Overview of Article 120, UCMJ

Brief History
Structure
Definitions
Legal issues

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TJAGLCS Criminal Law Department
ARTICLE 120:
A BRIEF HISTORY

Pre-2007 law:

1. Sexual intercourse
2. By force and without consent
ARTICLE 120: A BRIEF HISTORY

Cox Commission recommendation (May 2001):

- “Repeal the rape and sodomy provisions of the Uniform Code of Military Justice, 10 U.S.C. §§ 920 & 925, and the offenses specified under the general article, 10 U.S.C. § 134, that concern criminal sexual misconduct. Replace them with a comprehensive Criminal Sexual Conduct Article, such as is found in the Model Penal Code or Title 18 of the United States Code.”

- “A comprehensive Criminal Sexual Conduct statute would more realistically reflect the offenses that should be proscribed under military law.”

“...Article 120 is antiquated in its approach to sexual offenses. In particular, the article does not reflect the more recent trend for rape statutes to recognize gradations in the offense based on context. See generally Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice 11 (Nat’l Inst. of Military Justice 2001).”

“Because Article 120 is dated...the traditional military rape elements have been applied in contexts for which the elements were not initially contemplated. Case law has evolved to address this reality.”

ARTICLE 120: A BRIEF HISTORY

NDAA FY 05 required SecDef to review the UCMJ and MCM “with the objective of determining what changes are required to improve the ability of the military justice system to address issues relating to sexual assault.”

Also, required SecDef “to conform” the UCMJ and MCM “more closely” to other Federal Laws.

18 U.S.C. used as a model for New Article 120.
Congress passed a comprehensively reformed Article 120 as part of the FY06 NDAA

POTUS signed Executive Order 13447 (28 Sept 2007)

Effective for all offenses on or after 01 October 2007
Constitutional challenges and criticism led to Congressional reexamination of Article 120 and an amendment in the FY12 NDAA.

Current version of Article 120 is effective for all offenses on or after 28 June 2012.
Practicing the law

- 2012 MCM
- Benchbook instructions 28 Jun 2012
- New MRE E.O. (15 May 2013)
  - Includes Art 120 (2012) max punishments
- Art 120 Part IV E.O.
- Draft Part IV MCM
- Signed ~ 2013?
- Effective 30 days later
- 2014 MCM?
Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President’s authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.
Structure

Three categories:

- Article 120: Adult crimes
- Article 120a: Stalking
- Article 120b: Child crimes
- Article 120c: Other sexual misconduct
Art 120 (2007)

**ADULT CRIMES**
- RAPE
- AGGRAVATED SEXUAL ASSAULT
- AGgravated sexual contact
- ABUSIVE SEXUAL CONTACT
- WRONGFUL SEXUAL CONTACT

**CHILD CRIMES**
- RAPE OF A CHILD
- AGGRAVATED SEXUAL CONTACT WITH A CHILD
- AGGRAVATED SEXUAL ASSAULT OF A CHILD
- ABUSIVE SEXUAL CONTACT WITH A CHILD
- AGGRAVATED SEXUAL ABUSE OF A CHILD
- INDECENT LIBERTY WITH A CHILD

**OTHER SEXUAL CRIMES**
- INDECENT ACT
- FORCIBLE PANDERING
- INDECENT EXPOSURE
# Art 120 (2012)

## ADULT CRIMES (Art 120)
- RAPE
- SEXUAL ASSAULT
- AGGRAVATED SEXUAL CONTACT
- ABUSIVE SEXUAL CONTACT

## STALKING (Art 120a)

## CHILD CRIMES (Art 120b)
- RAPE OF A CHILD
- SEXUAL ASSAULT OF A CHILD
- SEXUAL ABUSE OF A CHILD

## OTHER SEXUAL MISCONDUCT (Art 120c)
- INDECENT VIEWING, VISUAL RECORDING, OR BROADCASTING
- FORCIBLE PANDERING
- INDECENT EXPOSURE
SEXUAL ASSAULT

