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Part II

Defense Department

Manual for Courts-Martial; Proposed Amendments; Notice

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2012–OS–0129]

Manual for Courts-Martial; Proposed Amendments

AGENCY: Joint Service Committee on Military Justice (JSC), DoD.

ACTION: Notice of Proposed Amendments to the Manual for Courts-Martial, United States (2012 ed.) and Notice of Public Meeting.

SUMMARY: The Department of Defense is proposing changes to the *Manual for Courts-Martial, United States* (2012 ed.) (MCM). The proposed changes concern the rules of procedure and evidence and the punitive articles applicable in trials by courts-martial. These proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, ''Preparation, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters and Testimony,'' June 15, 2007, and do not constitute the official position of the Department of Defense, the Military Departments, or any other Government agency.

This notice also sets forth the date, time and location for a public meeting of the JSC to discuss the proposed changes.

This notice is provided in accordance with DoD Directive 5500.17, ''Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice,'' May 3, 2003.

This notice is intended only to improve the internal management of the Federal Government. It is not intended to create any right or benefit, substantive or procedural, enforceable at law by any party against the United States, its agencies, its officers, or any person.

The committee also invites members of the public to suggest changes to the Manual for Courts-Martial; address specific recommended changes, and supporting rationale.

DATES: Comments on the proposed changes must be received no later than 60 days from publication in the register. A public meeting for comments will be held on December 11, 2012, at 10 a.m. in the 14th Floor Conference Room, 1777 N. Kent St., Rosslyn, VA 22209–2194.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: LTC Christopher Kennebeck, Chief, Policy Branch, Criminal Law Division, OTJAG, Room 3B548, Washington, DC 20301, 571.256.8136, email *usarmy.pentagon.hqda-otjag.mbx.jsc-public-comments@mail.mil.*

SUPPLEMENTARY INFORMATION: The proposed amendments to the MCM are as follows:

Annex

Section 1. Part I of the Manual for Courts-Martial, United States, is amended as follows:

(a) Paragraph 4 is amended to read as follows:

''The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures (Part I–V). This Manual shall be applied consistent with the purpose of military law.

The Manual shall be identified by the year in which it was printed; for example, ''Manual for Courts-Martial, United States (20xx edition).'' Any amendments to the Manual made by Executive Order shall be identified as ''20xx'' Amendments to the Manual for Courts-Martial, United States, ''20xx'' being the year the Executive Order was signed.

The Department of Defense Joint Service Committee (JSC) on Military Justice reviews the Manual for Courts-Martial and proposes amendments to the Department of Defense for consideration by the President on an annual basis. In conducting its annual review, the JSC is guided by DoD Directive 5500.17, ''The Roles and Responsibilities of the Joint Service Committee (JSC) on Military Justice.'' DoD Directive 5500.17 includes provisions allowing public participation in the annual review process.''

Sec. 2. Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) R.C.M. 201(c) is amended to read as follows:

''(c) *Contempt.* A judge detailed to a court-martial may punish for contempt any person who uses any menacing word, sign, or gesture in the presence of the judge during the proceedings of the court-martial; disturbs the proceedings of the court-martial by any riot or disorder; or willfully disobeys the lawful writ, process, order, rule, decree, or command of the court-martial. The punishment may not exceed confinement for 30 days or a fine of $1,000, or both.''

(b) R.C.M. 307(c)(3) is amended to read as follows:

''(3) *Specification.* A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication; however, specifications under Article 134 must expressly allege the terminal element. Except for aggravating factors under R.C.M 1003(d) and R.C.M. 1004, facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required.''

(c) R.C.M. 307(c)(4) is amended to read as follows:

''(4) *Multiple offenses.* Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person. Unreasonable multiplication of charges is addressed in R.C.M. 906(b)(12); multiplicity is addressed in R.C.M. 907(b)(3)(B); and punishment limitations are addressed in R.C.M. 1003(c)(1)(C).''

(d) R.C.M. 405(f)(10) is amended to read as follows:

''(10) Have evidence, including documents or physical evidence, produced as provided under subsection (g) of this rule;''

(e) R.C.M. 405(g)(1)(B) is amended to read as follows:

''(B) *Evidence.* Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is relevant to the investigation and not cumulative, shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely and in compliance with this rule. As soon as practicable after receipt of a request by the accused for information which may be protected under Mil. R. Evid. 505 or 506, the investigating officer shall notify the person who is authorized to issue a protective order under subsection (g)(6) of this rule, and the convening authority, if different. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.''

(f) R.C.M. 405(g)(2)(C) is amended to read as follows:

''(C) *Evidence generally.* The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer shall inform the parties.''

(g) R.C.M. 405(g)(2)(C)(i) is inserted to read as follows:

''(i) Evidence under the control of the Government. Upon the investigating officer's determination that evidence is reasonably available, the custodian of the evidence shall

be requested to provide the evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).''

(h) R.C.M. 405(g)(2)(C)(ii) is inserted to read as follows:

''(ii) *Evidence not under the control of the Government.* Evidence not under the control of the Government may be obtained through noncompulsory means or by subpoena duces tecum issued pursuant to procedures set forth in R.C.M. 703(f)(4)(B). A determination by the investigating officer that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).''

(i) R.C.M. 405(i) is amended as follows:

''(i) Military Rules of Evidence. The Military Rules of Evidence do not apply in pretrial investigations under this rule except as follows:

(1) Military Rules of Evidence 301, 302, 303, 305, and Section V shall apply in their entirety.

(2) Military Rule of Evidence 412 subsections (a) and (b) shall apply in any case defined as a sexual offense in Mil. R. Evid. 412(d).

(A) *Evidence generally inadmissible.* Evidence described in Mil. R. Evid. 412(a) offered under any theory other than one enumerated in Mil. R. Evid. 412(b) is inadmissible. The investigating officer must note the exclusion of such evidence and the basis upon which it was offered in the investigating officer's report. An investigating officer who is not a judge advocate must seek legal advice from an impartial source concerning the admissibility, handling, and reporting of any such evidence.

(B) *Procedure to determine admissibility.* With respect to any evidence offered under a theory described in Mil. R. Evid. 412(b), the investigating officer must make a determination as to admissibility, as follows:

(i) *Notice.* A party intending to offer evidence under Mil. R. Evid. 412(b) must serve written notice on counsel representing the United States and the investigating officer at least 5 days prior to the date of the pretrial investigation that specifically describes the evidence and states the Mil. R. Evid. 412(b) purpose for which it is to be offered, unless the investigating officer, for good cause shown, sets a different time.

(ii) *Victim notice.* The investigating officer must notify the victim or, when appropriate, the victim's guardian or representative, or ensure that the notification is accomplished by the counsel representing the United States.

(iii) *Hearing.* Before admitting evidence under this rule, the investigating officer must conduct a closed hearing. The hearing must not take place prior to the accused's R.C.M. 405(f) rights advisement, but may otherwise occur during the normal course of the investigation. At the hearing, the parties may call witnesses, including the victim, and offer relevant evidence. R.C.M. 405(g) continues to apply during this hearing. The victim must be afforded a reasonable opportunity to attend and be heard. If the victim is unavailable within the meaning of R.C.M. 405(g)(1), the alternatives to testimony enumerated in R.C.M. 405(g)(4)(B) are available, including a sworn statement created for the purpose of the hearing.

(iv) *Order.* If the investigating officer determines on the basis of the hearing described in subsection (2)(B)(iii) that the evidence the accused seeks to offer is relevant for a purpose under Mil. R. Evid. 412(b), and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the pretrial investigation. The investigating officer must specify the evidence that may be offered and the areas with respect to which the victim or witness may be questioned.''

(j) R.C.M. 405(j)(2)(C) is amended as follows:

''(2) *Contents.* The report of investigation shall include:

(C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence, including any findings made or documents admitted pursuant to subsection (i)(2)(B)(iv)'' (k) R.C.M. 703(e)(2)(B) is amended to read as follows:

''(B) *Contents.* A subpoena shall state the command by which the proceeding is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command the person to whom it is directed to produce books, papers, documents, data, or other objects or electronically stored information designated therein at the proceeding or at an earlier time for inspection by the parties.''

(l) R.C.M. 703(e)(2)(C) is amended to read as follows:

''(C) *Who may issue.* A subpoena may be issued by the summary court-martial, counsel representing the United States, or after referral, trial counsel, to secure witnesses or evidence for that court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.''

(m) R.C.M. 703(e)(2)(D) is amended to read as follows:

''(D) *Service.* A subpoena may be served by the person authorized by this rule to issue it, a United States Marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named and by providing to the person named travel orders and a means for reimbursement for fees and mileage as may be prescribed by the Secretary concerned, or in the case of hardship resulting in the subpoenaed witness's inability to comply with the subpoena absent initial government payment, by providing to the person named travel orders, fees and mileage sufficient to comply with the subpoena in rules prescribed by the Secretary concerned.''

(n) R.C.M. 703(e)(2)(G)(ii) is amended to read as follows:

''(ii) *Requirements.* A warrant of attachment may be issued only upon probable cause to believe that the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that a means of reimbursement of fees and mileage was provided to the witness or advanced to the witness in cases of hardship, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the subpoena, and that no valid excuse is reasonably apparent for the witness' failure to appear.''

(o) R.C.M. 703(f)(4)(B) is amended to read as follows:

''(B) *Evidence not under the control of the Government.* Evidence not under the control of the Government may be obtained by subpoena issued in accordance with subsection (e)(2) of this rule. A subpoena duces tecum to produce books, papers, documents, data, or other objects or electronically stored information for pretrial investigation pursuant to Article 32 may be issued, following the convening authority's order directing such pretrial investigation, by either the investigating officer appointed under R.C.M. 405(d)(1) or the counsel representing the United States. A person in receipt of a subpoena duces tecum for an Article 32 hearing need not personally appear in order to comply with the subpoena.''

(p) R.C.M. 906(b)(12) is amended to read as follows:

''(12) *Unreasonable multiplication of charges.* The military judge may provide a remedy, as provided below, if he or she finds there has been an unreasonable multiplication of charges as applied to findings or sentence.

(i) *As applied to findings.* Charges that arise from substantially the same transaction, while not legally multiplicious, may still be unreasonably multiplied as applied to findings. When the military judge finds, in his or her discretion, that the offenses have been unreasonably multiplied, the appropriate remedy shall be dismissal of the lesser offenses or merger of the offenses into one specification.

(ii) *As applied to sentence.* Where the military judge finds that the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings, he or she may find that there is an unreasonable multiplication of charges as applied to sentence. If the military judge makes such a finding, the maximum punishment for those offenses determined to be unreasonably multiplied shall be the maximum authorized punishment of the offense carrying the greatest maximum punishment.''

(q) R.C.M. 907(b)(3) is amended to read as follows:

''(3) *Permissible grounds.* A specification may be dismissed upon timely motion by the accused if one of the following is applicable:

(A) *Defective.* When the specification is so defective that it substantially misled the accused, and the military judge finds that, in the interest of justice, trial should proceed on remaining charges and specifications without undue delay; or

(B) *Multiplicity.* When the specification is multiplicious with another specification, is

unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice. A charge is multiplicious if the proof of such charge also proves every element of another charge.''

(r) R.C.M. 916(b)(1) is amended to read as follows:

''(1) *General rule.* Except as listed below in paragraphs (2) and (3), the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist.''

(s) R.C.M. 916(b)(3) is amended to read as follows:

''(3) *Mistake of fact as to age.* In the defense of mistake of fact as to age as described in Article 120b(d)(2) in a prosecution of a child sexual offense, the accused has the burden of proving mistake of fact as to age by a preponderance of the evidence.''

(t) R.C.M. 916(j)(2) is amended to read as follows:

''(2) *Child Sexual Offenses.* It is a defense to a prosecution for Article 120b(b), sexual assault of a child, and Article 120b(c), sexual abuse of a child, that, at the time of the offense, the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years. The accused must prove this defense by a preponderance of the evidence.''

(u) R.C.M. 920(e)(5)(D) is amended to read as follows:

''(D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add: The burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused. When the issue of mistake of fact under R.C.M. 916(j)(2) is raised, add: The accused has the burden of proving the defense of mistake of fact as to age by a preponderance of the evidence.]''

(v) R.C.M. 1003(c)(1)(C) is amended to read as follows:

''(C) *Multiple Offenses.* When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense, unless the military judge finds that the offenses are either multiplicious or unreasonably multiplied.

(i) *Multiplicity.* A charge is multiplicious and must be dismissed if the proof of such charge also proves every element of another charged offense unless Congress intended to impose multiple punishments for the same act.

(ii) *Unreasonable Multiplication.* If the military judge finds that there is an unreasonable multiplication of charges as applied to sentence, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense carrying the greatest maximum punishment. The military judge may either merge the offenses for sentencing, or dismiss one or more of the charges.''

(w) R.C.M. 1004(c)(7)(B) is amended to read as follows:

''(B) The murder was committed: while the accused was engaged in the commission or attempted commission of any robbery, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in the commission or attempted commission of any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense.''

(x) R.C.M. 1004(c)(8) is amended to read as follows:

''(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, sodomy, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson was major and who manifested a reckless indifference for human life.''

(y) R.C.M. 1004(c)(9) is amended to read as follows:

''(9) That, only in the case of a sexual offense:

(A) Under Article 120b, the victim was under the age of 12; or

(B) Under Articles 120 or 120b, the accused maimed or attempted to kill the victim;''

(z) R.C.M. 1103(b)(3) is amended by inserting new subsection (N) after R.C.M. 1103(b)(3)(M) as follows:

(N) Documents pertaining to the receipt of the record of trial by the victim pursuant to subsection (g)(3) of this rule.

(aa) R.C.M. 1103(g) is amended by inserting new subsection (3) after R.C.M. 1103(g)(2) as follows:

''(3) *Cases involving sexual offenses.*

(A) *Scope; qualifying victim.* In a general or special court-martial involving an offense under Article 120, Article 120b, Article 120c, Article 125, and all attempts to commit such offenses in violation of Article 80, where the victim of such an offense testified during the proceedings, a copy of the record of trial shall be given free of charge to that victim regardless of whether any such specification resulted in an acquittal or conviction. If a victim is a minor, a copy of the record of trial shall instead be provided to the parent or legal guardian of the victim.

(B) *Notice.* In accordance with regulations of the Secretary concerned, and no later than authentication of the record, trial counsel shall cause each qualifying victim to be notified of the opportunity to receive a copy of the record of trial. Qualifying victims may decline receipt of such documents in writing and any written declination shall be attached to the original record of trial.

(C) *Documents to be provided.* For purposes of this subsection, the record of trial shall consist of documents described in subsection (b)(2) of this rule, except for proceedings described in subsection (e) of this rule, in which case the record of trial shall consist of items described in subsection (e). Matters attached to the record as described in subsection (b)(3) of this rule are not required to be provided.'' (bb) R.C.M. 1104 (b)(1) is amended by inserting new subsection (E) after the Discussion section to R.C.M. 1104(b)(1)(D)(iii)(d) as follows:

''(E) *Victims of Sexual Assault.* Qualifying victims, as defined in R.C.M. 1103(g)(3)(A), shall be served a copy of the record of trial in the same manner as the accused under subsection (b) of this rule. In accordance with regulations of the Secretary concerned:

(i) A copy of the record of trial shall be provided to each qualifying victim as soon as it is authenticated, or if the victim requests, at a time thereafter. The victim's receipt of the record of trial, including any delay in receiving it, shall be documented and attached to the original record of trial.

(ii) A copy of the convening authority's action as described in R.C.M. 1103(b)(2)(D)(iv) shall be provided to each qualifying victim as soon as each document is prepared. If the victim makes a request in writing, service of the record of trial may be delayed until the action is available.

(iii) Classified information pursuant to subsection (b)(1)(D) of this rule, sealed matters pursuant to R.C.M. 1103A, or other portions of the record the release of which would unlawfully violate the privacy interests of any party, to include those afforded by 5 U.S.C. § 552a, The Privacy Act of 1974, shall not be provided. Matters attached to the record as described in R.C.M. 1103(b)(3) are not required to be provided.''

Sec. 3. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

(a) In paragraphs 1 through 113, the lesser included offenses in subparagraph d are uniformly amended to delete the existing language and insert the following words:

''See paragraph 3 of this part and Appendix 12A.''

(b) Paragraph 3b, Article 79, Lesser Included Offenses, is amended to read as follows:

''b. *Explanation.*

(1) In general. A lesser offense is ''necessarily included'' in a charged offense when the elements of the lesser offense are a subset of the elements of the charged offense, thereby putting the accused on notice to defend against the lesser offense in addition to the offense specifically charged. A lesser offense may be ''necessarily included'' when:

(a) All of the elements of the lesser offense are included in the greater offense, and the common elements are identical (for example, larceny as a lesser included offense of robbery);

(b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is a subset by being legally less serious (for example, housebreaking as a lesser included offense of burglary); or

(c) All of the elements of the lesser offense are ''included and necessary'' parts of the greater offense, but the mental element is a subset by being legally less serious (for example, wrongful appropriation as a lesser included offense of larceny).

