UCMJ assaultive crimes, including Murder, but without further explanation. "Legal justification" standing alone means "done in the performance of a lawful duty." R.C.M. 916(c). "Legal excuse," however, is not defined in either the Manual for Courts-Martial or in military case law. Logically, the phrase may be limited to defenses such as duress or mental disease or defect, which do not justify a crime, but excuse its commission. A reasonable argument also can be made, however, that evidence the victim consented is a "legal excuse" for the use of some levels of force. (A person

cannot consent to force likely to cause grievous bodily harm. 2012 Art. 120(g)(8)(B).) Furthermore, “without legal excuse” has been held to be unconstitutionally vague in the absence of a statutory definition. *Thornhill v. Alabama*, 310 U.S. 88, 100 (1940). The full meaning of “unlawful force” is sure to be a source of litigation, albeit litigation that could be reduced by the President. A unique feature of military law is the power of the President to define phrases and elements in the UCMJ by Executive Order. A definition of “unlawful” and “legal excuse” would be helpful additions. No Executive Order is expected, however, before 2013.

2. 2012 Article 120(a)(2): The second method of committing Rape was also amended. The 2007 version of Rape proscribes a Sexual Act by “causing” grievous bodily harm. 2012 Article 120 expands this to include using force causing “*or likely to cause*” grievous bodily harm, which is self-explanatory.

3-5. 2012 Article 120(a)(3), (4), (5): The remaining three ways to commit rape, threatening grievous bodily harm, rendering the victim unconscious, and administering a drug, are unchanged. None has been controversial or difficult to apply in current law.

-- “Sexual Act”

Commission of a Sexual Act is the primary element of both **Rape** and **Sexual Assault** [2012 Art. 120(a) and (b)]. In prior law, a Sexual Act was limited to penetration of either the vulva or the “genital opening.” “Sexual Act” in 2012 Article 120 expands the definition to include penetration of “the vulva *or anus or mouth*,” in one of two ways: (1) if a penis is involved, no specific intent is necessary. If the Sexual Act involves penetration by “any [other] part of the body or by any object” it must be done with the specific intent “to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.” These changes both make the statute gender neutral. The changes also greatly expand the forms of sexual activity which can be criminal, because Article 120 now includes penetration of additional bodily openings, by any part of the body, rather than limiting the penetration to “hand or finger” as in 2007 Article 120. The meaning of the changes is facially apparent, and unlikely to be controversial.

B. 2012 Article 120(b): Sexual Assault

Sexual Assault is called “Aggravated Sexual Assault” in 2007 Article 120, but was not aggravated from any lesser crime. 2012 Article 120 eliminated the superfluous word. A

Sexual Act is an element of all six ways to commit Sexual Assault. 2012 Article 120(b)(1) contains four of the six ways to commit Sexual Assault, two of which are textually identical to current law.

1. 2012 Article 120(b)(1)(A) The first retained element is "threatening or placing that other person in fear." The definition of this element has changed, but only to make the type of threat all-inclusive. The statute penalizes a Sexual Act committed by "a communication or action that is *of sufficient consequence to cause a reasonable fear*" that the threat may be carried out. The italicized language, retained from prior law, is an objective standard for measuring the threat. The government need not prove that this victim was placed in fear, but that the acts of the offender were "sufficient to cause a reasonable fear" in the average person. This perspective reflects Congressional intent to focus the proof of sexual crimes on the acts of the offender rather than the reactions of the victim.

(B) The second way a Sexual Act constitutes Sexual Assault is by "causing bodily harm" to the victim. "Bodily harm" means "any offensive touching, however slight." For reasons that are unclear, however, Congress reintroduced consent into "bodily harm" cases, when it integrated an example into the definition. Because "bodily harm" is defined in 2012 Article 120 as "any offensive touching . . . including any non-consensual sexual act or nonconsensual sexual contact," a charging document that charges Sexual Assault by causing bodily harm incorporates this phrase into the criminal charge. This language requires the government to prove beyond a reasonable doubt that the victim did not consent to the touching. This section creates a crime which is effectively a force/consent statute. In some situations, despite the apparent step backward, proof of these two simple elements is easier than proof of a more complex statute. This section also allows for a situation where the sexual activity began consensually, but in which consent was withdrawn for any number of reasons. Because the "consent" phrase is an example only, however, the government can choose to "charge out" the consent language by describing the particular offensive touching. When the specification charges a specific offensive touching, the required proof is an inquiry into whether the acts of the offender are objectively sufficient to be an offensive touching.

