

Unloaded Gun? It's Still Assault

By Mathew B. TullyQ. Is pointing an unloaded weapon at someone just as serious an offense as pointing a loaded weapon at him?

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A service member who points a gun at another person generally commits an assault in violation of Article 128 of the Uniform Code of Military Justice. Whether the gun is loaded will influence the type of assault charged: simple assault or aggravated assault with a dangerous weapon likely to produce death or grievous bodily harm. The Manual for Courts-Martial defines "simple assault" as an attempt or offer "to do bodily harm to a certain person ... with unlawful force or violence." An assault can be aggravated when it involves a "dangerous weapon," which could cause death or grievous harm. That's defined as serious bodily injury, such as "fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs." Potential punishments for these two types of assaults differ significantly. The maximum penalty for a simple assault with an unloaded firearm is dishonorable discharge, total forfeiture of pay and three years in prison. Aggravated assault with a loaded firearm carries a maximum penalty of dishonorable discharge, total forfeiture of pay and 10 years behind bars. In the 1998 case *U.S. v. Tyrone Davis*, the U.S. Court of Appeals for the Armed Forces found that an unloaded weapon does not qualify as a dangerous weapon under Article 128 - even though, as a dissenting judge noted, the "Guidebook for Marines" states that "unless the man who handles [the gun] respects it as a deadly weapon, it is a source of danger to him and everyone near him." The case involved a Marine corporal who, in a so-called "blanket party" hazing ritual, pointed a pistol at another Marine who had been grabbed, kicked and beaten and said, "I ought to cap you now." Despite being charged with assault with a dangerous weapon, the corporal pleaded guilty to simple assault because the pistol was unloaded. However, the judge found the unloaded pistol to be a dangerous weapon and convicted him of aggravated assault. The U.S. Navy-Marine Corps Court of Criminal Appeals upheld the conviction. But the military's high court set aside that decision and returned the case to the Judge Advocate General of the Navy. Service members should note that even a misdemeanor conviction for domestic violence, regardless of whether a weapon was involved, will preclude the service member from carrying a weapon under service regulations and may lead to administrative separation. Troops charged with a weapon-related assault offense should immediately contact a military law attorney, who may be able to show that the weapon in question was not dangerous or that no attempt to do or offer harm was made.