(2) *Sua sponte duty.* A military judge must instruct panel members on lesser included offenses reasonably raised by the evidence.

(3) *Multiple lesser included offenses.* When the offense charged is a compound offense

comprising two or more included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged. For example, robbery includes both larceny and assault. Therefore, in a proper case, a court-martial may find an accused not guilty of robbery, but guilty of wrongful appropriation and assault.

(4) *Findings of guilty to a lesser included offense.* A court-martial may find an accused not guilty of the offense charged, but guilty of a lesser included offense by the process of exception and substitution. The court-martial may except (that is, delete) the words in the specification that pertain to the offense charged and, if necessary, substitute language appropriate to the lesser included offense. For example, the accused is charged with murder in violation of Article 118, but found guilty of voluntary manslaughter in violation of Article 119. Such a finding may be worded as follows:

Of the Specification: Guilty, except the word ''murder'' substituting therefor the words ''willfully and unlawfully kill,'' of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge: Not guilty, but guilty of a violation of Article 119.

If a court-martial finds an accused guilty of a lesser included offense, the finding as to the charge shall state a violation of the specific punitive article violated and not a violation of Article 79.

(5) *Specific lesser included offenses.* Specific lesser included offenses, if any, are listed for each offense in Appendix 12A, but the list is merely guidance to practitioners; is not all-inclusive; and is not binding on military courts.''

(c) Paragraph 45, Article 120—Rape and sexual assault generally, is amended by inserting new subparagraph b. immediately after subparagraph a. to read as follows:

''b. *Elements.*

(1) *Rape involving contact between penis and vulva or anus or mouth.*

(a) *By unlawful force*

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, between the penis and vulva or anus or mouth; and

(ii) That the accused did so with unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm*

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, between the penis and vulva or anus or mouth; and

(ii) That the accused did so by using force causing or likely to cause death or grievous bodily harm to any person.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.*

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, between the penis and vulva or anus or mouth; and

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.

(d) *By first rendering that other person unconscious*

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, between the penis and vulva or anus or mouth; and

(ii) That the accused did so by first rendering that other person unconscious.

(e) *By administering a drug, intoxicant, or other similar substance*

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, between the penis and vulva or anus or mouth; and

(ii) That the accused did so by administering to that other person by force or threat of force, or without the knowledge or permission 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.

(2) *Rape involving penetration of the vulva, anus, or mouth by any part of the body or any object.*

(a) *By force*

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva, anus, or mouth of another person by any part of the body or by any object;

(ii) That the accused did so with unlawful force; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(b) By force causing or likely to cause death or grievous bodily harm

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva, anus, or mouth of another person by any part of the body or by any object;

(ii) That the accused did so by using force causing or likely to cause death or grievous bodily harm to any person; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(c) By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva, anus, or mouth of another person by any part of the body or by any object;

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(d) By first rendering that other person unconscious

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva, anus, or mouth of another person by any part of the body or by any object;

(ii) That the accused did so by first rendering that other person unconscious; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(e) By administering a drug, intoxicant, or other similar substance

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva, anus, or mouth of another person by any part of the body or by any object;

(ii) That the accused did so by administering to that other person by force or threat of force, or without the knowledge or permission 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; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(3) Sexual assault involving contact between penis and vulva or anus or mouth.

(a) By threatening or placing that other person in fear

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, between the penis and vulva or anus or mouth; and

(ii) That the accused did so by threatening or placing that other person in fear.

(b) By causing bodily harm

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, between the penis and vulva or anus or mouth; and

(ii) That the accused did so by causing bodily harm to that other person.

(c) By fraudulent representation

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, between the penis and vulva or anus or mouth; and

(ii) That the accused did so by making a fraudulent representation that the sexual act served a professional purpose.

(d) By false pretense

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, between the penis and vulva or anus or mouth; and

(ii) That the accused did so by inducing a belief by any artifice, pretense, or concealment that the accused is another person.

(e) Of a person who is asleep, unconscious, or otherwise unaware the act is occurring

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, between the penis and vulva or anus or mouth; and

(ii) That the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring.

(iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring.

(f) When the other person is incapable of consenting

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, between the penis and vulva or anus or mouth;

(ii) That the other person was incapable of consenting to the sexual act due to:

(A) Impairment by any drug, intoxicant or other similar substance; or

(B) A mental disease or defect, or physical disability; and

(iii) That the accused knew or reasonably should have known of the impairment, mental disease or defect, or physical disability of the other person.

(4) Sexual assault involving penetration of the vulva, anus, or mouth by any part of the body or any object.

(a) By threatening or placing that other person in fear

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva, anus, or mouth by any part of the body or by any object;

(ii) That the accused did so by threatening or placing that other person in fear; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(b) By causing bodily harm

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva, anus, or mouth by any part of the body or by any object;

(ii) That the accused did so by causing bodily harm to that other person; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(c) By fraudulent representation

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva, anus, or mouth by any part of the body or by any object;

(ii) That the accused did so by making a fraudulent representation that the sexual act served a professional purpose when it served no professional purpose; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(d) By false pretense

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva, anus, or mouth by any part of the body or by any object;

(ii) That the accused did so by inducing a belief by any artifice, pretense, or concealment that the accused is another person; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(e) Of a person who is asleep, unconscious, or otherwise unaware the act is occurring

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva, anus, or mouth by any part of the body or by any object;

(ii) That the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring;

(iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and

(iv) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(f) When the other person is incapable of consenting

(i) That the accused committed a sexual act upon another person by causing penetration, however slight, of the vulva, anus, or mouth by any part of the body or by any object;

(ii) That the other person was incapable of consenting to the sexual act due to:

(A) Impairment by any drug, intoxicant or other similar substance; or

(B) A mental disease or defect, or physical disability;

(iii) That the accused knew or reasonably should have known of the impairment, mental disease or defect, or physical disability of the other person; and

(iv) That the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(5) Aggravated sexual contact involving the touching of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person.

(a) By force

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;

(ii) That the accused did so with unlawful force; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(b) By force causing or likely to cause death or grievous bodily harm

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;

(ii) That the accused did so by using force causing or likely to cause death or grievous bodily harm to any person; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(c) By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(d) By first rendering that other person unconscious

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;

(ii) That the accused did so by first rendering that other person unconscious; and

(iii) That the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(e) By administering a drug, intoxicant, or other similar substance

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;

(ii) That the accused did so by administering to that other person by force or threat of force, or without the knowledge or permission 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; and

(iii) That the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(6) Aggravated sexual contact involving the touching of any body part of any person.

(a) By force

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;

(ii) That the accused did so with unlawful force; and

(iii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

(b) By force causing or likely to cause death or grievous bodily harm

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;

(ii) That the accused did so by using force causing or likely to cause death or grievous bodily harm to any person; and

(iii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping; and

(iii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

(d) *By first rendering that other person unconscious*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;

(ii) That the accused did so by first rendering that other person unconscious; and

(iii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

(e) *By administering a drug, intoxicant, or other similar substance*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;

(ii) That the accused did so by administering to that other person by force or threat of force, or without the knowledge or permission 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; and

(iii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

(7) *Abusive sexual contact involving the touching of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person.*

(a) *By threatening or placing that other person in fear*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;

(ii) That the accused did so by threatening or placing that other person in fear; and

(iii) That the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(b) *By causing bodily harm*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;

(ii) That the accused did so by causing bodily harm to that other person; and

(iii) That the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(c) *By fraudulent representation*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;

(ii) That the accused did so by making a fraudulent representation that the sexual act served a professional purpose; and

(iii) That the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(d) *By false pretense*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;

(ii) That the accused did so by inducing a belief by any artifice, pretense, or concealment that the accused is another person; and

(iii) That the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;

(ii) That the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring;

(iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and

(iv) That the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(f) *When the other person is incapable of consenting*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person;

(ii) That the other person was incapable of consenting to the sexual act due to:

(A) Impairment by any drug, intoxicant or other similar substance; or

(B) A mental disease or defect, or physical disability;

(iii) That the accused knew or reasonably should have known of the impairment, mental disease or defect, or physical disability of the other person; and

(iv) That the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(8) *Abusive sexual contact involving the touching of any body part of any person.*

(a) *By threatening or placing that other person in fear*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;

(ii) That the accused did so by threatening or placing that other person in fear; and

(iii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

(b) *By causing bodily harm*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;

(ii) That the accused did so by causing bodily harm to that other person; and

(iii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

(c) *By fraudulent representation*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;

(ii) That the accused did so by making a fraudulent representation that the sexual act served a professional purpose when it served no professional purpose; and

(iii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

(d) *By false pretense*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;

(ii) That the accused did so by inducing a belief by any artifice, pretense, or concealment that the accused is another person; and

(iii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;

(ii) That the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring;

(iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring; and

(iv) That the accused did so with intent to arouse or gratify the sexual desire of any person.

(f) *When the other person is incapable of consenting*

(i) That the accused committed sexual contact upon another person by touching, or causing another person to touch, any body part of any person;

(ii) That the other person was incapable of consenting to the sexual act due to:

(A) Impairment by any drug, intoxicant or other similar substance; or

(B) A mental disease or defect, or physical disability;

(iii) That the accused knew or reasonably should have known of the impairment, mental disease or defect, or physical disability of the other person; and

(iv) That the accused did so with intent to arouse or gratify the sexual desire of any person.''

(c) Paragraph 45, Article 120—Rape and sexual assault generally, is amended by inserting new subparagraph c. immediately after subparagraph b. to read as follows:

''c. *Explanation.*

(1) In general. Sexual offenses have been separated into three statutes: adults (120), children (120b), and other offenses (120c).

(2) *Definitions.* The terms are defined in Paragraph 45a(g).

(3) *Victim character and privilege.* See Mil. R. Evid. 412 concerning rules of evidence relating to the character of the victim of an alleged sexual offense. See Mil. R. Evid. 514 concerning rules of evidence relating to privileged communications between the victim and victim advocate.

(4) *Consent as an element.* Lack of consent is not an element of any offense under this paragraph unless expressly stated. Consent may be relevant for other purposes.''

(d) Paragraph 45, Article 120—Rape and sexual assault generally, is amended by inserting new subparagraph d. immediately after subparagraph c. to read as follows:

''d. *Lesser included offenses.* See paragraph 3 of this part and Appendix 12A.''

(e) Paragraph 45, Article 120—Rape and sexual assault generally, is amended by

inserting new subparagraph e. immediately after subparagraph d. to read as follows:

''e. *Maximum punishments.*

(1) Rape. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *Sexual assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) *Aggravated sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.''

(f) Paragraph 45, Article 120—Rape and sexual assault generally, is amended by inserting new subparagraph f. immediately after subparagraph e. to read as follows:

''f. *Sample specifications.*

(1) *Rape involving contact between penis and vulva or anus or mouth.*

(a) *By force.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____ by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis, by using unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____ by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis, by using force likely to cause death or grievous bodily harm to _____, to wit: _____.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____ by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis, by (threatening _____) (placing _____ in fear) that _____ would be subjected to (death) (grievous bodily harm) (kidnapping).

(d) *By first rendering that other person unconscious.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____ by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis, by first rendering _____ unconscious by _____.

(e) *By administering a drug, intoxicant, or other similar substance.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____ by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis, by administering to _____ (by force) (by threat of force) (without the knowledge or permission of _____) a (drug) (intoxicant) (list other similar substance), to wit: _____, thereby substantially impairing the ability of _____ to appraise or control his/her conduct.

(2) *Rape involving penetration of genital opening by any part of the body or any object.*

(a) *By force.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, commit a sexual act upon _____, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object) by using unlawful force, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse/gratify the sexual desire of) _____.

(b) *By force causing or likely to cause death or grievous bodily injury.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object) by using force likely to cause death or grievous bodily harm to _____, to wit: _____, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse/gratify the sexual desire of) _____.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon _____, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object) by (threatening _____) (placing _____ in fear) that _____ would be subjected to (death) (grievous bodily harm) (kidnapping), with an intent to (abuse) (humiliate) (harass) (degrade) (arouse/gratify the sexual desire of) _____.

(d) *By first rendering that other person unconscious.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, commit a sexual act upon _____, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object) by first rendering _____ unconscious, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse/gratify the sexual desire of) _____.

(e) *By administering a drug, intoxicant, or other similar substance.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, commit a sexual act upon _____, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object) by administering to _____ (by force) (by threat of force) (without the knowledge or permission of _____) a (drug) (intoxicant) (list other similar substance), to wit: _____, thereby substantially impairing the ability of _____ to appraise or control his/her conduct, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse/gratify the sexual desire of) _____.

(3) *Sexual assault involving contact between penis and vulva.*

(a) *By threatening or placing that other person in fear.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis, by (threatening _____) (placing _____ in fear).

(b) *By causing bodily harm.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, commit a sexual act upon _____, by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis by causing bodily harm to _____, to wit: _____.

(c) *By fraudulent representation.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis by making a fraudulent representation that the sexual act served a professional purpose, to wit: _____.

(d) *By false pretense.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis by inducing a belief by (artifice) (pretense) (concealment) that the said accused was another person.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis when he/she knew or reasonably should have known that _____ was (asleep) (unconscious) (unaware the sexual act was occurring due to _____).

(f) *When the other person is incapable of consenting.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, by causing penetration of _____'s (vulva) (anus) (mouth) with _____'s penis, when _____ was incapable of consenting to the sexual act because he/she [was impaired by (a drug, to wit: _____) (an intoxicant, to wit: _____) ()] [had a (mental disease, to wit: _____) (mental defect, to wit: _____) (physical disability, to wit: _____)], a condition that was known or reasonably should have been known by the said accused.

(4) *Sexual assault involving penetration of vulva or anus or mouth by any part of the body or any object.*

(a) *By threatening or placing that other person in fear.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, commit a sexual act upon _____, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), by (threatening _____) (placing _____ in fear), with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(b) *By causing bodily harm.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, commit a sexual act upon _____, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), by causing bodily harm to _____, to wit:_____ with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(c) *By fraudulent representation.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), by making a fraudulent representation that the sexual act served a professional purpose, to wit:

_____, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(d) *By false pretense.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, commit a sexual act upon _____, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), by inducing a belief by (artifice) (pretense) (concealment) that the said accused was another person, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, commit a sexual act upon _____, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), when he/she knew or reasonably should have known that _____ was (asleep) (unconscious) (unaware the sexual act was occurring due to _____), with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(f) *When the other person is incapable of consenting.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, commit a sexual act upon _____, by penetrating the (vulva) (anus) (mouth) of _____ with (list body part or object), when _____ was incapable of consenting to the sexual act because he/she [was impaired by (a drug, to wit: _____) (an intoxicant, to wit: _____) ()] [had a (mental disease, to wit: _____) (mental defect, to wit: _____) (physical disability, to wit: _____)], a condition that was known or reasonably should have been known by the said accused, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) _____.

(5) *Aggravated sexual contact involving the touching of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person.*

(a) *By force.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause _____ to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, by using unlawful force, with an intent to (abuse) (humiliate) (degrade) _____.

(b) *By force causing or likely to cause death or grievous bodily harm.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, [(touch) (cause _____ to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, by using force likely to cause death or grievous bodily harm to _____, to wit: _____, with an intent to (abuse) (humiliate) (degrade) _____.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause _____ to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, by (threatening _____) (placing _____ in fear) that _____ would be subjected to (death) (grievous bodily harm) (kidnapping), with an intent to (abuse) (humiliate) (degrade) _____.

(d) *By first rendering that other person unconscious.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause _____ to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, by rendering _____ unconscious by _____, with an intent to (abuse) (humiliate) (degrade) _____.

(e) *By administering a drug, intoxicant, or other similar substance.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause _____ to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, by administering to _____ (by force) (by threat of force) (without the knowledge or permission of ____) a (drug) (intoxicant) (___) thereby substantially impairing the ability of _____ to appraise or control his/her conduct, with an intent to (abuse) (humiliate) (degrade) _____.

(6) *Aggravated sexual contact involving the touching of any body part of any person.*

(a) *By force.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause _____ to touch)] [(directly) (through the clothing)] (name of body part) of _____, by using unlawful force, with an intent to (arouse) (gratify the sexual desire of) _____.

(b) *By force causing or likely to cause death or grievous bodily harm.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause _____ to touch)] [(directly) (through the clothing)] (name of body part) of _____, by using force likely to cause death or grievous bodily harm to _____, to wit: _____, with an intent to (arouse) (gratify the sexual desire of) _____.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause _____ to touch)] [(directly) (through the clothing)] (name of body part) of _____, by (threatening _____) (placing _____ in fear) that _____ would be subjected to (death) (grievous bodily harm) (kidnapping), with an intent to (arouse) (gratify the sexual desire of) _____.

(d) *By first rendering that other person unconscious.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause _____ to touch)] [(directly) (through the clothing)] (name of body part) of _____, by rendering _____ unconscious by _____, with an intent to (arouse) (gratify the sexual desire of) _____.