RAPE

ABUSIVE SEXUAL CONTACT

AGGRAVATED SEXUAL CONTACT

CONDUCT

CIRCUMSTANCES

Adult Crimes
RAPE

AGGRAVATED SEXUAL CONTACT

More severe circumstances

Unlawful force

Force = Death or GBH

Fear of Death, GBH, or kidnapping

Rendering unconscious

Administering substance that substantially impairs

CONDUCT

CIRCUMSTANCES

Adult Crimes
Sexual assault and abusive sexual contact can be classified into less severe circumstances:

- Fear
- Bodily harm
- Fraud
- "Knew or reasonably should have known" incapable of consenting

Adult Crimes

Conduct

Circumstances
Sexual contact
- Touching (or causing another to touch) directly or through clothing of genitalia, anus, groin, breast, inner thigh, or buttocks with intent to abuse, humiliate, harass, or degrade any person or
- Touching (or causing another to touch) directly or through clothing any body part by any body part with intent to gratify the sexual desire of any person.
**Sexual Act**
Contact between penis and vulva or anus or mouth or

Penetration of vulva, anus, or mouth by any body part or object with the intent to:

a. Abuse, humiliate, harass, or degrade any person or
b. Arouse or gratify the sexual desire of any person.
<table>
<thead>
<tr>
<th>Sexual Act</th>
<th>RELATIONAL ASSAULT</th>
<th>RAPE</th>
<th>LWOP</th>
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<tbody>
<tr>
<td>Adult Crimes</td>
<td>Less severe circumstances</td>
<td>More severe circumstances</td>
<td>30</td>
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<table>
<thead>
<tr>
<th>Sexual Contact</th>
<th>ABUSIVE SEXUAL CONTACT</th>
<th>AGGREGATED SEXUAL CONTACT</th>
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<tr>
<td>Adult Crimes</td>
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</table>
Child Crimes

Sexual Act
- < 12
  - LWOP
  - Rape of Child
- 12 < V < 16
  + force
  - LWOP
  - Rape of Child
- 12 < V < 16
  - Sexual Assault of Child

Lewd Act
- < 16
  - Sexual Abuse of Child
  - 20 with contact
  - 15 other cases
Art 120c - Indecent Viewing, Visual Recording, or Broadcasting

Two observation crimes

1. Views (1 year)
2. Photographs, videotapes, films, or records (5 years)

One broadcasting crime (7 years)

• Knowingly broadcasts or distributes one of above
• Knew or should have known made under circumstances above
SEXUAL ACT

ARTICLE 120 (2007)
1. **Contact** between penis and vulva

OR

1. **Penetration** of the genital opening of another
2. By a hand, finger, or any object
3. With the intent to:
   a. Abuse, humiliate, harass, or degrade any person or
   b. Arouse or gratify the sexual desire of any person.

ARTICLE 120 (2012)
1. **Contact** between penis and vulva or anus or mouth

OR

1. **Penetration** of vulva, anus, or mouth
2. By any body part or object
3. With the intent to:
   a. Abuse, humiliate, harass, or degrade any person or
   b. Arouse or gratify the sexual desire of any person.
# SEXUAL CONTACT

<table>
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<tr>
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<tr>
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<tr>
<td><strong>2. Directly or through clothing</strong></td>
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<tr>
<td><strong>3. Genitalia, anus, groin, breast, inner thigh, or buttocks</strong></td>
<td><strong>3. Of genitalia, anus, groin, breast, inner thigh, or buttocks</strong></td>
</tr>
<tr>
<td><strong>4. With intent to:</strong></td>
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</tr>
<tr>
<td>a. Abuse, humiliate, harass, or degrade any person, OR</td>
<td><strong>OR</strong></td>
</tr>
<tr>
<td>b. Gratify the sexual desire of any person.</td>
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</tr>
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<td></td>
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</tr>
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<td></td>
<td><strong>3. Any body part by any body part</strong></td>
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<tr>
<td></td>
<td><strong>4. With intent to gratify the sexual desire of any person.</strong></td>
</tr>
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</table>
LEWD ACT

