

JSC Recommended Option (Part I), As Modified By Office of Legislative Counsel

Amendments to the Uniform Code of Military Justice

1. Sec. __. ADMINISTRATIVE SESSIONS OF COURTS-MARTIAL

Section 839(a) of title 10, United States Code, is amended by adding at the end the following new sentence: “If permitted by regulations of the Secretary concerned, and if the accused has a counsel physically present at his location, these proceedings may be conducted by the use of video-teleconferencing or similar technology.”

Section-By-Section Analysis

The section would permit the Secretary concerned to authorize arraignments and other proceedings under Article 39(a) at a location remote from the military judge via video-teleconferencing-type technology when the accused has a counsel physically present at his location.

Currently, Article 39(a)(4) of the Uniform Code of Military Justice (10 U.S.C. 839) requires the presence of the accused during all Article 39(a) sessions. Article 39(a) sessions are those sessions of a court-martial that include arraignments, guilty plea inquiries, advisements of rights, motion sessions, and various other administrative tasks. Article 39(a) sessions are not used to present evidence to the trier of fact. Pursuant to this statutory language, the President would enact procedural rules that implement this requirement in Rule for Courts-Martial (RCM) 804 and 805.

This section, and subsequent rule changes, would allow for appearances of the accused and counsel or the military judge by remote means at Article 39(a) sessions. This amendment would recognize the worldwide, mobile, and in-theater considerations that are unique to the Armed Forces of the United States as they relate to criminal justice proceedings. Allowing for Secretarial implementation would ensure the needs of the individual Services are addressed prior to implementation of this section. This procedure would be similar to the Military Extraterritorial Jurisdiction Act that allows initial appearances of a civilian accused with a Federal Magistrate via telephonic or like measures. Should this amendment pass, the Joint Service Committee on Military Justice is prepared to recommend the necessary rules changes to the President for inclusion in the next Executive order amending the Manual for Courts-Martial.

**2. SEC. ____ . UNLIMITED PERIOD FOR PROSECUTION OF MURDER AND RAPE,
AND EXTENDED PERIOD FOR PROSECUTION OF CHILD ABUSE CASES IN
COURTS-MARTIAL.**

Section 843 of title 10, United States Code, is amended—

(1) in subsection (a), by inserting ", murder, rape" after "in a time of war"; and

(2) in subsection (b)(2)—

(A) in subparagraph (A), by striking "before the child attains the age of 25 years" and inserting "during the life of the victim or within five years from the date of the offense, whichever is greater,";

(B) in subparagraph (B)—

(i) by striking "sexual or physical";

(ii) in clause (i), by striking "Rape or carnal" and inserting "Carnal"; and

(iii) in clause (v) by striking "Indecent assault," and inserting "Kidnapping, indecent assault,"; and

(C) by adding at the end the following new subparagraph:

"(C) In subparagraph (A), the term 'child abuse offense' includes an act that involves abuse of a person who has not attained the age of 18 years and would constitute an offense under chapters 110 or 117 or section 1591 of title 18."

Section-by-Section Analysis

This section would revise and clarify the statutes of limitations for murder, rape, and child abuse offenses under section 843 of title 10, United States Code.

Specifically, this section would include all murders in the class of offenses that have no statute of limitations and clarify that rape is an offense that has an unlimited statute of limitations. This section also would provide, consistent with 18 U.S.C. 3283, a life-of-the-child/victim statute of limitations for certain enumerated child abuse offenses. This increase in the UCMJ statute of limitations applicable to child abuse offenses would conform military practice to that of Federal jurisdictions. However, the “life-of-the-child/victim” standard inadvertently creates a problem with the intended extension of the statute of limitations should the child/victim soon die after the abusive incident. It was Congress' intent to *increase* the statute of limitations for the prosecution of certain child abuse offenses. Unfortunately, Congress' choice of language actually could operate to *decrease* the statute of limitations if a child/victim were to unexpectedly die, or die as a direct or indirect result of the abusive incident. For example, if at age 12 a child is abused and subsequently reports the abuse, but before charges are brought the child unexpectedly dies at age 14, or commits suicide due to the emotional trauma being experienced, the child victim's death only two years after the abusive incident would close the life-of-the-child/victim statute of limitations' period and bar prosecution. To address such circumstances, this section would provide for increasing the period of the statute of limitation to become the life of the child/victim or within 5 years from the date of the offense, whichever is greater.