(e) *By administering a drug, intoxicant, or other similar substance.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause _____ to touch)] [(directly) (through the clothing)] (name of body part) of _____, by administering to _____ (by force) (by threat of force) (without the knowledge or permission of _____) a (drug) (intoxicant) (____) and thereby substantially impairing the ability of _____ to appraise or control his/her conduct, with an intent to (arouse) (gratify the sexual desire of) _____.

(7) *Abusive sexual contact involving the touching of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person.*

(a) *By threatening or placing that other person in fear.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____ by (threatening _____) (placing _____ in fear), with an intent to (abuse) (humiliate) (degrade) _____.

(b) *By causing bodily harm.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____ by causing bodily harm to _____, to wit: _____, with an intent to (abuse) (humiliate) (degrade) _____.

(c) *By fraudulent representation.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____ by making a fraudulent representation that the sexual contact served a professional purpose, to wit: _____, with an intent to (abuse) (humiliate) (degrade) _____.

(d) *By false pretense.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____ by inducing a belief by (artifice) (pretense) (concealment) that the said accused was another person, with an intent to (abuse) (humiliate) (degrade) _____.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____ when he/she knew or reasonably should have known that _____ was (asleep) (unconscious) (unaware the sexual contact was occurring due to _____), with an intent to (abuse) (humiliate) (degrade) _____.

(f) *When that person is incapable of consenting.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of _____ when _____ was incapable of consenting to the sexual contact because he/she [was impaired by (a drug, to wit: _____) (an intoxicant, to wit: _____) (1) [had a (mental disease, to wit: _____) (mental defect, to wit: _____)

(physical disability, to wit: _____)] and this condition was known or reasonably should have been known by _____, with an intent to (abuse) (humiliate) (degrade) _____.

(8) *Abusive sexual contact involving the touching of any body part of any person.*

(a) *By threatening or placing that other person in fear.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (name of body part) of _____ by (threatening _____) (placing _____ in fear), with an intent to (arouse) (gratify the sexual desire of) _____.

(b) *By causing bodily harm.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (name of body part) of _____ by causing bodily harm to _____, to wit: _____, with an intent to (arouse) (gratify the sexual desire of) _____.

(c) *By fraudulent representation.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (name of body part) of _____ by making a fraudulent representation that the sexual contact served a professional purpose, to wit: _____, with an intent to (arouse) (gratify the sexual desire of) _____.

(d) *By false pretense.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (name of body part) of _____ by inducing a belief by (artifice) (pretense) (concealment) that the said accused was another person, with an intent to (arouse) (gratify the sexual desire of) _____.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring.* In that (personal jurisdiction data), did (at/on board location), on or about ____ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (name of body part) of _____ when he/she knew or reasonably should have known that _____ was (asleep) (unconscious) (unaware the sexual contact was occurring due to _____), with an intent to (arouse) (gratify the sexual desire of) _____.

(f) *When that person is incapable of consenting.* In that (personal jurisdiction data), did (at/on board location), on or about _____ 20__, [(touch) (cause another person to touch)] [(directly) (through the clothing)] the (name of body part) of _____ when _____ was incapable of consenting to the sexual contact because he/she [was impaired by (a drug, to wit: _____) (an intoxicant, to wit: _____) (1) [had a (mental disease, to wit: _____) (mental defect, to wit: _____) (physical disability, to wit: _____)], a condition that was known or reasonably should have been known by _____, with an intent to (arouse) (gratify the sexual desire of) _____.''

(g) Paragraph 45b, Article 120—Rape and Sexual assault of a child, is amended by inserting new subparagraph b. immediately after subparagraph a. to read as follows:

''b. *Elements.*

(1) *Rape of a child involving contact between penis and vulva or anus or mouth.*

(a) *Rape of a child who has not attained the age of 12.*

(i) That the accused committed a sexual act upon a child causing penetration, however slight, between the penis and the vulva or anus or mouth; and

(ii) That at the time of the sexual act the child had not attained the age of 12 years.

(b) *Rape by force of a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child causing penetration, however slight, between the penis and the vulva or anus or mouth; and

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years, and

(iii) That the accused did so by using force against that child or any other person.

(c) *Rape by threatening or placing in fear a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child causing penetration, however slight, between the penis and the vulva or anus or mouth;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by threatening the child or another person or placing that child in fear.

(d) *Rape by rendering unconscious a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child causing penetration, however slight, between the penis and the vulva or anus or mouth;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by rendering that child unconscious.

(e) *Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child causing penetration, however slight, between the penis and the vulva or anus or mouth;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by administering to that child a drug, intoxicant, or other similar substance.

(2) *Rape of a child involving penetration of vulva, anus or mouth by any part of the body or any object.*

(a) *Rape of a child who has not attained the age of 12.*

(i) That the accused committed a sexual act upon a child by causing penetration, however slight, of the vulva, anus or mouth of the child by any part of the body or by any object;

(ii) That at the time of the sexual act the child had not attained the age of 12 years; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(b) *Rape by force of a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child by causing penetration, however slight, of the vulva, anus or mouth of the child by any part of the body or by any object;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years;

(iii) That the accused did so by using force against that child or any other person; and

(iv) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(c) *Rape by threatening or placing in fear a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child by causing penetration, however slight, of the vulva, anus or mouth of the child by any part of the body or by any object;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years;

(iii) That the accused did so by threatening the child or another person or placing that child in fear; and

(iv) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(d) *Rape by rendering unconscious a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child by causing penetration, however slight, of the vulva, anus or mouth of the child by any part of the body or by any object;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years;

(iii) That the accused did so by rendering that child unconscious; and

(iv) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(e) *Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child by causing penetration, however slight, of the vulva, anus or mouth of the child by any part of the body or by any object;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years;

(iii) That the accused did so by administering to that child a drug, intoxicant, or other similar substance; and

(iv) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(3) *Sexual assault of a child.*

(a) *Sexual assault of a child who has attained the age of 12 involving contact between penis and vulva or anus or mouth.*

(i) That the accused committed a sexual act upon a child causing contact between penis and vulva or anus or mouth; and

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years.

(b) *Sexual assault of a child who has attained the age of 12 involving penetration*

of vulva, anus or mouth by any part of the body or any object.

(i) That the accused committed a sexual act upon a child by causing penetration, however slight, of the vulva or anus or mouth of the child by any part of the body or by any object;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(4) *Sexual abuse of a child.*

(a) *Sexual abuse of a child by sexual contact involving the touching of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person.*

(i) That the accused committed sexual contact upon a child by touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person; and

(ii) That the accused did so with intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(b) *Sexual abuse of a child by sexual contact involving the touching of any body part.*

(i) That the accused committed sexual contact upon a child by touching, or causing another person to touch, either directly or through the clothing, any body part of any person; and

(ii) That the accused did so with intent to arouse or gratify the sexual desire of any person.

(c) *Sexual abuse of a child by indecent exposure.*

(i) That the accused intentionally exposed his/her genitalia, anus, buttocks, or female areola or nipple to a child by any means; and

(ii) That the accused did so with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

(d) *Sexual abuse of a child by indecent communication.*

(i) That the accused intentionally communicated indecent language to a child by any means; and

(ii) That the accused did so with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

(e) *Sexual abuse of a child by indecent conduct.*

(i) That the accused engaged in indecent conduct, intentionally done with or in the presence of a child; and

(ii) That the indecent conduct amounted to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.''

(h) Paragraph 45b, Article 120b—Rape and sexual assault of a child, is amended by inserting new subparagraph c. immediately after subparagraph b. to read as follows:

''c. *Explanation.*

(1) *In general.* Sexual offenses have been separated into three statutes: adults (120), children (120b), and other offenses (120c).

(2) *Definitions.* Terms not defined in this paragraph are defined in paragraph 45b.a(h), *supra.''*

(i) Paragraph 45b, Article 120b—Rape and sexual assault of a child, is amended by inserting new subparagraph d. immediately after subparagraph c. to read as follows:

''d. *Lesser included offenses.* See paragraph 3 of this part and Appendix 12A.''

(j) Paragraph 45b, Article 120b—Rape and sexual assault of a child, is amended by inserting new subparagraph e. immediately after subparagraph d. to read as follows:

''e. *Maximum punishment.*

(1) *Rape of a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *Sexual assault of a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) *Sexual abuse of a child.*

(a) *Cases involving sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(b) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.''

(k) Paragraph 45b, Article 120b—Rape and sexual assault of a child, is amended by inserting new subparagraph f. immediately after subparagraph e. to read as follows:

''f. *Sample specifications.*

(1) *Rape of a child involving contact between penis and vulva or anus or mouth.*

(a) *Rape of a child who has not attained the age of 12.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had not attained the age of 12 years, by causing penetration of ___'s (vulva) (anus) (mouth) with ___'s penis.

(b) *Rape by force of a child who has attained the age of 12 years.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had attained the age of 12 years but had not attained the age of 16 years, by causing penetration of ___'s (vulva) (anus) (mouth) with ___'s penis, by using force against ___.

(c) *Rape by threatening or placing in fear a child who has attained the age of 12 years.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had attained the age of 12 years but had not attained the age of 16 years, by causing penetration of ___'s (vulva) (anus) (mouth) with ___'s penis by (threatening ___) (placing ___ in fear).

(d) *Rape by rendering unconscious of a child who has attained the age of 12 years.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had attained the age of 12 years but had not attained the age of 16 years, by causing penetration of ___'s (vulva) (anus) (mouth) with ___'s penis by rendering ___ unconscious by ___.

(e) *Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12 years.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had attained the age of 12 years but had not attained the age of 16 years, by causing penetration of ___'s (vulva) (anus) (mouth) with ___'s penis by administering to ___ a (drug) (intoxicant) (___), to wit:___.

(2) *Rape of a child involving penetration of the vulva or anus or mouth by any part of the body or any object.*

(a) *Rape of a child who has not attained the age of 12.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had not attained the age of 12 years, by penetrating the (vulva) (anus) (mouth) of ___ with (list body part or object), with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) ___.

(b) *Rape by force of a child who has attained the age of 12 years.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating the (vulva) (anus) (mouth) of ___ with (list body part or object), by using force against ___, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) ___.

(c) *Rape by threatening or placing in fear a child who has attained the age of 12 years.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating the (vulva) (anus) (mouth) of ___ with (list body part or object), by (threatening ___) (placing ___ in fear), with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) ___.

(d) *Rape by rendering unconscious of a child who has attained the age of 12 years.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating the (vulva) (anus) (mouth) of ___ with (list body part or object), by rendering ___ unconscious, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) ___.

(e) *Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12 years.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating the (vulva) (anus) (mouth) of ___ with (list body part or object), by administering to ___ a (drug) (intoxicant) (___), to wit: ___, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) ___.

(3) *Sexual assault of a child.*

(a) *Sexual assault of a child who has attained the age of 12 years involving contact between penis and vulva or anus or mouth.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had

attained the age of 12 years but had not attained the age of 16 years, by causing penetration of ___'s (vulva) (anus) (mouth) with ___'s penis.

(b) *Sexual assault of a child who has attained the age of 12 years involving penetration of vulva or anus or mouth by any part of the body or any object.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20__, commit a sexual act upon ___, a child who had attained the age of 12 years but had not attained the age of 16 years, by penetrating the (vulva) (anus) (mouth) of ___ with (list body part or object), with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) ___.

(4) *Sexual abuse of a child.*

(a) *Sexual abuse of a child involving sexual contact involving the touching of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20 __, commit a lewd act upon ___, a child who had not attained the age of 16 years, by intentionally [(touch) (cause ___ to touch)] [(directly) (through the clothing)] the (genitalia) (anus) (groin) (breast) (inner thigh) (buttocks) of ___, with an intent to (abuse) (humiliate) (degrade) ___.

(b) *Sexual abuse of a child involving sexual contact involving the touching of any body part of any person.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20 __, commit a lewd act upon ___, a child who had not attained the age of 16 years, by intentionally exposing [his (genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)] to ___, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) ___.

(c) *Sexual abuse of a child involving indecent exposure.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20 __, commit a lewd act upon ___, a child who had not attained the age of 16 years, by intentionally [(touch) (cause ___ to touch)] [(directly) (through the clothing)] (name of body part) of ___, with an intent to (arouse) (gratify the sexual desire of) ___.

(d) *Sexual abuse of a child involving indecent communication.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20 __, commit a lewd act upon ___, a child who had not attained the age of 16 years, by intentionally communicating to ___ indecent language to wit: ___, with an intent to (abuse) (humiliate) (harass) (degrade) (arouse) (gratify the sexual desire of) ___.

(e) *Sexual abuse of a child involving indecent conduct.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20 __, commit a lewd act upon ___, a child who had not attained the age of 16 years, by engaging in indecent conduct, to wit: ___, intentionally done (with) (in the presence of) ___, which conduct amounted to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.''

(m) Paragraph 45c, Article 120—Other sexual misconduct, is amended by inserting new subparagraph b. immediately after subparagraph a. to read as follows:

''b. *Elements.*

(1) *Indecent viewing.*

(a) That the accused knowingly and wrongfully viewed the private area of another person;

(b) That said viewing was without the other person's consent; and

(c) That said viewing took place under circumstances in which the other person had a reasonable expectation of privacy.

(2) *Indecent visual recording.*

(a) That the accused knowingly recorded (photographed, videotaped, filmed, or recorded by any means) the private area of another person;

(b) That said visual recording was without the other person's consent; and

(c) That said visual recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(3) *Broadcasting of an indecent visual recording.*

(a) That the accused knowingly broadcast a certain visual recording of another person's private area;

(b) That said visual recording was made or broadcast without the other person's consent;

(c) That the accused knew or reasonably should have known that the visual recording was made or broadcast without the other person's consent;

(d) That said visual recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonably should have known that said visual recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(4) *Distribution of an indecent visual recording.*

(a) That the accused knowingly distributed a certain visual recording of another person's private area;

(b) That said visual recording was made or distributed without the other person's consent;

(c) That the accused knew or reasonably should have known that said visual recording was made or distributed without the other person's consent;

(d) That said visual recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonably should have known that said visual recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(5) *Forcible pandering.*

(a) That the accused compelled a certain person to engage in an act of prostitution with any person; and

(6) *Indecent exposure.*

(a) That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple;

(b) That the exposure was in an indecent manner; and

(c) That the exposure was intentional.''

(l) Paragraph 45c, Article 120—Other sexual misconduct, is amended by inserting new subparagraph c. immediately after subparagraph b. to read as follows:

''c. *Explanation.*

(1) *In general.* Sexual offenses have been separated into three statutes: adults (120), children (120b), and other offenses (120c).

(2) *Definitions.*

(a) *Recording or visual recording.* A ''recording'' or ''visual recording'' is a still or moving visual image captured or recorded by any means.

(b) Other terms are defined in paragraph 45c.a(d), *supra.''*

(m) Paragraph 45c, Article 120—Other sexual misconduct, is amended by inserting new subparagraph b. immediately after subparagraph a. to read as follows:

''d. *Lesser included offenses.* See paragraph 3 of this part and Appendix 12A.''

(n) Paragraph 45c, Article 120—Other sexual misconduct, is amended by inserting new subparagraph e. immediately after subparagraph d. to read as follows:

''e. *Maximum punishment.*

(1) *Indecent viewing.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Indecent visual recording.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Broadcasting or distribution of an indecent visual recording.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(4) *Forcible pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 12 years.

(5) *Indecent exposure.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.''

(o) Paragraph 45c, Article 120—Other sexual misconduct, is amended by inserting new subparagraph f. immediately after subparagraph e. to read as follows:

''f. *Sample specifications.*

(1) *Indecent viewing, visual recording, or broadcasting.*

(a) *Indecent viewing.* In that (personal jurisdiction data), did (at/on board location), on or about ___20 __, knowingly and wrongfully view the private area of ___, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(b) *Indecent visual recording.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20 __, knowingly (photograph) (film) (make a visual recording of) the private area of ___, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(c) *Broadcasting or distributing an indecent visual recording.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20 __, knowingly (broadcast) (distribute) a visual recording of the private area of ___, when the said accused knew or reasonably should have known that the said visual recording was (made) (and/or) (distributed/broadcast) without the consent of ___ and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(2) *Forcible pandering.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20 __, wrongfully compel ___ to engage in (a sexual act) (sexual contact) with ___, to wit: ___, for the purpose of receiving (money) (other compensation) (___).

(3) *Indecent exposure.* In that (personal jurisdiction data), did (at/on board location), on or about ___ 20 __, intentionally expose [his (genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)] in an indecent manner, to wit: ___.''

(p) Paragraphs 61 through 113, except for paragraphs 63, 87, 88, 90, and 101, the sample specifications in subparagraph f are uniformly amended to insert the words below between the last word and the period in each sample specification:

'', and that said conduct was (to the prejudice of good order and discipline in the armed forces) (and was) (of a nature to bring discredit upon the armed forces)''

(q) Paragraph 60, Article 134(b)—General Article, is amended to read as follows:

''b. *Elements.* The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital, the proof must establish every element of the crime or offense as required by the applicable law. All offenses under Article 134 require proof of a single terminal element; however, the terminal element may be proven using any of three theories of liability corresponding to clause 1, 2, or 3 offenses.