4 TYPES OF LEWD ACTS:

1. Any sexual contact
2. Intentionally exposing (with one of two intents)
3. Intentionally communicating indecent language (with one of two intents)
4. Any indecent conduct
   a. Intentionally done with or in the presence of a child
   b. Traditional “form of immorality” definition

Physical presence requirement eliminated
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<td>Action to compel submission of another or to overcome or prevent another’s resistance by:</td>
<td>1. The use of a weapon; or</td>
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<tr>
<td>1. The use or display of a dangerous weapon or object; or</td>
<td>2. The use of such physical strength or violence as is sufficient to overcome, restrain or injure a person; or</td>
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<tr>
<td>2. The suggestion of possession of a dangerous weapon or object that is used in a manner to cause the alleged victim to believe it is a dangerous weapon or object; or</td>
<td>3. Inflicting physical harm sufficient to coerce or compel submission by the victim.</td>
</tr>
<tr>
<td>3. Physical violence, strength, power, or restraint applied to the alleged victim, sufficient that the alleged victim could not avoid or escape the sexual conduct.</td>
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FORCE

ARTICLE 120 (2007)

Action to compel submission of another or to overcome or prevent another’s resistance by:

1. The use or display of a dangerous weapon or object; or

2. The suggestion of possession of a dangerous weapon or object that is used in a manner to cause the alleged victim to believe it is a dangerous weapon or object; or

3. Physical violence, strength, power, or restraint applied to the alleged victim, sufficient that the alleged victim could not avoid or escape the sexual conduct.

ARTICLE 120 (2012) – child crimes

1. The use of a weapon;

2. The use of such physical strength or violence as is sufficient to overcome, restrain or injure a child; or

3. Inflicting physical harm.

In the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force.
Bodily Harm
“to wit” or not “to wit”

(3) Bodily harm. The term ‘bodily harm’ means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

It’s in the pleading:

1. In that A did sexually assault V by committing a sexual act with V, to wit: penetration of V’s vulva with his penis by causing bodily harm, to wit: pushing V to the bed and holding her down with his hands.

Consent ≠ element

2. In that A did sexually assault V by committing a sexual act with V, to wit: penetration of V’s vulva with his penis by causing bodily harm.

Consent = element: the penetration serves as both the sexual act AND the bodily harm IF the Government proves the sexual act was nonconsensual.
"Known or reasonably should be known"

(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;
Rape by administration:
Administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct.

Sexual Assault when incapable of consent:
Commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the Accused.
Legal Issues

Consent

Force ↔ Capacity
CONSENT

• Lack of consent is not an element (two exceptions).
• “freely given agreement ...by a competent person.”
• Cannot Consent:
  ✓ Sleeping, unconscious, incompetent
  ✓ Death/GBH
  ✓ Render unconscious
  ✓ Under threat or fear
  ✓ Fraud
How is consent evidence used?
Sexual Assault by Causing Bodily Harm

1. Sex Act

2. Bodily Harm
Sexual Assault (asleep, unconscious, or otherwise)

1. Sex Act

2. Victim asleep, unconscious, or otherwise unaware the sex act is occurring

3. Accused knew or reasonably should have known victim was asleep, unconscious, or otherwise unaware.
Sexual Assault (incapable of consent)

1. Sex Act

2. Victim incapable of consent due to
   a. Impairment by drug, intoxicant, similar substance
   b. Mental disease or defect or physical disability

3. Accused knew or reasonably should have known of the impairment or disease/defect/disability
Consent: Timing
General/Specific Intent

Why do we care?

- Lesser Included Offenses
- Mistake of Fact Defense
(j) Ignorance or mistake of fact.

(1) Generally. Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused’s knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.
[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense.

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If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.

However, if the accused’s knowledge or intent is immaterial as to an element, then ignorance or mistake is not an excuse.
Impairment Defense?
Sexual Assault (incapable of consent)

1. Sex Act

2. Victim incapable of consent due to
   a. Impairment by drug, intoxicant, similar substance
   b. Mental disease or defect or physical disability

3. Accused knew or reasonably should have known of the impairment or disease/defect/disability