Two new crimes were added to 2012 Article 120(b)(1). The first of these could be called "the doctor's Sexual Assault" ("making a fraudulent representation that the sexual act serves a professional purpose.") The second is "the twins crime" (inducing a belief . . .

that the person is another person.") Both are self-explanatory, and are likely to be charged rarely.

-- Impaired victim Sexual Assaults

A majority of military sexual assault charges arise from incidents involving non-strangers, the use of alcohol or drugs, and sexual activity. In many of these cases, the victim is impaired by the ingestion of alcohol or drugs. The degree of that impairment is a frequent area of dispute during trial. 2007 Article 120 made a Sexual Act illegal if the victim was "substantially incapacitated" or "substantially incapable" of appraising the nature of the sexual act, declining participation in the sexual act, or communicating unwillingness to engage in the sexual act. "Substantially incapacitated" proved to be difficult to define with any clarity. The cases were notoriously hard to prove beyond a reasonable doubt. The statute focused jury panels on the mental state of the victim, with little inquiry into the knowledge of the accused.

In 2012 Article 120, Congress tried to shift that balance by focusing on what the offender "knew or reasonably should have known." The new language is generally more clear – "substantially" is nowhere to be found – but the government arguably has a greater burden of proof because the new law specifies the victim state of consciousness more clearly.

2. 2012 Article 120(b)(2) criminalizes commission of a sexual act upon another when the offender "knows or reasonably should know that the other person is asleep, unconscious, or *otherwise unaware* that the sexual act is occurring." This section actually contains six ways of committing sexual assault: it contains two types of offender knowledge by three victim states of consciousness. Whether a person "knows," whether a person is "asleep," or whether a person is "unconscious" all are straightforward questions of objective proof. They are all-or-nothing facts for the jury to determine. "Otherwise unaware," however, is unfortunately vague. It encompasses so many possibilities as to defy generalization and ultimately will be fact-specific.

"Reasonably should know" (and its similar grammatical variant "reasonably should be known" in subsection (3)) presents a novel approach to serious crime: it requires only a negligence *mens rea*. One can question the "fairness" of such a rule, but constitutional challenges to the standard are unlikely to be successful, as Congress has the *power* to define crimes as it sees fit. "Reasonably should" know is a pure objective question: would a reasonable person in the position of the accused have known the victim was

asleep, unconscious, or otherwise unaware? Section (b)(2) is a powerful prosecutorial tool that should, in theory, improve the chances of conviction in this common factual situation.

3. 2012 Article 120(b)(3) addresses the conscious but highly impaired victim and the mentally ill victim. There is no statutory way to make proof of these cases easier, and some ambiguity is inherent in factual situations like these. Under this section, the government must prove that the victim was (1) "incapable of consenting to the sexual act;" (2) either due to "impairment" by some intoxicant, or due to mental disease or defect, and (3) that the offender knew or reasonably should have known of the condition. Permitting a charge that the offender "should have known" the victim was too impaired to be capable of consenting may be easier to explain to fact-finders than a requirement of proving "substantial incapacity."

C. 2012 Article 120(c) Aggravated Sexual Contacts

The elements of Aggravated Sexual Contact are identical to those of Rape, but the offense requires Sexual Contact rather than Sexual Act.

D. 2012 Article 120(d) Abusive Sexual Contact

The elements of Abusive Sexual Contact are identical to those of Sexual Assault, but the offense requires Sexual Contact rather than Sexual Act.

This arrangement is the same as current law, but the definition of Sexual Contact is expanded in 2012 Article 120.

-- "Sexual Contact"

The two ways to commit Sexual Contact in 2012 Article 120 are similar to current law, but expand the range of criminality in two ways. The first Sexual Contact definition punishes "touching, *or causing another person to touch*, directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate or degrade any person." The italics denote new language, reflecting the reality that causing a victim to engage in sexual contact is as blameworthy as when the offender does the touching.

The second definition of Sexual Contact criminalizes thought as much as action, and is conceptually new. Sexual Contact means "any touching, or causing another person to touch, either directly or through the clothing, of *any body part of any person*, if done with

an intent to arouse or gratify the sexual desire of any person." Although the specific intent element probably satisfies constitutional notice, the range of behavior encompassed by this definition is breathtaking.

DEFENSES : They are gone!