(1) For clause 1 or 2 offenses under Article 134, the following proof is required:

(a) That the accused did or failed to do certain acts; and

(b) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) For clause 3 offenses under Article 134, the following proof is required:

(a) That the accused did or failed to do certain acts that satisfy each element of the federal or assimilated statute; and

(b) That the offense charged was an offense not capital.''

(r) Paragraph 60, Article 134(c)(6)(a)—General Article, is amended to read as follows:

''(a) *Specifications under clause 1 or 2.* When alleging a clause 1 or 2 violation, the specification must expressly allege that the conduct was ''to the prejudice of good order and discipline'' or that it was ''of a nature to bring discredit upon the armed forces.'' The same conduct may be prejudicial to good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces. Both clauses may be alleged; however, only one must be proven to satisfy the terminal element. If conduct by an accused does not fall under any of the enumerated Article 134 offenses (paragraphs 61 through 113 of this Part), a specification not listed in this Manual may be used to allege the offense.''

(s) Paragraph 60, Article 134(c)(6)(b)—General Article, is amended to read as follows:

''(b) *Specifications under clause 3.* When alleging a clause 3 violation, the specification must expressly allege that the conduct was ''an offense not capital,'' and each element of the federal or assimilated statute must be alleged expressly or by necessary implication. In addition, the federal or assimilated statute should be identified.''

(t) Paragraph 60, Article 134(c)(6)(b)—General Article, is deleted:

(u) Paragraph 61, Article 134—Abusing public animal, is amended to read as follows:

''61. Article 134—(Animal Abuse)

a. *Text of statute. See* paragraph 60.

b. *Elements.*

(1) *Abuse, neglect or abandonment of an animal.*

(a) That the accused wrongfully abused, neglected or abandoned a certain (public*) animal (and the accused caused the serious injury or death of the animal*); and

(b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(***Note:** Add these elements as applicable.)

(2) *Sexual act with an animal.*

(a) That the accused engaged in a sexual act with a certain animal; and

(b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.* This offense prohibits knowing, reckless, or negligent abuse, neglect, or abandonment of an animal. This offense does not include legalized hunting, trapping, or fishing; reasonable and recognized acts of training, handling, or disciplining of an animal; normal and accepted farm or veterinary practices; research or testing conducted in accordance with approved military protocols; protection of person or property from an unconfined animal; or authorized military operations or military training.

(2) *Definitions.* As used in this paragraph:

(A) ''*Abuse''* means intentionally and unjustifiably: overdriving, overloading, overworking, tormenting, beating, depriving of necessary sustenance, allowing to be housed in a manner that results in chronic or repeated serious physical harm, carrying or confining in or upon any vehicles in a cruel or reckless manner, or otherwise mistreating an animal. Abuse may include any sexual touching of an animal if done with the intent to gratify the sexual desire of the accused and if not included in the definition of sexual act below.

(B) ''*Neglect''* means allowing another to abuse an animal, or, having the charge or custody of any animal, intentionally, knowingly, recklessly, or negligently failing to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved.

(C) ''*Abandoned''* means the intentional, knowing, reckless or negligent leaving of an animal at a location without providing minimum care while having the charge or custody of that animal.

(D) ''*Animal''* means pets and animals of the type that are raised by individuals for resale to others, including but not limited to: Cattle, horses, sheep, pigs, goats, chickens, dogs, cats and similar animals owned or under the control of any person. Animal does not include reptiles, insects, arthropods, or any animal defined or declared to be a pest by the administrator of the United States Environmental Protection Agency.

(E) ''*Public animal''* means any animal owned or used by the United States or any animal owned or used by a local or State government in the United States, its territories or possessions. This would include, for example, drug detector dogs used by the government.

(F) ''*Sexual act''* with an animal means contact between the sex organ, anus or mouth of a person and the sex organ, mouth, or anus of an animal, or any penetration, however slight, of any part of the body of the person into the sex organ or anus of an animal.

(H) ''*Serious injury''* of an animal means physical harm that involves a temporary but substantial disfigurement; causes a temporary but substantial loss or impairment of the function of any bodily part or organ; causes a fracture of any bodily part; causes permanent maiming; causes acute pain of a duration that results in suffering; or carries a substantial risk of death. Serious injury includes, but is not limited to, burning, torturing, poisoning, or maiming.

d. *Lesser included offenses.* See paragraph 3 of this part and Appendix 12A.

e. *Maximum punishment.*

(1) *Abuse, neglect or abandonment of an animal.* Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Abuse, neglect or abandonment of a public animal.* Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) *Sexual act with an animal or cases where the accused caused the serious injury or death of the animal.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that _____, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about (date), (wrongfully [abuse] [neglect] [abandon]) (*engage in a sexual act, to wit: _____, with) a certain (*public) animal (*and caused [serious injury to] [the death of] the animal), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).

(* **Note:** Add these elements as applicable.)''

(v) Paragraph 90, Article 134—Indecent Acts with another was deleted by Executive Order 13447, 72 Fed. Reg. 56179 (Oct. 2, 2007), Article 134 (Indecent Conduct) is inserted and reads as follows:

''90. Article 134—(Indecent Conduct)

a. *Text of Statute. See* paragraph 60.

b. *Elements.*

(1) That the accused engaged in a certain conduct;

(2) That the conduct was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) ''*Indecent''* means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

(2) Indecent conduct includes offenses previously prescribed by ''Indecent acts with another'' except that the presence of another person is no longer required. For purposes of this offense, the words ''conduct'' and ''act'' are synonymous. For child offenses, some indecent conduct may be included in the definition of lewd act and preempted by Article 120b(c). *See* paragraph 60c(5)(a).

d. *Lesser included offense.* See paragraph 3 of this part and Appendix 12A.

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about (date), (wrongfully commit indecent conduct, to wit: _____), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (or) (and was) (of a nature to bring discredit upon the armed forces).''

Changes to Appendix 12, Maximum Punishment Chart

(a) Article 120 is deleted and is replaced with the following:

Offense	Discharge	Confinement	Forfeiture
Rape	DD,BCD	Life [4]	Total.
Sexual Assault	DD,BCD	30 yrs	Total.
Aggravated Sexual Contact	DD,BCD	20 yrs	Total.
Abusive Sexual Contact	DD,BCD	7 yrs	Total.

[4] With or without eligibility for parole.

(b) Article 120b is inserted and reads as follows:

Offense	Discharge	Confinement	Forfeiture
Rape of a Child	DD,BCD	Life [4]	Total.
Sexual Assault of a Child	DD,BCD	30 yrs	Total.
Sexual Abuse of a Child:			
Cases Involving Sexual Contact	DD,BCD	20 yrs	Total.
Other Cases	DD,BCD	15 yrs	Total.

[4] With or without eligibility for parole.

(c) Article 120c is inserted and reads as follows:

Offense	Discharge	Confinement	Forfeiture
Indecent Viewing	DD,BCD	1 yr	Total.
Indecent Visual Recording	DD,BCD	5 yrs	Total.
Broadcasting or Distributing of an Indecent Visual Recording	DD,BCD	7 yrs	Total.
Forcible Pandering	DD,BCD	12 yrs	Total.
Indecent Exposure	DD,BCD	1 yr	Total.

(c) Insert the following Note after Article 120c:

[**Note:** The Article 120, 120b, and 120c maximum punishments apply to offenses committed after 28 June 2012. *See* Appendices 23, 27, and 28]

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APPENDINX 12A
LESSER INCLUDED OFFENSES

This chart was compiled for convenience purposes only and is not the ultimate authority for specific lesser included offenses. Lesser offenses are those which are necessarily included in the offense charged. *See* Article 79. Depending on the factual circumstances in each case, the offenses listed below may be considered lesser included. The elements of the proposed lesser included offense should be compared with the elements of the greater offense to determine if the elements of the lesser offense are derivative of the greater offense and vice versa. The "elements test" is the proper method for determining lesser included offenses. *See* Appendix 23.

Attempts to commit an offense may constitute a lesser included offense and are not listed. *See* Article 80.

Article	*Offense*	*Lesser Included Offense*
77	Principals (*see* Part IV, Para. 1)	
78	Accessory after the fact (*see* Part IV, Para. 2)	
79	Lesser included Offenses (*see* Part IV, Para. 3)	
80	Attempts (*see* Part IV, Para. 4)	
81	Conspiracy (*see* Part IV, Para. 5)	
82	Solicitation	
83	Fraudulent enlistment, appointment, or separation	
84	Effecting unlawful enlistment, appointment, or separation	
85	Desertion	Art. 86
86	Absence without leave	
87	Missing movement	
	- *Design*.....	Art. 87 (*neglect*); Art. 86
	- *Neglect*.....	Art. 86
88	Contempt toward officials	
89	Disrespect toward a superior commissioned officer	Art. 117
90	Assaulting or willfully disobeying superior commissioned officer	
	- *Striking superior commissioned officer in execution of office*.....	Art. 90 (*drawing or lifting up a weapon or offering violence to superior commissioned officer*); Art. 128 (*assault; assault consummated by battery; assault with a dangerous weapon; assault or assault consummated by battery upon commissioned officer not in the execution of office*)
	- *Drawing or lifting up a weapon or offering violence to superior Commissioned officer in execution of office*.....	Art. 128 (*assault; assault with dangerous weapon; assault upon a commissioned officer not in the execution of office*)
	- *Willfully disobeying lawful order of superior commissioned officer*.....	Art. 92; Art. 89
91	Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	
	- *Striking or assaulting warrant, noncommissioned, or petty officer in the execution of office*.....	Art. 128 (*assault; assault consummated by a battery; assault with a dangerous weapon; assault upon warrant, noncommissioned or petty officer not in the execution of office*)
	- *Disobeying a warrant, noncommissioned, or petty officer*.....	Art. 92
	- *Treating with contempt or being disrespectful in language or deportment toward warrant, noncommissioned, or petty officer in the execution of office*.....	Art. 117
92	Failure to obey order or regulation	

93	Cruelty and maltreatment	
94	Mutiny and sedition	
	- *Mutiny by creating violence or disturbance*……	Art. 90; Art. 116; Art. 128 (*assault*)
	- *Mutiny by refusing to obey orders or perform duties*……	Art. 90 (*willful disobedience of commissioned officer*); Art. 91 (*willful disobedience of warrant, noncommissioned, or petty officer*); Art. 92
	- *Sedition*……	Art. 116; Art. 128 (*assault*)
95	Resistance, flight, breach of arrest, and escape	
	- *Resisting apprehension*……	Art. 128 (*assault; assault consummated by battery*)
Article	*Offense*	*Lesser Included Offense*
96	Releasing prisoner without proper authority	
	- *Suffering a prisoner to escape through design*……	Art. 96 (*neglect*)
97	Unlawful detention	
98	Noncompliance with procedural rules	
99	Misbehavior before the enemy	
	- *Running away*……	Art. 85 (*desertion with intent to avoid hazardous duty or important service*); Art. 86 (*absence without authority; going from appointed place of duty*)
	- *Endangering safety of a command, unit, place, ship, or military property*……	Art. 92
	- *Casting away arms or ammunition*……	Art. 108
	- *Cowardly conduct*……	Art. 85 (*desertion with intent to avoid hazardous duty or important service*); Art. 86; Art. 99 (*running away*)
	- *Quitting place of duty to plunder or pillage*……	Art. 86 (*going from appointed place of duty*)
100	Subordinate compelling surrender	
101	Improper use of countersign	
102	Forcing a safeguard	
103	Captured or abandoned property	
104	Aiding the enemy	
105	Misconduct as a prisoner	
106	Spies	
106a	Espionage	
107	False official statements	
108	Military property of the United States—sale, loss, damage, destruction, or wrongful disposition	
	- *Willfully damaging military property*……	Art. 108 (*damaging military property through neglect*); Art. 109 (*willfully damaging non-military property*)
	- *Willfully suffering military property to be damaged*……	Art. 108 (*through neglect suffering military property to be damaged*)
	- *Willfully destroying military property*……	Art. 108 (*through neglect destroying military property; willfully damaging military property; through neglect damaging military property*); Art. 109 (*willfully destroying non-military property; willfully damaging non-military property*)
	- *Willfully suffering military property to be destroyed*……	Art. 108 (*through neglect suffering military property to be destroyed; willfully suffering military property to be damaged; through neglect suffering military property to be damaged*)
	- *Willfully losing military property*……	Art. 108 (*through neglect, losing military property*)
	- *Willfully suffering military property to be lost*……	Art. 108 (*through neglect, suffering military property to be lost*)
	- *Willfully suffering military property to be sold*……	Art. 108 (*through neglect, suffering military property to be sold*)
	- *Willfully suffering military property to be wrongfully disposed of*……	Art. 108 (*through neglect, suffering military property to be wrongfully disposed of in the manner alleged*)
109	Property other than military property of the United States—waste, spoilage, or destruction	

110	Improper hazarding of vessel	
	- *Willfully and wrongfully hazarding a vessel*.....	Art. 110 (*negligently hazarding a vessel*)
	- *Willfully and wrongfully suffering a vessel to be hazarded*.....	Art. 110 (*negligently suffering a vessel to be hazarded*)
111	Drunken or reckless operation of vehicle, aircraft, or vessel	
	- *Reckless, wanton, or impaired operation or physical control of a vessel*..	Art. 110
	- *Drunken operation of a vehicle, vessel, or aircraft while drunk or with a blood or breath alcohol concentration in violation of the described per se standard*.....	Art. 110; Art. 112
Article	*Offense*	*Lesser Included Offense*
112	Drunk on duty	
112a	Wrongful use, possession, etc., of controlled substances	
	- *Wrongful use of controlled substance*.....	Art. 112a (*wrongful possession of controlled substance*)
	- *Wrongful manufacture of controlled substance*.....	Art. 112a (*wrongful possession of controlled substance*)
	- *Wrongful introduction of controlled substance*.....	Art. 112a (*wrongful possession of controlled substance*)
	- *Wrongful possession, manufacture, or introduction of a controlled substance with intent to distribute*.....	Art. 112a (*wrongful possession, manufacture, or introduction of controlled substance*)
113	Misbehavior of sentinel or lookout	
	- *Drunk on post*.....	Art. 112; Art. 92 (*dereliction of duty*)
	- *Sleeping on post*.....	Art. 92 (*dereliction of duty*)
	- *Leaving post*.....	Art. 92 (*dereliction of duty*); Art. 86 (*going from appointed place of duty*)
114	Dueling	
115	Malingering	
116	Riot or breach of peace	
	- *Riot*.....	Art. 116 (*Breach of peace*)
117	Provoking speeches or gestures	
118	Murder	
	- *Premeditated murder and murder during certain offenses*.....	Art. 118 (*intent to kill or inflict great bodily harm; act inherently dangerous to another*)
	- *All murders under Article 118*.....	Art. 119 (*involuntary manslaughter*); Art. 128 (*assault; assault consummated by battery; aggravated assault*)
	- *Murder as defined in Article 118(1), (2), and (4)*.....	Art. 119 (*voluntary manslaughter*)
119	Manslaughter	
	- *Voluntary manslaughter*.....	Art. 119 (*involuntary manslaughter*); Art. 128 (*assault; assault consummated by battery; aggravated assault*)
	- *Involuntary manslaughter*.....	Art. 128 (*assault; assault consummated by battery*)
119a	Death or injury of an unborn child	
	- *Killing an unborn child*.....	Art. 119a (*injuring an unborn child*)
	- *Intentionally killing an unborn child*.....	Art. 119a (*killing an unborn child; injuring an unborn child*)
120[1]	Rape and sexual assault generally	
	- *Rape*	
	- *By unlawful force*.....	Art. 120(b)(1)(B); Art. 120(c); Art. 120(d); Art. 128 (*assault; assault consummated by battery*)
	- *By force causing or likely to cause death or grievous bodily harm to any person*.....	Art. 120(a)(1); Art. 120(b)(1)(B); Art. 120(c); Art. 120(d); Art. 128 (*assault; assault consummated by battery; assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; assault intentionally inflicting grievous bodily harm*)
	- *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping*.....	Art. 120(b)(1)(B); Art. 120(c); Art. 120(d)

[1] This chart only includes the 2012 version of Art. 120. *See* Appendix 27 and 28 for prior versions.