In addition, this section, again consistent with 18 U.S.C. 3283, would add kidnapping to the list of enumerated offenses for the life-of-the-child/victim statute of limitations.

Finally, this section would expand the definition of “child abuse offense” so the life-of-the-child/victim statute of limitations would specifically apply to certain, particularly egregious Title 18 offenses committed against victims under the age of 18 at the time of the offense.

**3. SEC. ____ . ESTABLISHING THE OFFENSE OF STALKING UNDER THE
UNIFORM CODE OF MILITARY JUSTICE.**

(a) IN GENERAL.—(1) Subchapter X of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after section 893 (article 93) the following new section:

"§ 893a. Art. 93a. Stalking

"(a) Any person subject to this chapter—

"(1) who wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family;

"(2) who has knowledge or should have knowledge that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; and

"(3) whose acts induce reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself or to a member of his or her immediate family, is guilty of stalking.

"(b) Any person found guilty of stalking shall be punished as a court-martial may direct.

"(c) For purposes of this section:

"(1) The term 'course of conduct' means repeatedly maintaining a visual or physical proximity to a specific person, or repeatedly conveying verbal or written threats, or threats implied by conduct or a combination thereof directed at or toward a specific person.

"(2) The term 'repeatedly' means on two or more occasions.

"(3) The term 'immediate family' means a spouse, parent, child, sibling, or any other family member or relative who regularly resides in the household or who within the prior six months regularly resided in the household."

(2) The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 893 the following new item:

"893a. Art. 93a. Stalking."

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect 12 months after the date of the enactment of this Act and apply with respect to offenses committed after such effective date.

Section-By-Section Analysis

This section would create the offense of "stalking" of another person under the Uniform Code of Military Justice (UCMJ).

Currently, military case law recognizes criminal culpability for actions that amount to "stalking" offenses, and allows the military to bring charges under Article 134, UCMJ, that are modeled after other jurisdictions when the military can prove that the conduct is prejudicial to good order and discipline or is of a nature to bring discredit upon the Armed Forces. *See United States v. Saunders*, 39 M.J. 1 (2003). In addition, the Article 93, UCMJ, offense of "Cruelty and Maltreatment" encompasses acts of sexual harassment of subordinates. In other situations, acts of sexual harassment may be charged as a violation of Department of Defense (DoD) and Military Department regulations punishable under Article 92, UCMJ. The addition of "stalking" under new Article 93a would complement the prohibited acts covered in Article 93, UCMJ, but without regard to whether that person is the offender's subordinate.

The DoD has modeled this section after the Federal "Model Antistalking Code for the States" by (1) requiring a "course of conduct;" (2) specifically including "sexual assault" as but one example of "bodily harm;" and (3) including members of the victim's immediate family among those persons who can be threatened with such bodily harm or death. Unlike the Federal statute at 18 U.S.C. 2261A, and consistent with the military's worldwide jurisdiction, this section lacks the requirement that the conduct involve traveling in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States.

4. SEC. ____ . AMENDING OFFENSE OF RAPE UNDER THE UNIFORM CODE OF MILITARY JUSTICE; ELIMINATION OF MISTAKE OF AGE DEFENSE IN CARNAL KNOWLEDGE OF CHILD CASES.

(a) CONSENT.—Section 920(a) of title 10, United States Code (article 120 of the Uniform Code of Military Justice), is amended by striking ", by force and without consent," and inserting "by force".

(b) MISTAKE OF AGE DEFENSE.—Section 920 of such title is further amended by striking subsection (d).