Although Congress eliminated consent as an element of sexual crimes in 2007, it created a mess by adding defenses of consent and mistake of fact as to consent to Article 120. The double burden-shift arrangement – requiring the accused to prove the defense by a preponderance of evidence, after which the government had to disprove the defense beyond a reasonable doubt – was declared a "legal impossibility" in *United States v. Prather*, 69 M.J. 338, 344-45 (C.A.A.F. 2011). *Prather* also held that requiring the accused to prove consent in a "substantially incapable" case was unconstitutional.

Fortunately, the Army Trial Judiciary predicted the *Prather* issue, and had been ignoring the statutory language since 2007 Article 120 took effect. The Military Judges Benchbook pattern jury instructions require the government to disprove properly raised defenses of consent or mistake of fact as to consent. These instructions, which consciously favored the accused, saved most military convictions from reversal, but it will never be known how many cases were lost due to the added burden on the government.

2012 Article 120 removed all defenses specific to the statute, allowing "any applicable defenses" available under the UCMJ. Because there is no general defense of consent, it is no longer a defense to sexual crimes. Mistake of Fact (MOF), however, is a recognized defense. Rule for Court Martial 916(j). Key changes to 2012 Article 120 have removed MOF as a defense to most charges under the statute.

CAVEAT: The military has a long history of permitting the accused to argue mistake of fact for any crime, and especially for sexual crimes. Upcoming pattern jury instructions may expand the defense beyond the statutory text. The following analysis looks at the words of the statute without historical expectations.

Two initial principles are essential to analysis of MOF under R.C.M. 916(j). First, this defense applies only to *elements of the crime*. Where the defense is applicable, the mistake must be such that the accused would "not be guilty" of the offense charged, by negating proof of an element.

Second, MOF is not a *defense* if the evidence of mistake only contradicts facts proven by the government. In that case, it is not a mistake at all, but merely an assertion of an alternative interpretation of facts.

Mistake of fact is a defense only if the statutory term or element is externally-referent, because only then can an accused be mistaken about some other person's belief. "Externally-referent" means that an action or belief of someone other than the accused is an element of proof. If the provision is internally-referent – referring only to the actions or beliefs of the accused – the accused cannot legally claim he was mistaken about his own mental state or action. Only elements that directly invoke beliefs of "the victim" will be susceptible to a MOF defense. These include Rape by force … "by inflicting physical harm sufficient to coerce or compel submission by *the victim*," Art. 120(g)(5)(C); Rape . . . by administering a drug "without the *knowledge or consent of that person*," Art. 120(a)(5); and Sexual Assault by "*inducing a belief*" by artifice. Art. 120(b)(1)(D).

Sections that look like they invoke MOF, but do not, include the threatening sections. Although the element is "threatening or placing that other person in fear," the phrase is defined as an objective standard, "action that *is of sufficient consequence to cause a reasonable fear."* This focuses on the actions of the accused, not the effect on the victim. *United States v. Neal*, 68 M.J. 289, 304 (C.A.A.F. 2010). A contrary argument could be based on *United States v. Goodman,* 70 M.J. 396, 399 (C.A.A.F. 2011), but the statute in *Goodman* did not contain the "sufficient to" language of 2012 Article 120.

Two other special cases arise under 2012 Article 120(b), Sexual Assault. First, Sexual Assault by "causing [unspecified] bodily harm," would allow the MOF defense, due to the phrase "including any non-consensual sexual act," which directly invokes consent. Clever trial counsel, however, can charge the defense away if they specify particular bodily harm, eliminating the "including" phrase.

Second, Article 120(b)(2) and (b)(3) use the phrase "knows or reasonably should know" of a disabled condition of the victim. This phrase, however, is purely objective. The accused can claim that he did not know, and he is merely contradicting government evidence of his actual knowledge. A claim that that the accused reasonably should not have known is not a mistake; it is evidence that a reasonable person would not have known of the victim's condition.

It is important to remember, however, that even when evidence of consent or mistake is not a viable defense, it is still admissible. Such evidence can be relevant to whether the

government has proven an element such as force or bodily injury. *U.S. v. Neal,* supra, at 303. If the evidence does not constitute a *defense*, however, the Military Judge should not give an instruction singling out that evidence to be proven beyond a reasonable doubt.

The newest version of UCMJ Article 120 takes a significant step towards focusing sexual assault prosecutions on offender behavior. Consent is completely eliminated as a defense and (with minor exceptions) as an element of military sexual crimes. Alcohol-involved sexual offenses, which are common in the military, now require an accused to pay attention: if the offender "knew or should have known" that the victim was incapable of agreeing to the sexual activity, the offender is criminally responsible for the sexual activity.

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