	- *By first rendering that other person unconscious*.....	Art. 120(b)(2); Art. 120(c); Art. 120(d)
	- *By administering to that person a drug, intoxicant*.....	Art. 120(c); Art. 128 (*assault; assault consummated by battery*)
	- *Sexual Assault*	
	- *By threatening or placing that other person in fear*.....	Art. 120(d)
	- *By causing bodily harm to that other person*.....	Art. 120(d); Art. 128 (*assault; assault consummated by battery*)
Article	*Offense*	*Lesser Included Offense*
	- *By making a fraudulent representation that the sexual act serves a professional purpose*.....	Art. 120(d)
	- *Inducing a belief by any artifice, pretense, or concealment that the person is another person*.....	Art. 120(d)
	- *Upon another person when the person know or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring*.....	Art. 120(d)
	- *When the other person is incapable of consenting*.....	Art. 120(d)
	- *Aggravated sexual contact*	
	- *By force*.....	Art. 120(d); Art. 128 (*assault; assault consummated by battery*)
	- *By force likely to cause death or grievous bodily harm*.....	Art. 120(d); Art. 128 (*assault; assault consummated by battery*)
	- *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping*.....	Art. 120(d)
	- *By first rendering that person unconscious*.....	Art. 120(d); Art. 128 (*assault; assault consummated by battery*)
	- *By administering a drug, intoxicant, or other similar substance*.....	Art. 120(c); Art. 128 (*assault; assault consummated by battery*)
	- *Abusive sexual contact*.....	Art. 128 (*assault; assault consummated by battery*)
120a	Stalking	
120b	Rape and sexual assault of a child	
	- *Rape of a child*	
	- *Of a child who has not attained the age of 12*.....	Art. 120b(c); Art. 120c
	- *By force of a child who has attained the age of 12*.....	Art. 120b(b); Art. 120b(c); Art. 128 (*assault consummated by battery upon a child under 16 years*)
	- *By threatening or placing in fear a child who has attained the age of 12*.....	Art. 120b(b); Art. 120b(c)
	- *By rendering unconscious a child who has attained the age of 12*.....	Art. 120b(b); Art. 120b(c); Art. 128 (*assault consummated by battery upon a child under 16 years*)
	- *Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12*.....	Art. 120b(b); Art. 120b(c); Art. 128 (*assault consummated by battery upon a child under 16 years*)
	- *Sexual assault of a child*	
	- *Sexual assault of a child who has not attained the age of 12 involving contact between penis and vulva or anus or mouth*..	Art. 120b(c)
	- *Sexual assault of a child who has attained the age of 12 involving penetration of vulva, anus, or mouth by any part of of the body or any object*.....	Art. 120b(c)
120c	Other sexual misconduct	
121	Larceny and wrongful appropriation	
	- *Larceny*.....	Art. 121 (*wrongful appropriation*)
	- *Larceny of military property*.....	Art. 121 (*wrongful appropriation; larceny of property other than military property*)
122	Robbery	Art. 121 (*larceny; wrongful appropriation*); Art. 128 (*assault; assault consummated by battery: assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm*)
123	Forgery	
123a	Making, drawing, or uttering check, draft, or order without sufficient funds	
124	Maiming	Art. 128 (*assault; assault consummated by batter;*

		assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm)
125	Sodomy	
	- *With a child under the age of 16*.....	Art. 125 (*forcible sodomy*)

Article	*Offense*	*Lesser Included Offense*
126	Arson	
	- *Aggravated arson*.....	Art. 126 (*simple arson*)
127	Extortion	
128	Assault	
	- *Assault consummated by a battery*.....	Art. 128 (*simple assault)*
	- *Assault upon a commissioned, warrant, noncommissioned, or petty officer*.....	Art. 128 (*simple assault; assault consummated by battery*)
	- *Assault upon a sentinel or lookout in the execution of duty*.....	Art. 128 (*simple assault; assault consummated by battery*)
	- *Assault consummated by a battery upon a child under 16 years*.....	Art. 128 (*simple assault; assault consummated by battery*)
	- *Assault with a dangerous weapon or other means of force likely to produce death or grievous bodily harm*.....	Art. 128 (*simple assault; assault consummated by battery; (when committed upon a child under the age of 16 years; assault consummated by battery upon a child under the age of 16 years*))
	- *Assault in which grievous bodily harm is intentionally inflicted*.....	Art. 128 (*simple assault; assault consummated by battery; assault with a dangerous weapon (when committed upon a child under the age of 16 years; assault consummated by battery upon a child under the age of 16 years*))
129	Burglary	Art. 130 (*housebreaking*)
130	Housebreaking	
131	Perjury	
132	Frauds against the United States	
133	Conduct unbecoming an officer and gentleman	
134	Abusing public animal	
134	Adultery	
134	Assault – with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking	
	- *Assault with intent to murder*.....	Art. 128 (*assault; assault consummated by battery; assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm*); Art. 134 (*assault with intent to commit voluntary manslaughter; willful or careless discharge of a firearm*)
	- *Assault with intent to commit voluntary manslaughter*.....	Art. 128 (*assault; assault consummated by battery; assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm*); Art. 134 (*willful or careless discharge of a firearm*)
	- *Assault with intent to commit rape or sodomy*.....	Art. 128 (*assault; assault consummated by battery; assault with a dangerous weapon*)
	- *Assault with intent to commit burglary*.....	Art. 128 (*assault; assault consummated by battery; assault with a dangerous weapon*); Art. 134 (*assault with intent to commit housebreaking*)
	- *Assault with intent to commit robbery, arson, or housebreaking*.....	Art. 128 (*assault; assault consummated by battery; assault with a dangerous weapon*)
134	Bigamy	
134	Bribery and graft	
	- *Bribery*.....	Art. 134 (*graft*)
134	Burning with intent to defraud	
134	Check, worthless, making and uttering – by dishonorably failing to maintain funds	
134	Child endangerment	
	- *Child Endangerment by Design*.....	Art. 134 (*child endangerment by culpable negligence*)

Article	*Offense*	*Lesser Included Offense*
134	Child pornography	
	- *Possessing child pornography with intent to distribute*.....	Art. 134 (*possessing child pornography*)
	- *Distributing child pornography*.....	Art. 134 (*possessing child pornography; possessing child pornography with intent to distribute*)
	- *Producing child pornography*.....	Art. 134 (*possessing child pornography*)

134	Cohabitation, wrongful	
134	Correctional custody – offenses against	
134	Debt, dishonorably failing to pay	
134	Disloyal statements	
134	Disorderly conduct, drunkenness	
134	Drinking liquor with prisoner	
134	Drunkenness – incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug	
134	False or unauthorized pass offenses *- Wrongful use or possession of false or unauthorized military or official pass, permit, discharge certificate, or identification card, with the intent to defraud or deceive*.....	Art. 134 (*same offenses, except without the intent to defraud or deceive*)
134	False pretenses, obtaining services under	
134	False swearing	
134	Firearm, discharging – through negligence	
134	Firearm, discharging – willfully, under such circumstances as to endanger human life	Art. 134 (*firearm, discharging – through negligence*)
134	Fleeing scene of accident	
134	Fraternization	
134	Gambling with subordinate	
134	Homicide, negligent	
134	Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official	
134	Indecent language	Art. 117 (*provoking speeches*)
134	Jumping from vessel into the water	
134	Kidnapping	
134	Mail: taking, opening, secreting, destroying, or stealing	Art. 121
134	Mails: depositing or causing to be deposited obscene matters in	
134	Misprision of serious offense	
134	Obstructing justice	
134	Wrongful interference with an adverse administrative proceeding	
134	Pandering and prostitution	
134	Parole, violation of	
134	Perjury: subornation of	
134	Public record: altering, concealing, removing, mutilating, obliterating, or destroying	
134	Quarantine: medical, breaking	Art. 134 (*breaking restriction*)
134	Reckless endangerment	
134	Restriction, breaking	
134	Seizure: destruction, removal, or disposal of property to prevent	
134	Self-injury without intent to avoid service	
134	Sentinel or lookout: offenses against or by	
134	Soliciting another to commit an offense	
134	Stolen property: knowingly receiving, buying, concealing	
134	Straggling	
134	Testify: wrongful refusal	
134	Threat or hoax designed or intended to cause panic or public fear *- Threat*.....	Art. 134 (*communicating a threat*); Art. 128 (*assault*)
134	Threat, communicating	Art. 117
134	Unlawful entry	
134	Weapon: concealed, carrying	
134	Wearing unauthorized insignia, decoration, badge, ribbon, device or lapel button	

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Changes to the Discussion Accompanying the Manual for Courts-Martial, United States

Section 1. The Discussion to Part I of the Manual for Courts-Martial, United States, is amended as follows:

(a) The Discussion immediately following Paragraph 4 is amended to read as follows:

''The Department of Defense, in conjunction with the Department of Homeland Security, has published supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Discussion (accompanying the Preamble, the Rules for Courts-Martial, and the Punitive Articles), an Analysis, and various appendices. These supplementary materials do not constitute the official views of the Department of Defense, the Department of Homeland Security, the Department of Justice, the military departments, the United States Court of Appeals for the Armed Forces, or any other authority of the Government of the United States, and they do not constitute rules. *Cf., e.g.,* 5 U.S.C. 551 (1982). The supplementary materials do not create rights or responsibilities that are binding on any person, party, or other entity (including any authority of the Government of the United States whether or not included in the definition of ''agency'' in 5 U.S.C. 551(1)). Failure to comply with matter set forth in the supplementary materials does not, of itself, constitute error, although these materials may refer to requirements in the rules set forth in the Executive Order or established by other legal authorities (for example, binding judicial precedents applicable to courts martial) which are based on sources of authority independent of the supplementary materials. *See* Appendix 21 in this Manual.

The 1995 amendment to paragraph 4 of the Preamble eliminated the practice of identifying the Manual for Courts-Martial, United States, by a particular year. Historically the Manual had been published in its entirety sporadically (*e.g.,* 1917, 1921, 1928, 1949, 1951, 1969 and 1984) with amendments to it published piecemeal. It was therefore logical to identify the Manual by the calendar year of publication, with periodic amendments identified as ''Changes'' to the Manual. Beginning in 1995, however, a new edition of the Manual was published in its entirety and a new naming

convention was adopted. *See* Exec. Order No. 12960. Beginning in 1995, the Manual was to be referred to as ''Manual for Courts-Martial, United States (19xx edition).'' Amendments made to the Manual can be researched in the relevant Executive Order as referenced in Appendix 25. Although the Executive Orders were removed from Appendix 25 of the Manual in 2012 to reduce printing requirements, they can be accessed online. *See* Appendix 25. The new changes to the Manual will also be annotated in the Preface.

Executive Order 13262, dated April 11, 2002, mandated that, ''The Manual shall be identified as 'Manual for Courts-Martial, United States (2002 edition).' '' Therefore, the preambles in the 2005 and 2008 Manuals were improperly amended. In 2013, the preamble was amended to identify new Manuals based on their publication date.''

Section 2. The Discussion to Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) Delete the first two ''Notes'' in the discussion immediately following R.C.M. 307(c)(3).

(b) Insert the words ''For Article 134 offenses, also refer to paragraph 60c(6) in Part IV.'' after the words ''How to draft specifications.'' in the discussion immediately following R.C.M. 307(c)(3).

(c) Delete the ''Note'' below (G) in the discussion immediately following R.C.M. 307(c)(3).

(d) Part (G)(i) in the discussion immediately following R.C.M. 307(c)(3) is amended to read as follows:

''(i) *Elements.* The elements of the offense must be alleged, either expressly or by necessary implication, except that article 134 specifications must expressly allege the terminal element. *See* paragraph 60c(6) in Part IV. If a specific intent, knowledge, or state of mind is an element of the offense, it must be alleged.''

(e) Part (G)(v) in the discussion immediately following R.C.M. 307(c)(3) is inserted to read as follows:

''(v) *Lesser Included Offenses.* The elements of the contemplated lesser included offense should be compared with the elements of the greater offense to determine if the elements of the lesser offense are derivative of the greater offense and vice versa. *See* discussion following paragraph 3b(1)(c) in Part IV and the related analysis in Appendix 23.''

(f) The discussion immediately following R.C.M. 307(c)(4) is amended to read as follows:

''The prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion. It is based on reasonableness, and has no foundation in Constitutional rights. To determine if charges are unreasonably multiplied, see R.C.M. 906(b)(12). Because prosecutors are free to plead in the alternative, it may be reasonable to charge two or more offenses that arise from one transaction if sufficient doubt exists as to the facts or the law. In no case should both an offense and a lesser included offense thereof be separately charged. *See also* Part IV, Para. 3, and R.C.M. 601(e)(2) concerning referral of several offenses.''

(g) The Discussion immediately following R.C.M. 405(g)(1)(B) is amended to read as follows:

''In preparing for the investigation, the investigating officer should consider what evidence, including evidence that may be obtained by subpoena duces tecum, will be necessary to prepare a thorough and impartial investigation. The investigating officer should consider, as to potential witnesses, whether their personal appearance will be necessary. Generally, personal appearance is preferred, but the investigating officer should consider whether, in light of the probable importance of a witness' testimony, an alternative to testimony under subsection (g)(4)(A) of this rule would be sufficient.

After making a preliminary determination of what witnesses will be produced and other evidence considered, the investigating officer should notify the defense and inquire whether it requests the production of other witnesses or evidence. In addition to witnesses for the defense, the defense may request production of witnesses whose testimony would favor the prosecution.

Once it is determined what witnesses the investigating officer intends to call, it must be determined whether each witness is reasonably available. That determination is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. For example, the temporary absence of a witness on leave for 10 days would normally justify using an alternative to that witness' personal appearance if the sole reason for the witness' testimony was to impeach the credibility of another witness by reputation evidence, or to establish a mitigating character trait of the accused. On the other hand, if the same witness was the only eyewitness to the offense, personal appearance would be required if the defense requested it and the witness is otherwise reasonably available. The time and place of the investigation may be changed if reasonably necessary to permit the appearance of a witness. Similar considerations apply to the production of evidence, including evidence that may be obtained by subpoena duces tecum.

If the production of witnesses or evidence would entail substantial costs or delay, the investigating officer should inform the commander who directed the investigation.

The provision in (B), requiring the investigating officer to notify the appropriate authorities of requests by the accused for information privileged under Mil. R. Evid. 505 or 506, is for the purpose of placing the appropriate authority on notice that an order, as authorized under subparagraph (g)(6), may be required to protect whatever information the government may decide to release to the accused.''

(h) The following Discussion is inserted immediately after R.C.M. 405(g)(2)(C)(i):

''Evidence shall include documents and physical evidence which are relevant to the investigation and not cumulative. *See* subsection (g)(1)(B). The investigating officer may discuss factors affecting reasonable availability with the custodian and with others. If the custodian determines that the evidence is not reasonably available, the reasons for that determination should be provided to the investigating officer.''

(i) The following Discussion is inserted immediately after R.C.M. 405(g)(2)(C)(ii):

''A subpoena duces tecum to produce books, papers, documents, data, electronically stored information, or other objects for pretrial investigation pursuant to Article 32 may be issued by the investigating officer or counsel representing the United States. *See* R.C.M. 703(f)(4)(B).

The investigating officer may find that evidence is not reasonably available if: the subpoenaed party refuses to comply with the duly issued subpoena duces tecum; the evidence is not subject to compulsory process; or the significance of the evidence is outweighed by the difficulty, expense, delay, and effect on military operations of obtaining the evidence.''

(j) The Discussion immediately following R.C.M. 405(g)(3) is amended to read as follows:

''See Department of Defense Joint Travel Regulations, Vol 2, paragraph C7910.''

(k) The Discussion immediately following R.C.M. 405(i) is amended to read as follows:

''With regard to all evidence, the investigating officer should exercise reasonable control over the scope of the inquiry. See subsection (e) of this rule. An investigating officer may consider any evidence, even if that evidence would not be admissible at trial. However, see subsection (g)(4) of this rule as to limitations on the ways in which testimony may be presented. Certain rules relating to the form of testimony which may be considered by the investigating officer appear in subsection (g) of this rule.

Mil. R. Evid. 412 evidence, including closed hearing Testimony, must be protected pursuant to the Privacy Act of 1974, 5 U.S.C. 552a. Evidence deemed admissible by the investigating officer should be made a part of the report of investigation. *See* subsection j(2)(C), *infra.* Evidence deemed inadmissible, and the testimony taken during the closed hearing, should not be included in the report of investigation and should be safeguarded. The investigating officer and counsel representing the United States are responsible for careful handling of any such evidence to prevent indiscriminate viewing or disclosure. Although R.C.M. 1103A does not apply, its requirements should be used as a model for safeguarding inadmissible evidence and closed hearing testimony. The convening authority and the appropriate judge advocate are permitted to review such safeguarded evidence and testimony. *See* R.C.M. 601(d)(1).''

(l) The Discussion immediately following R.C.M. 703(e)(2)(B) is amended to read as follows:

''A subpoena may not be used to compel a witness to appear at an examination or interview before trial, but a subpoena may be used to obtain witnesses for a deposition or a court of inquiry. In accordance with subsection (f)(4)(B) of this rule, a subpoena duces tecum to produce books, papers, documents, data, or other objects or electronically stored information for pretrial

investigation pursuant to Article 32 may be issued, following the convening authority's order directing such pretrial investigation, by either the investigating officer appointed under R.C.M. 405(d)(1) or the counsel representing the United States.

A subpoena normally is prepared, signed, and issued in duplicate on the official forms. See Appendix 7 for an example of a Subpoena with certificate of service (DD Form 453) and a Travel Order (DD Form 453–1).''