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect 12 months after the date of the enactment of this Act and apply with respect to offenses committed after such effective date.

Section-By-Section Analysis

This section would eliminate the requirement that rape under the Uniform Code of Military Justice (UCMJ) be committed without the victim's consent. It also would eliminate the mistake-of-age defense from the crime of carnal knowledge of a child under section 920 of title 10, United States Code (Article 120).

Currently, for a service member to be found guilty of rape, Article 120, UCMJ, requires the government to prove that the service member committed sexual intercourse by force and without consent. This section would eliminate the requirement that the government prove that the victim did not consent to sexual intercourse, unless the issue of consent is first raised by the accused. This change is consistent with the majority of State jurisdictions, as well as the federal prosecution scheme in 18 U.S.C. 2241 *et al.* It also would allow the government to focus on the accused and the force applied to the victim rather than on the victim's manifestation of lack of consent.

If Congress passes these changes, the Joint Service Committee on Military Justice (JSC) would recommend changes to the Manual for Courts-Martial (MCM) to implement this section. As part of those recommendations, the JSC also would propose MCM changes that recognize varying degrees of culpability, with corresponding changes in the maximum punishment under Article 120 based upon the amount and type of force applied. Conceptually, this approach is consistent with the majority of State jurisdictions and 18 U.S.C. 2241 *et al.*

5. SEC. ____ . AMENDING OFFENSE OF SODOMY UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

1 (a) FORCIBLE SODOMY AND SODOMY OF A CHILD.—(1) Section 925 of title 10, United
2 States Code (article 125 of the Uniform Code of Military Justice), is amended to read as follows:

3 **"§ 925. Art. 125. Forcible sodomy and sodomy of a child**

4 "(a) Any person subject to this chapter who engages in unnatural carnal copulation by
5 force with another person is guilty of forcible sodomy. Any person found guilty of forcible
6 sodomy shall be punished as a court-martial may direct.

7 "(b) Any person subject to this chapter who, under circumstances not amounting to
8 forcible sodomy, commits an act of unnatural carnal copulation with a person—

9 "(1) who is not his or her spouse; and

10 "(2) who has not attained the age of sixteen years;

11 "is guilty of sodomy of a child and shall be punished as a court-martial may direct.

12 "(c) Penetration, however slight, is sufficient to complete either of these offenses."

13 (2) The table of sections at the beginning of subchapter X of chapter 47 of such title is
14 amended by striking the item relating to section 925 and inserting the following new item:

15 "925. Art. 125. Forcible sodomy and sodomy of a child."

16 (b) EFFECTIVE DATE.—The amendments made by this section shall take effect 12 months
17 after the date of the enactment of this Act and apply with respect to offenses committed after
18 such effective date.

Section-By-Section Analysis

This section would require sodomy under Article 125 of the Uniform Code of Military Justice (UCMJ) to be committed by force and would create a specific offense of sodomy of a child.

Currently, under Article 125, UCMJ (10 U.S.C. 925), a service member who is found guilty of engaging in unnatural carnal copulation with another person or an animal is convicted of sodomy. There is no statutory requirement that the service member commit this offense "by force." This section would require the government to prove that the act of unnatural carnal copulation with another person was done "by force." This section also would delineate the specific offense of sodomy of a child.

Finally, this section would remove from coverage under Article 125, UCMJ, all acts of sodomy that are not committed by force or not committed with a child. Instead, the Joint Service Committee on Military Justice (JSC) would propose complementary changes to the Manual for Courts-Martial (MCM) placing all sexual acts between consenting adults that are prejudicial to good order and discipline or service discrediting, including "consensual sodomy" and "bestiality," under one consolidated paragraph 62 addressing sex-related offenses in Part IV of the MCM.

The effective date provision would provide the Department of Defense with the twelve months necessary before implementation of these legislative changes to process and staff the corresponding MCM changes requiring Presidential signature, and to properly train military justice practitioners, law enforcement investigators, commanders and service members worldwide.