(m) The Discussion immediately following R.C.M. 703(e)(2)(D) is amended to read as follows:

''If practicable, a subpoena should be issued in time to permit service at least 24 hours before the time the witness will have to travel to comply with the subpoena.

Informal service. Unless formal service is advisable, the person who issued the subpoena may mail it to the witness in duplicate, enclosing a postage-paid envelope bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the envelope provided. The return envelope should be addressed to the person who issued the subpoena. The person who issued the subpoena should include with it a statement to the effect that the rights of the witness to fees and mileage will not be impaired by voluntary compliance with the request and that a voucher for fees and mileage will be delivered to the witness promptly on being discharged from attendance.

Formal service. Formal service is advisable whenever it is anticipated that the witness will not comply voluntarily with the subpoena. Appropriate fees and mileage must be paid or tendered. *See* Article 47. If formal service is advisable, the person who issued the subpoena must assure timely and economical service. That person may do so by serving the subpoena personally when the witness is in the vicinity. When the witness is not in the vicinity, the subpoena may be sent in duplicate to the commander of a military installation near the witness. Such commanders should give prompt and effective assistance, issuing travel orders for their personnel to serve the subpoena when necessary.

Service should ordinarily be made by a person subject to the code. The duplicate copy of the subpoena must have entered upon it proof of service as indicated on the form and must be promptly returned to the person who issued the subpoena. If service cannot be made, the person who issued the subpoena must be informed promptly. A stamped, addressed envelope should be provided for these purposes.

For purposes of this Rule, *hardship* is defined as any situation which would substantially preclude reasonable efforts to appear that could be solved by providing transportation for fees and mileage to which the witness is entitled for appearing at the hearing in question.''

(n) The Discussion immediately following R.C.M. 703(e)(2)(G)(i) is amended to read as follows:

''A warrant of attachment (DD Form 454) may be used when necessary to compel a witness to appear or produce evidence under this rule. *See* Appendix 7. A warrant of attachment is a legal order addressed to an official directing that official to have the person named in the order brought before a court.

Subpoenas issued under R.C.M. 703 are Federal process and a person not subject to the code may be prosecuted in a Federal civilian court under Article 47 for failure to comply with a subpoena issued in compliance with this rule and formally served.

Failing to comply with such a subpoena is a felony offense, and may result in a fine or imprisonment, or both, at the discretion of the district court. The different purposes of the warrant of attachment and criminal complaint under Article 47 should be borne in mind. The warrant of attachment, available without the intervention of civilian judicial proceedings, has as its purpose the obtaining of the witness' presence, testimony, or documents. The criminal complaint, prosecuted through the civilian Federal courts, has as its purpose punishment for failing to comply with process issued by military authority. It serves to vindicate the military interest in obtaining compliance with its lawful process.

For subpoenas issued for pretrial investigation pursuant to Article 32 under subsection (f)(4)(B), the General Court-Martial convening authority with jurisdiction over the case may issue a warrant of attachment to compel production of documents.''

(o) The Discussion immediately following R.C.M. 703(f)(1) is amended to read as follows:

''Relevance is defined by Mil. R. Evid 401. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact. The discovery and introduction of classified or other government information is controlled by Mil. R. Evid. 505 and 506.''

(p) The following Discussion is added immediately after R.C.M. 704(f)(4)(B):

''Public Law 112–81, *The FY12 National Defense Authorization Act,* § 542, amended Article 47 to allow the issuance of subpoenas duces tecum for Article 32 hearings. Although the amended language cites Article 32(b), this new subpoena power extends to documents subpoenaed by the investigating officer, whether requested by the defense or the government.''

(q) The Discussion immediately following R.C.M. 809(a) is amended to read as follows:

''Article 48 makes punishable ''direct'' contempt, as well as ''indirect'' or ''constructive'' contempt. ''Direct'' contempt is that which is committed in the presence of the court-martial or its immediate proximity. ''Presence'' includes those places outside the courtroom itself, such as waiting areas, deliberation rooms, and other places set aside for the use of the court-martial while it is in session. ''Indirect'' or ''constructive'' contempt is non-compliance with lawful writs, processes, orders, rules, decrees, or commands of the court-martial. A ''direct'' or ''indirect'' contempt may be actually seen or heard by the court-martial, in which case it may be punished summarily. *See* subsection (b)(1) below. A ''direct'' or ''indirect'' contempt may also be a contempt not actually observed by the court-martial; for example, when an unseen person makes loud noises, whether inside or outside the courtroom, which impede the orderly progress of the proceedings. In such a case the procedures for punishing for contempt are more extensive. *See* subsection (b)(2) below.

The words ''any person,'' as used in Article 48, include all persons, whether or not subject to military law, except the military judge, members, and foreign nationals outside the territorial limits of the United States who are not subject to the code. The military judge may order the offender removed whether or not contempt proceedings are held. It may be appropriate to warn a person whose conduct is improper that persistence in a course of behavior may result in removal or punishment for contempt. *See* R.C.M. 804, 806.

Each contempt may be separately punished.

A person subject to the code who commits contempt may be tried by court-martial or otherwise disciplined under Article 134 for such misconduct in addition to or instead of punishment for contempt. *See* paragraph 108, Part IV. *See also* Article 98. The 2010 amendment of Article 48 expanded the contempt power of military courts to enable them to enforce orders, such as discovery orders or protective orders regarding evidence, against military or civilian attorneys. Persons not subject to military jurisdiction under Article 2, having been duly subpoenaed, may be prosecuted in Federal civilian court under Article 47 for neglect or refusal to appear or refusal to qualify as a witness or to testify or to produce evidence.''

(r) The Discussion immediately following R.C.M. 906(b)(5) is amended to read as follows:

''Each specification may state only one offense. R.C.M. 307(c)(4). A duplicitous specification is one which alleges two or more separate offenses. Lesser included offenses (*see* paragraph 3, Part IV) are not separate, nor is a continuing offense involving separate acts. The sole remedy for a duplicitous specification is severance of the specification into two or more specifications, each of which alleges a separate offense contained in the duplicitous specification. However, if the duplicitousness is combined with or results in other defects, such as misleading the accused, other remedies may be appropriate. See subsection (b)(3) of this rule. *See also* R.C.M. 907(b)(3).

(s) The Discussion immediately following R.C.M. 906(b)(12) is amended to read as follows:

''Unreasonable multiplication of charges as applied to findings and sentence is a limitation on the military's discretion to charge separate offenses and does not have a foundation in the Constitution. The concept is based on reasonableness and prohibition against prosecutorial overreaching. In contrast, multiplicity is grounded in the Double Jeopardy clause of the Fifth

Amendment. It prevents an accused from being twice punished for one offense if it is contrary to the intent of Congress. *See* R.C.M. 907(b)(3). Therefore, a motion for relief from unreasonable multiplication of charges as applied to findings and sentence differs from a motion to dismiss on the grounds of multiplicity.

The following non-exhaustive factors should be considered when determining whether two or more offenses are unreasonably multiplied: Whether the specifications are aimed at distinctly separate criminal acts; whether they represent or exaggerate the accused's criminality; whether they unreasonably increase his or her exposure to punishment; and whether they suggest prosecutorial abuse of discretion in drafting of the specifications. Because prosecutors are permitted to plead in the alternative based on exigencies of proof, a ruling on this motion ordinarily should be deferred until after findings are entered.''

(t) The Discussion immediately following R.C.M. 907(b)(3) is amended to read as follows:

''Multiplicity is a legal concept, arising from the Double Jeopardy clause of the Fifth Amendment, which provides that no person shall be put in jeopardy twice for the same offense. Absent legislative intent to the contrary, an accused cannot be convicted and punished for violations of two or more statutes if they arise from a single act. Where Congress intended to impose multiple punishments for the same act, imposition of such sentence does not violate the Constitution.

Multiplicity differs from unreasonable multiplication of charges. If two offenses are not multiplicious, they nonetheless may constitute an unreasonable multiplication of charges as applied to findings or sentence. *See* R.C.M. 906(b)(12). Unreasonable multiplication of charges is a limitation on the military's discretion to charge separate offenses; it does not have a foundation in the Constitution; and it is based on reasonableness and the prohibition against prosecutorial overreaching. The military judge is to determine, in his or her discretion, whether the charges constitute unreasonable multiplication of charges as applied to findings or sentencing. *See* R.C.M. 906(b)(12).

To determine if two charges are multiplicious, the practitioner should first determine whether they are based on separate acts. If so, the charges are not multiplicious because separate acts may be charged and punished separately. If the charges are based upon a single act, the practitioner should next determine if it was Congress's intent to impose multiple convictions and punishments for the same act. Although there are multiple sources to determine Congressional intent (*e.g.,* the statute itself or legislative history), when there is no overt expression, Congressional intent may be inferred based on the elements of the charged statutes and their relationship to each other. If each statute contains an element not contained in the other, it may be inferred that Congress intended they be charged and punished separately. Likewise, if each statue contains the same elements, it may be inferred that Congress did not intend they be charged and punished separately. A lesser included offense will always be multiplicious if charged separately, but offenses do not have to be lesser included to be multiplicious.

Ordinarily, a specification should not be dismissed for multiplicity before trial. The less serious of any multiplicious specifications shall be dismissed after findings have been reached. Due consideration must be given, however, to possible post-trial or appellate action with regard to the remaining specification.''

(u) The Discussion immediately following R.C.M. 910(a)(1) is amended to read as follows:

''*See* paragraph 3, Part IV, concerning lesser included offenses. When the plea is to a lesser included offense without the use of exceptions and substitutions, the defense counsel should provide a written revised specification to be included in the record as an appellate exhibit.

A plea of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged. *See also* subsection (g) of this rule.

A plea of guilty does not prevent the introduction of evidence, either in support of the factual basis for the plea, or, after findings are entered, in aggravation. *See* R.C.M. 1001(b)(4).

(v) The Discussion immediately following R.C.M. 916(j)(2) is amended to read as follows:

''Examples of ignorance or mistake which need only exist in fact include: Ignorance of the fact that the person assaulted was an officer; belief that property allegedly stolen belonged to the accused; belief that a controlled substance was really sugar.

Examples of ignorance or mistake which must be reasonable as well as actual include: Belief that the accused charged with unauthorized absence had permission to go; belief that the accused had a medical ''profile'' excusing shaving as otherwise required by regulation. Some offenses require special standards of conduct (*see,* for example, paragraph 68, Part IV, Dishonorable failure to maintain sufficient funds); the element of reasonableness must be applied in accordance with the standards imposed by such offenses.

Examples of offenses in which the accused's intent or knowledge is immaterial include: Any rape of a child, or any sexual assault or sexual abuse of a child when the child is under 12 years old. However, such ignorance or mistake may be relevant in extenuation and mitigation.

See subsection (l)(1) of this rule concerning ignorance or mistake of law.''

(w) The Discussion immediately following R.C.M. 918(a)(1) is amended to read as follows:

''*Exceptions and Substitutions.* One or more words or figures may be excepted from a specification and, when necessary, others substituted, if the remaining language of the specification, with or without substitutions, states an offense by the accused which is punishable by the court-martial. Changing the date or place of the offense may, but does not necessarily, change the nature or identity of an offense.

If A and B are joint accused and A is convicted but B is acquitted of an offense charged, A should be found guilty by excepting the name of B from the specification as well as any other words indicating the offense was a joint one.

Lesser Included Offenses. If the evidence fails to prove the offense charged but does prove an offense necessarily included in the offense charged, the factfinder may find the accused not guilty of the offense charged but guilty of the lesser included offense. *See* paragraph 3 of Part IV concerning lesser included offenses.

Offenses arising from the same act or transaction. The accused may be found guilty of two or more offenses arising from the same act or transaction, whether or not the offenses are separately punishable. *But see* R.C.M. 906(b)(12); 907(b)(3)(B); 1003(c)(1)(C).

(x) The Discussion immediately following R.C.M. 1003(c)(1)(C) is amended to read as follows:

''Multiplicity is addressed in R.C.M. 907(b)(3)(B). Unreasonable multiplication of charges is addressed in R.C.M. 906(b)(12).''

(y) The following Discussion is inserted immediately after R.C.M. 1103(b)(3)(N):

''Per R.C.M. 1114(f), consult service regulations for distribution of promulgating orders.''

(z) The following Discussion is inserted immediately after R.C.M. 1103(g)(3):

''Subsections (b)(3)(N) and (g)(3) of this rule were added to implement Article 54(e), UCMJ, in compliance with the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81 § 586). Service of a copy of the record of trial on a victim is prescribed in R.C.M. 1104(b)(1)(E).''

(aa) The following Discussion is added immediately after R.C.M. 1104(b)(1)(E):

''Subsection (b)(1)(E) of this rule was added to implement Article 54(e), UCMJ, in compliance with the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81 § 586). The contents of the victim's record of trial is prescribed in R.C.M. 1103(g)(3)(C).

Promulgating orders are to be distributed in accordance with R.C.M. 1114(f).''

Section 3. The Discussion to Part IV of the Manual for Courts-Martial, United States, is amended as follows:

(a) The Discussion immediately following Article 79(b)(1)(c) is amended to read as follows:

''The ''elements test'' is the proper method for determining lesser included offenses. *See United States* v. *Jones,* 68 M.J. 465 (C.A.A.F. 2010); *United States* v. *Schmuck,* 489 U.S. 705 (1985); Appendix 23 of this Manual. Paragraph 3b(1) was amended to comport with the elements test, which requires that the elements of the lesser offense must be a subset of the elements of the charged offense. The elements test does not require identical statutory language, and normal principals of statutory interpretation are permitted. The elements test is necessary to safeguard the due process requirement of notice to a criminal defendant.''

(b) The Discussion immediately following, paragraph 3, Article 79(b)(5), Conviction of lesser included offenses, is amended to read as follows:

''Practitioners must consider lesser included offenses on a case-by-case basis. *See United States v. Jones,* 68 M.J. 465 (C.A.A.F. 2010); *United States* v. *Alston,* 69 M.J. 214 (C.A.A.F. 2010); discussion following paragraph 3b(1)(c) above. The lesser included offenses listed in Appendix 12A were amended in 2013 to comport with the elements test; however, practitioners must analyze each lesser included offense on a case-by-case basis. *See* Appendix 23 of this Manual.''

(c) The following Discussion is inserted immediately after paragraph 60, Article 134(b)—General Article:

''The terminal element is merely the expression of one of the clauses under Article 134. See paragraph c below for an explanation of the clauses and rules for drafting specifications. More than one clause may be alleged and proven; however, proof of only one clause will satisfy the terminal element. For clause 3 offenses, the military judge may judicially notice whether an offense is capital. *See* Mil. R. Evid. 202.''

(d) The following Discussion is inserted immediately after paragraph 60, Article 134(c)(6)(a)—General Article:

''Clauses 1 and 2 are theories of liability that must be expressly alleged in a specification so that the accused will be given notice as to which clause or clauses to defend against. The words ''to the prejudice of good order and discipline in the armed forces'' encompass both paragraph c(2)(a), prejudice to good order and discipline, and paragraph c(2)(b), breach of custom of the Service. A generic sample specification is provided below:

''*In that _____, (personal jurisdiction data), did (at/on board location), on or about _____ 20____, (commit elements of Article 134 clause 1 or 2 offense), and that said conduct (was to the prejudice of good order and discipline in the armed forces) (and) (was of a nature to bring discredit upon the armed forces).*''

If clauses 1 and 2 are alleged together in the terminal element, the word ''and'' should be used to separate them. Any clause not proven beyond a reasonable doubt should be excepted from the specification at findings. *See* R.C.M. 918(a)(1). *See also* Appendix 23. Although using the conjunctive ''and'' to connect the two theories of liability is recommended, a specification connecting the two theories with the disjunctive ''or'' is sufficient to provide the accused reasonable notice of the charge against him. *See* Appendix 23.''

(e) The following Discussion is inserted immediately after paragraph 60, Article 134(c)(6)(b)—General Article:

''The words ''an offense not capital'' are sufficient to provide notice to the accused that a clause 3 offense has been charged and are meant to include all crimes and offenses not capital. A generic sample specification for clause 3 offenses is provided below:

In that _____, (personal jurisdiction data), did (at/on board location), on or about _____ 20____, (commit: address each element), an offense not capital, in violation of (name or citation of statute).

In addition to alleging each element of the federal or assimilated statute, practitioners should consider including, when appropriate and necessary, words of criminality (*e.g.,* wrongfully, knowingly, or willfully).''

Changes to Appendix 22, Analysis of the Military Rules of Evidence

(a) Delete the Note at the start of the first paragraph, Section I, General Provisions.

(b) Amend Section I, General Provisions to add the following:

''*2012 Amendment:* On December 1, 2011, the Federal Rules of Evidence (Fed. R. Evid.) were amended by restyling the rules to make them simpler to understand and use, without changing the substantive meaning of any rule.

After considering these changes to the Federal Rules, the Joint Service Committee on Military Justice (hereinafter ''the committee'') made significant changes to the Military Rules of Evidence (Mil. R. Evid.) in 2012. In addition to making stylistic changes to harmonize these rules with the Federal Rules, the committee also made changes to ensure that the rules addressed the admissibility of evidence, rather than the conduct of the individual actors. Like the Federal Rules of Evidence, these rules ultimately dictate whether evidence is admissible at courts-martial and, therefore, it is appropriate to phrase the rules with admissibility as the focus, rather than a focus on the actor (i.e., the commanding officer, military judge, accused, etc.).

The rules were also reformatted to achieve clearer presentation. The committee used indented paragraphs with headings and hanging indents to allow the practitioner to distinguish between different subsections of the rules. The restyled rules also reduce the use of inconsistent terms that are intended to mean the same thing but may, because of the inconsistent use, be misconstrued by the practitioner to mean something different.

With most changes, the committee made special effort to avoid any style improvement that might result in a substantive change in the application of the rule. However, in some rules, the committee rewrote the rule with the express purpose to change the substantive content of the rule in order to affect the application of the rule in practice. In the analysis of each rule, the committee clearly indicates whether the changes are substantive or merely stylistic. The reader is encouraged to consult the analysis of each rule if he or she has questions as to whether the committee intended that a change to the rule have an effect on a ruling of admissibility.''

(c) The analysis following M.R.E. 101 is amended to add the following language:

''*2012 Amendment:* In subsection (a), the phrase ''including summary courts-martial'' was removed because Rule 1101 already addresses the applicability of these rules to summary courts-martial. In subsection (b), the word ''shall'' was changed to ''will'' because the committee agreed with the approach of the Advisory Committee on Evidence Rules to minimize the use of words such as ''shall'' and ''should'' because of the potential disparity in application and interpretation of whether the word is precatory or proscriptive. *See* Fed. R. Evid. 101, Restyled Rules Committee Note. In making this change, the committee did not intend to change any result in any ruling on evidence admissibility.

The discussion section was added to this rule to alert the practitioner that discussion sections, which previously did not appear in Part III of the Manual, are included in this edition to elucidate the committee's understanding of the rules. The discussion sections do not have the force of law and may be changed by the committee without an Executive Order, as warranted by changes in applicable case law. The discussion sections should be considered treatise material and are non-binding on the practitioner.

The committee also revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(d) The analysis following M.R.E. 103 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(e) The analysis following M.R.E. 104 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(f) The title of the analysis section of M.R.E. 105 is changed to ''Limiting Evidence that is Not Admissible Against Other Parties or for Other Purposes.''

(g) The analysis following M.R.E. 105 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(h) The analysis following M.R.E. 106 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

SECTION II—Judicial Notice

(i) The analysis following M.R.E. 201 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence. Former subsection (d) was subsumed into subsection (c) and the remaining subsections were renumbered accordingly. In making these changes, the committee did not intend to change any result in any ruling on evidence admissibility.''

(j) The analysis following M.R.E. 202 is amended to add the following language:

''*2012 Amendment:* Former Rule 201A was renumbered so that it now appears as Rule 202. In previous editions, Rule 202 did not exist and therefore no other rules were renumbered as a result of this change. The phrase ''in accordance with Mil. R. Evid. 104'' was added to subsection (b) to clarify that Rule 104 controls the military judge's relevancy determination.

The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

SECTION III—EXCLUSIONARY RULES AND RELATED MATTERS CONCERNING SELF-INCRIMINATION, SEARCH AND SEIZURE, AND EYEWITNESS IDENTIFICATION

(k) The analysis following M.R.E. 301 is amended to add the following language:

''*2012 Amendment:* In subsection (c), the phrase ''concerning the issue of guilt or innocence'' was removed because this subsection applies to the presentencing phase of the trial as well as the merits phase. The use of the term ''concerning the issue of guilt or innocence'' incorrectly implied that the subsection only referred to the merits phase. The rule was renamed ''Limited Waiver,'' changed from ''Waiver by the accused,'' to indicate that when an accused who is on trial for two or more offenses testifies on direct as to only one of the offenses, he has only waived his rights with respect to that offense and no other. Also, the committee moved this subsection up in the rule and renumbered it in order to address the issue of limited waivers earlier because of the importance of preserving the accused's right against self-incrimination.

In subsection (d), the committee intends that the word ''answer'' be defined as ''a witness's response to a question posed.'' *Black's Law Dictionary* 100 (8th ed. 2004). Subsection (d) only applies when the witness's response to the question posed may be incriminating. It does not apply when the witness desires to make a statement that is unresponsive to the question asked for the purpose of gaining protection from the privilege.

Former subsections (d) and (f)(2) were combined for ease of use. The issues typically arise chronologically in the course of a trial, because a witness often testifies on direct without asserting the privilege and then, during the ensuing cross-examination, asserts the privilege.

Former subsection (b)(2) was moved to a discussion section because it addresses conduct rather than the admissibility of evidence. *See supra,* General Provisions Analysis. Also, the committee changed the word ''should'' to ''may'' in light of CAAF's holding in *United States* v. *Bell,* 44 M.J. 403 (C.A.A.F. 2006). In that case, CAAF held that Congress did not intend for Article 31(b) warnings to apply at trial, and noted that courts have the discretion, but not an obligation, to warn witnesses on the stand. *Bell,* 44 M.J. at 405. If a member testifies at an Article 32 hearing or court-martial without receiving Article 31(b) warnings, his Fifth Amendment rights have not been violated and those statements can be used against him at subsequent proceedings. *Id.* at 405–06.

As a result of the various changes, the committee renumbered the remaining subsections accordingly. The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(l) The analysis following M.R.E. 302 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(m) The analysis following M.R.E. 303 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to ensure that it addressed admissibility rather than conduct. *See supra,* General Provisions Analysis. In doing so, the committee did not intend to change any result in any ruling on evidence admissibility.''

(n) The analysis following M.R.E. 304 is amended to add the following language:

''*2012 Amendment:* Former subsection (c), which contains definitions of words used throughout the rule, was moved so that it immediately follows subsection (a) and is highly visible to the practitioner. Former subsection (h)(3), which discusses denials, was moved to subsection (a)(2) so that it is included near the beginning of the rule to highlight the importance of an accused's right to remain silent. The committee moved and renumbered the remaining subsections so the rule generally follows the chronology of how the issues might arise at trial. In doing so, the committee did not intend to change any result in any ruling on evidence admissibility.

In subsection (b), the committee added the term ''allegedly'' in reference to derivative evidence to clarify that evidence is not derivative unless a military judge finds, by a preponderance of the evidence, that it is derivative.

In subsections (c)(5), (d), (f)(3)(A), and (f)(7), the committee replaced the word ''shall'' with ''will'' or ''must'' because the committee agreed with the approach of the Advisory Committee on Evidence Rules to minimize the use of words such as ''shall'' because of the potential disparity in application and interpretation of whether the word is precatory or proscriptive.

The committee also revised this rule for stylistic reasons and to ensure that it addressed admissibility rather than conduct. *See supra,* General Provisions Analysis. In doing so, the committee did not intend to change any result in any ruling on evidence admissibility.''

(o) The analysis following M.R.E. 305 is amended to add the following language:

''*2012 Amendment:* The definition of ''person subject to the code'' was revised to clarify that it includes a person acting as a knowing agent only in subsection (c). Subsection (c) covers the situation where a person subject to the code is interrogating an accused, and therefore an interrogator would include a knowing agent of a person subject to the code, such as local law enforcement acting at the behest of a military investigator. The term ''person subject to the code'' is also used in subsection (f), which discusses a situation in which a person subject to the code is being interrogated. If a knowing agent of a person subject to the code is being interrogated, subsection (f) is inapplicable, unless that agent himself is subject to the code.

The definition of ''custodial interrogation'' was moved to subsection (b) from subsection (d) in order to co-locate the definitions. The definition is derived from *Miranda* v. *Arizona,* 384 U.S. 436, 444–45 (1966), and *Berkemer* v. *McCarty,* 468 U.S. 420, 442 (1984).

''Accused'' is defined as ''a person against whom legal proceedings have been initiated.'' *Black's Law Dictionary* 23 (8th ed. 2004). ''Suspect'' is defined as ''a person believed to have committed a crime or offense.'' *Id.* at 1287. In subsection (c)(1), the word ''accused'' is used in the first sentence because the rule generally addresses the admissibility of a statement at a court-martial, at which legal proceedings have been initiated against the individual. Throughout the remainder of the rule, ''accused'' and ''suspect'' are used together to elucidate that an interrogation that triggers the need for Article 31 warnings will often take place before the individual has become an accused and is still considered only a suspect.

Although not specifically outlined in subsection (c), the committee intends that interrogators and investigators fully comply with the requirements of *Miranda* v. *Arizona,* 384 U.S. 436 (1966). When a suspect is subjected to custodial interrogation, the prosecution may not use statements stemming from that custodial interrogation unless it demonstrates that the suspect was warned of his rights *Id.* at 444. At a minimum, *Miranda* requires that ''the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.'' *Id.* A person subject to the code who is being interrogated may be entitled to both *Miranda* warnings and Article 31(b) warnings, depending on the circumstances.

The committee changed the titles of subsections (c)(2) and (c)(3) to ''Fifth Amendment Right to Counsel'' and ''Sixth Amendment Right to Counsel'' respectively because practitioners are more familiar with those terms. In previous editions, the subsections did not expressly state which right was implicated. Although the rights were clear from the text of the former rules, the new titles will allow practitioners to quickly find the desired rule.

Subsection (c)(3) is entitled ''Sixth Amendment Right to Counsel'' even though the protections of subsection (c)(3) exceed the constitutional minimal standard established by the Sixth Amendment and interpreted by the Supreme Court in *Montejo* v. *Louisiana,* 556 U.S. 778 (2009). In *Montejo,* the Court overruled its holding in *Michigan* v. *Jackson,* 475 U.S. 625 (1986), and found that a defendant's request for counsel at an arraignment or similar proceeding or an appointment of counsel by the court does not give rise to the presumption that a subsequent waiver by the defendant during a police-initiated interrogation is invalid. 556 U.S. at 798. In the military system, defense counsel is detailed to a court-martial. R.C.M. 501(b). The accused need not affirmatively request counsel. Under the Supreme Court's holding in *Montejo,* the detailing of defense counsel would not bar law enforcement from

initiating an interrogation with the accused and seeking a waiver of the right to have counsel present. However, subsection (c)(3) provides more protection than the Supreme Court requires. Under this subsection, if an accused is represented by counsel, either detailed or retained, he or she may not be interrogated without the presence of counsel. This is true even if, during the interrogation, the accused waives his right to have counsel present. If charges have been preferred but counsel has not yet been detailed or retained, the accused may be interrogated if he voluntarily waives his right to have counsel present.

The words ''after such request'' were added to subsection (c)(2) to elucidate that any statements made prior to a request for counsel are admissible, assuming, of course, that Article 31(b) rights were given. Without that phrase, the rule could be read to indicate that all statements made during the interview, even those made prior to the request, were inadmissible. This was not the intent of the committee and therefore the change was necessary.

The word ''shall'' was changed to ''will'' in subsections (a), (d), and (f) because the committee agreed with the approach of the Advisory Committee on Evidence Rules to minimize the use of ''shall'' because of the potential disparity in application and interpretation of whether the word is precatory or proscriptive.

In subsection (e)(1), the committee retained the requirement that the accused's waiver of the privilege against self-incrimination and the waiver of the right to counsel must be affirmative. This rule exceeds the minimal constitutional requirement. In *Berghuis* v. *Thompkins,* 130 S. Ct. 2250 (2010), the defendant remained mostly silent during a three-hour interrogation and never verbally stated that he wanted to invoke his rights to counsel and to remain silent. The Supreme Court held that the prosecution did not need to show that the defendant expressly waived his rights, and that an implicit waiver is sufficient. *Berghuis,* 130 S. Ct. at 2261. Despite the Supreme Court's holding, under this rule, in order for a waiver to be valid, the accused or suspect must actually take affirmative action to waive his rights. The committee recognizes that this rule places a greater burden on the government to show that the waiver is valid, and it was the intent of the committee to provide more protection to the accused or suspect than is required under the *Berghuis* holding.

In subsection (f)(2), the committee replaced the word ''abroad'' with ''outside of a state, district, commonwealth, territory, or possession of the United States'' in order to clearly define where the rule regarding foreign interrogations applies.

The committee also revised this rule for stylistic reasons and to ensure that it addressed admissibility rather than conduct. *See supra,* General Provisions Analysis. In doing so, the committee did not intend to change any result in any ruling on evidence admissibility.''

(p) The analysis following M.R.E. 311 is amended to add the following language:

''*2012 Amendment:* The definition of ''unlawful'' was moved from subsection (c) to subsection (b) so that it immediately precedes the subsection in which the term is first used in the rule. Other subsections were moved so that they generally follow the order in which the issues described in the subsections arise at trial. The committee renumbered the subsections accordingly and titled each subsection to make it easier for the practitioner to find the relevant part of the rule. The committee also subsumed former subsection (d)(2)(c), addressing a motion to suppress derivative evidence, into subsection (d)(1) because a motion to suppress seized evidence must follow the same procedural requirements as a motion to suppress derivative evidence.

The committee also revised this rule for stylistic reasons and to ensure that it addressed admissibility rather than conduct. *See supra,* General Provisions Analysis. In doing so, the committee did not intend to change any result in any ruling on evidence admissibility.''

(q) The analysis following M.R.E. 312 is amended to add the following language:

''*2012 Amendment:* Former subsection (b)(2) was moved to a discussion paragraph because it addresses the conduct of the examiner rather than the admissibility of evidence. *See supra,* General Provisions Analysis. Failure to comply with the requirement that a person of the same sex conduct the examination does not make the examination unlawful or the evidence inadmissible.

In subsection (c)(2)(a), the words ''clear indication'' were replaced with ''probable cause'' because the committee determined that ''clear indication'' was not well-understood by practitioners nor properly defined in case law, whereas ''probable cause'' is a recognized Fourth Amendment term. The use of the phrase ''clear indication'' likely came from the Supreme Court's holding in *Schmerber* v. *California,* 384 U.S. 757 (1966). In that case, the Court stated: ''In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.'' *Schmerber,* 384 U.S. at 770. However, in *United States* v. *Montoya de Hernandez,* 473 U.S. 531 (1985), the Supreme Court clarified that it did not intend to create a separate Fourth Amendment standard when it used the words ''clear indication.'' *Montoya de Hernandez,* 473 U.S. at 540 (''[W]e think that the words in *Schmerber* were used to indicate the necessity for particularized suspicion that the evidence sought might be found within the body of the individual, rather than as enunciating still a third Fourth Amendment threshold between ''reasonable suspicion'' and ''probable cause''). The committee decided that the appropriate standard for a search under subsection (c)(2)(a) is probable cause. The committee made this decision with the understanding that doing so raises the level of suspicion required to perform a search under this subsection beyond that which was required in previous versions of this rule. The same reasoning applies to the change in subsection (d), where the committee also replaced the words ''clear indication'' with ''probable cause.'' This decision is consistent with the Court of Military Appeals' opinion in *United States v. Bickel,* 30 M.J. 277, 279 (C.M.A. 1990) (''We have no doubt as to the constitutionality of such searches and seizures based on probable cause'').

In subsection (d), the committee replaced the term ''involuntary'' with ''nonconsensual'' for the sake of consistency and uniformity throughout the subsection. The committee did not intend to change the rule in any practical way by using ''nonconsensual'' in the place of ''involuntary.''

A discussion paragraph was added following subsection (e) to address a situation in which a person is compelled to ingest a substance in order to locate property within that person's body. This paragraph was previously found in subsection (e), and the committee removed it from the rule itself because it addresses conduct rather than the admissibility of evidence. *See supra,* General Provisions Analysis.

The committee added the last line of subsection (f) to conform the rule to CAAF's holding in *United States v. Stevenson,* 66 M.J. 15 (C.A.A.F. 2008). In *Stevenson,* the court held that any additional intrusion, beyond what is necessary for medical treatment, is a search within the meaning of the Fourth Amendment. *Id.* at 18 (''The Supreme Court has not adopted a *de minimis* exception to the Fourth Amendment's warrant requirement''). The committee moved the first line of former subsection (f) to a discussion paragraph because it addresses conduct rather than the admissibility of evidence, and is therefore more appropriately addressed in a discussion paragraph. *See supra,* General Provisions Analysis.

The committee also revised this rule for stylistic reasons and to ensure that it addressed admissibility rather than conduct. *See supra,* General Provisions Analysis. In doing so, the committee did not intend to change any result in any ruling on evidence admissibility.''

(r) The analysis following M.R.E. 313 is amended to add the following language:

''*2012 Amendment:* The definition of ''inventory'' was added to subsection (c) to further distinguish inventories from inspections. The committee also revised this rule for stylistic reasons and to ensure that it addressed admissibility rather than conduct. *See supra,* General Provisions Analysis. In doing so, the committee did not intend to change any result in any ruling on evidence admissibility.''

(s) The analysis following M.R.E. 314 is amended to add the following language:

''*2012 Amendment:* Language was added to subsection (a) to elucidate that the rules as written afford at least the minimal amount of protection required under the Constitution as applied to servicemembers. If new case law is developed after the publication of these rules which raises the minimal constitutional standards for the admissibility of evidence, that standard will apply to evidence admissibility, rather than the standard established under these rules.

In subsection (c), the committee intentionally limited the ability of a

commander to search persons or property upon entry or exit from the installation alone, rather than anywhere on the installation, despite the indication of some courts in dicta that security personnel can search a personally owned vehicle anywhere on a military installation based on no suspicion at all. *See, e.g., United States v. Rogers,* 549 F.2d 490, 493 (8th Cir. 1973). Allowing suspicionless searches anywhere on a military installation too drastically narrows an individual's privacy interest. Although individuals certainly have a diminished expectation of privacy when they are on a military installation, they do not forgo their privacy interest completely.

The committee added a discussion section below subsection (c) to address searches conducted contrary to a treaty or agreement. That material was previously located in subsection (c) and was moved to the discussion because it addresses conduct rather than the admissibility of evidence. *See supra,* General Provisions Analysis.

Although not explicitly stated in subsection (e)(2), the committee intends that the Supreme Court's holding in *Georgia v. Randolph* apply to this subsection. 547 U.S. 103 (2006) (holding that a warrantless search was unreasonable if a physically present co-tenant expressly refused to give consent to search, even if another co-tenant had given consent).

In subsection (f)(2), the phrase ''reasonably believed'' was changed to ''reasonably suspected'' to align with recent case law and to alleviate any confusion that ''reasonably believed'' established a higher level of suspicion required to conduct a stop-and-frisk than required by the Supreme Court in *Terry v. Ohio,* 392 U.S. 1 (1968). The ''reasonably suspected'' standard conforms to the language of the Supreme Court in *Arizona* v. *Johnson,* 555 U.S. 323, 328 (2009), in which the Court stated: ''To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.'' The committee intends that this standard, and no higher, be required before an individual can be stopped and frisked under this subsection. Additionally, the committee added a discussion paragraph following this subsection to further expound on the nature and scope of the search, based on case law. *See, e.g., Terry,* 392 U.S. at 30–31; *Pennsylvania* v. *Mimms,* 434 U.S. 106 (1977).

In subsection (f)(3), the committee changed the phrase ''reasonable belief'' to ''reasonable suspicion'' for the same reasons discussed above. The committee added the discussion section to provide more guidance on the nature and scope of the search, based on case law. *See, e.g., Michigan* v. *Long,* 463 U.S. 1032, 1049 (1983) (''the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons''); *Pennsylvania v. Mimms,* 434 U.S. 106 (1977) (there was no Fourth Amendment violation when the driver was ordered out of the car after a valid traffic stop but without any suspicion that he was armed and dangerous because ''what is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety''); *Maryland v. Wilson,* 519 U.S. 408 (1997) (extending the holding in *Mimms* to passengers as well as drivers).

The committee moved the language from former subsection (g)(2), describing the search of an automobile incident to a lawful arrest of an occupant, to the discussion paragraph immediately following the subsection because it addresses conduct rather than the admissibility of evidence. *See supra,* General Provisions Analysis. The discussion section is based on the Supreme Court's holding in *Arizona* v. *Gant,* 556 U.S. 332 (2009) (''Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest'').

The committee also revised this rule for stylistic reasons and to ensure that it addressed admissibility rather than conduct. *See supra,* General Provisions Analysis. In doing so, the committee did not intend to change any result in any ruling on evidence admissibility.''

(t) The analysis following M.R.E. 315 is amended to add the following language:

''*2012 Amendment:* Former subsection (h) was moved so that it immediately follows subsection (a). It was changed to a discussion paragraph because it generally applies to the entire rule, rather than any particular subsection and also because it addresses conduct rather than the admissibility of evidence. *See supra,* General Provisions Analysis.

In subsection (b), the committee changed the term ''authorization to search'' to ''search authorization'' to align it with the term more commonly used by practitioners and law enforcement. The committee moved former subsection (c)(4) to a discussion paragraph because it addresses conduct rather than the admissibility of evidence. *See Supra,* General Provisions Analysis.

The committee moved the second sentence in former subsection (d)(2) to subsection (d) to elucidate that its content applies to both commanders under subsection (d)(1) and military judges or magistrates under subsection (d)(2). The committee did so in reliance on CAAF's decision in *United States* v. *Huntzinger,* 69 M.J. 1 (C.A.A.F. 2010), which held that a commander is not *per se* disqualified from authorizing a search under this rule even if he has participated in investigative activities in furtherance of his command responsibilities.

The committee moved former subsection (h)(4), addressing the execution of search warrants, to subsection (e), now entitled ''Who May Search,'' so that it was co-located with the subsection discussing the execution of search authorizations.

In subsection (f)(2), the word ''shall'' was changed to ''will'' because the committee agreed with the approach of the Advisory Committee on Evidence Rules to minimize the use of words such as ''shall'' and ''should'' because of the potential disparity in application and interpretation of whether the word is precatory or proscriptive. In doing so, the committee did not intend to change any result in any ruling on evidence admissibility.

Subsection (g) was revised to include a definition of exigency rather than to provide examples that may not encompass the wide range of situations where exigency might apply. The definition is derived from Supreme Court jurisprudence. *See Kentucky* v. *King,* 131 S. Ct. 1849 (2011). The committee retained the language concerning military operational necessity as an exigent circumstance because this rule may be applied to a unique military context where it might be difficult to communicate with a person authorized to issue a search authorization. *See, e.g., United States* v. *Rivera,* 10 M.J. 55 (C.M.A. 1980) (noting that exigency might exist because of difficulties in communicating with an authorizing official, although the facts of that case did not support such a conclusion). The committee intends that nothing in this rule would prohibit a law enforcement officer from entering a private residence without a warrant to protect the individuals inside from harm, as that is not a search under the Fourth Amendment. *See, e.g., Brigham City* v. *Stuart,* 547 U.S. 398 (2006) (holding that, regardless of their subjective motives, police officers were justified in entering a home without a warrant, under exigent circumstances exception to warrant requirement, as they had an objectively reasonable basis for believing that an occupant was seriously injured or imminently threatened with injury).

The committee also revised this rule for stylistic reasons and to ensure that it addressed admissibility rather than conduct. *See supra,* General Provisions Analysis. In doing so, the committee did not intend to change any result in any ruling on evidence admissibility.''

(u) The analysis following M.R.E. 316 is amended to add the following language:

''*2012 Amendment:* In subsection (a), the committee added the word ''reasonable'' to align the rule with the language found in the Fourth Amendment of the U.S. Constitution and Mil. R. Evid. 314 and 315.

In subsection (c)(5)(C), the committee intends that the term ''reasonable fashion'' include all action by law enforcement that the Supreme Court has established as lawful in its plain view doctrine. *See, e.g., Arizona* v. *Hicks,* 480 U.S. 321, 324–25 (1987) (holding that there was no search when an officer merely recorded serial numbers that he saw on a piece of stereo equipment, but that the officer did conduct a search when he moved the equipment to access serial numbers on the bottom of the turntable); *United States* v. *Lee,* 274 U.S. 559, 563 (1927) (use of a searchlight does not constitute a Fourth Amendment violation); it is not the committee's intent to establish a stricter definition of plain view than that required by

the Constitution, as interpreted by the Supreme Court. An officer may seize the item only if his conduct satisfies the three-part test prescribed by the Supreme Court: (1) He does not violate the Fourth Amendment by arriving at the place where the evidence could be plainly viewed; (2) its incriminating character is ''readily apparent''; and (3) he has a lawful right of access to the object itself. *Horton* v. *California,* 496 U.S. 128, 136–37 (1990).

The committee also revised this rule for stylistic reasons and to ensure that it addressed admissibility rather than conduct. *See supra,* General Provisions Analysis. In doing so, the committee did not intend to change any result in any ruling on evidence admissibility.''

(v) The analysis following M.R.E. 317 is amended to add the following language:

''*2012 Amendment:* The committee moved former subsections (b) and (c)(3) to a discussion paragraph because they address conduct rather than the admissibility of evidence. *See supra,* General Provisions Analysis.

The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(w) The analysis following M.R.E. 318 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

SECTION IV—RELEVANCY AND ITS LIMITS

(x) The title of the analysis section of M.R.E. 401 is changed to ''Test for Relevant Evidence.''

(y) The analysis following M.R.E. 401 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(z) The title of the analysis section of M.R.E. 402 is changed to ''General Admissibility of Relevant Evidence.''

(aa) The analysis following M.R.E. 402 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(bb) The analysis following M.R.E. 403 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(cc) The title of the analysis section of M.R.E. 404 is changed to ''Character Evidence; Crime or Other Acts.''

(dd) The analysis following M.R.E. 404 is amended to add the following language:

''*2012 Amendment:* The word ''alleged'' was added to references to the victim throughout this rule. Stylistic changes were also made to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(ee) The analysis following M.R.E. 405 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(ff) The analysis following M.R.E. 406 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(gg) The analysis following M.R.E. 407 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(hh) The title of the analysis section of M.R.E. 408 is changed to ''Compromise Offers and Negotiations.''

(ii) The analysis following M.R.E. 408 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(jj) The title of the analysis section of M.R.E. 409 is changed to ''Offers to Pay Medical and Similar Expenses.''

(kk) The analysis following M.R.E. 409 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(ll) The title of the analysis section of M.R.E. 410 is changed to ''Pleas, Plea Discussions, and Related Statements.''

(mm) The analysis following M.R.E. 410 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(nn) The analysis following M.R.E. 411 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(oo) The title of the analysis section of M.R.E. 412 is changed to ''Sex Offense Cases: The Victim's Sexual Behavior or Predisposition.''

(pp) The title of the analysis section of M.R.E. 413 is changed to ''Similar Crimes in Sexual Offense Cases.''

(qq) The analysis following M.R.E. 403 is amended to add the following language:

''*2012 Amendment:* The committee changed the time requirement in subsection (b) to align with the time requirements in Mil. R. Evid. 412 and the Federal Rules of Evidence. This change is also in conformity with military practice in which the military judge may accept pleas shortly after referral and sufficiently in advance of trial. Additionally, the committee revised subsection (d) to align with the Federal Rules of Evidence.

The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(rr) The title of the analysis section of M.R.E. 414 is changed to ''Similar Crimes in Child-Molestation Cases.''

(ss) The analysis following M.R.E. 414 is amended to add the following language:

''*2012 Amendment:* The committee changed the time requirement in subsection (b) to align with the time requirements in Mil. R. Evid. 412 and the Federal Rules of Evidence. This change is also in conformity with military practice in which the military judge may accept pleas shortly after referral and sufficiently in advance of trial. Additionally, the committee revised subsection (d) to align with the Federal Rules of Evidence.

The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

SECTION V—PRIVILEGES

(tt) The title of the analysis section of M.R.E. 501 is changed to ''Privilege in General.''

(uu) The analysis following M.R.E. 501 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(vv) The analysis following M.R.E. 502 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(ww) The analysis following M.R.E. 503 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(xx) The analysis following M.R.E. 504 is amended to add the following language:

''*2012 Amendment:* Subsection (c)(2)(D) was added pursuant to Exec. Order No. 13593. The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(yy) The analysis following M.R.E. 505 is amended to add the following language:

''*2012 Amendment:* The committee significantly restructured this rule to bring greater clarity and regularity to military practice. The changes focus primarily on expanding the military judge's explicit authority to conduct *ex parte* pretrial conferences in connection with classified information and detailing when the military judge is required to do so, limiting the disclosure of classified information per order of the military judge, specifically outlining the process by which the accused gains access to and may request disclosure of classified information, and the procedures for using classified material at trial. The changes

were intended to ensure that classified information is not needlessly disclosed while at the same time ensuring that the accused's right to a fair trial is maintained. Some of the language was adopted from the Military Commissions Rules of Evidence and the Classified Information Protection Act.''

(zz) The analysis following M.R.E. 506 is amended to add the following language:

''*2012 Amendment:* The committee significantly revised this rule to both bring greater clarity to it and also to align it with changes made to Mil. R. Evid. 505.''

(aaa) The analysis following M.R.E. 507 is amended to add the following language:

''*2012 Amendment:* The committee added subsection (b) to define terms that are used throughout the rule and added subsection (e)(1) to permit the military judge to hold an in camera review upon request by the prosecution. The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(bbb) The analysis following M.R.E. 509 is amended to add the following language:

''*2012 Amendment:* The committee added the language ''courts-martial, military judges'' to this rule in light of CAAF's holding in *United States* v. *Matthews,* 68 M.J. 29 (C.A.A.F. 2009). In that case, CAAF held that this rule as it was previously written created an implied privilege that protected the deliberative process of a military judge from disclosure and that testimony that revealed the deliberative thought process of the military judge is inadmissible. *Matthews,* 68 M.J. at 38–43. The changes simply express what the court found had previously been implied.''

(ccc) The analysis following M.R.E. 511 is amended to add the following language:

''*2012 Amendment:* Titles were added to the subsections of this rule for clarity and ease of use.''

(ddd) The analysis following M.R.E. 513 is amended to add the following language:

''*2012 Amendment:* In Exec. Order No. 13593, the President removed communications about spouse abuse as an exception to the spousal privilege by deleting the words ''spouse abuse'' and ''the person of the other spouse or'' from Mil. R. Evid. 513(d)(2), thus expanding the overall scope of the privilege. In removing the spouse abuse exception to Mil. R. Evid. 513, the privilege is now consistent with Mil. R. Evid. 514 in that spouse victim communications to a provider who qualifies as both a psychotherapist for purposes of Mil. R. Evid. 513 and as a victim advocate for purposes of Mil. R. Evid. 514 are covered.

In subsection (e)(3), the committee changed the language to further expand the military judge's authority and discretion to conduct in camera reviews. The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(eee) The analysis following M.R.E. 514 is amended to add the following language:

''*2012 Amendment:* Like the psychotherapist-patient privilege created by Mil. R. Evid. 513, Mil. R. Evid. 514 establishes a victim advocate-victim privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. Implemented as another approach to improving the military's overall effectiveness in addressing the crime of sexual assault, facilitating candor between victims and victim advocates, and mitigating the impact of the court-martial process on victims, the rule specifically emerged in response to concerns raised by members of Congress, community groups and *The Defense Task Force on Sexual Assault in the Military Services* (DTFSAMS). In its 2009 report, DTFSAMS noted: 35 states had a privilege for communications between victim advocates and victims of sexual assault; victims did not believe they could communicate confidentially with medical and psychological support services provided by DoD; there was interference with the victim-victim advocate relationship and continuing victim advocate services when the victim advocate was identified as a potential witness in a court-martial; and service members reported being ''re-victimized'' when their prior statements to victim advocates were used to cross-examine them in court-martial proceedings. DTFSAMS recommended that Congress ''enact a comprehensive military justice privilege for communications between a Victim Advocate and a victim of sexual assault.'' Both the DoD Joint Service Committee on Military Justice and Congress began considering a privilege. The committee chose to model a proposed Mil. R. Evid. 514 on Mil. R. Evid. 513, including its various exceptions, in an effort to balance the privacy of the victim's communications with a victim advocate against the accused's legitimate needs. Differing proposals for a victim advocate privilege were suggested as part of the FY2011 National Defense Authorization Act (NDAA), but were not enacted. A victim advocate privilege passed the House as part of the FY2012 NDAA, while the Senate version would have required the President to issue a Military Rule of Evidence providing a privilege. Congress removed both provisions because Mil. R. Evid. 514 was pending the President's signature and this rule accomplished the objective of ensuring privileged communications for sexual assault victims.

Under subsection (a), General Rule, the words ''under the Uniform Code of Military Justice'' in Mil. R. Evid. 514 mean that the privilege only applies to misconduct situations constituting a case that could result in UCMJ proceedings. It does not apply in situations in which the offender is not subject to UCMJ jurisdiction. There is no intent to apply Mil. R. Evid. 514 in any proceeding other than those authorized under the UCMJ. However, service regulations dictate how the privilege is applied to non-UCMJ proceedings. Furthermore, this rule only applies to communications between a victim advocate and the victim of a sexual or violent offense.

Under subsection (b), Definitions, the committee intended the definition of ''victim advocate'' to include, but not be limited to, personnel performing victim advocate duties within the DoD Sexual Assault Prevention and Response Office (such as a Sexual Assault Response Coordinator), and the DoD Family Advocacy Program (such as a domestic abuse victim advocate). To determine whether an official's duties encompass victim advocate responsibilities, DoD and military service regulations should be consulted. A victim liaison appointed pursuant to the Victim and Witness Assistance Program is not a ''victim advocate'' for purposes of this rule, nor are personnel working within an Equal Opportunity or Inspector General office. For purposes of this rule, the committee intended ''violent offense'' to mean an actual or attempted murder, manslaughter, rape, sexual assault, aggravated assault, robbery, assault consummated by a battery, or similar offense. A simple assault may be a violent offense where the violence has been physically attempted or menaced. A mere threatening in words is not a violent offense. The committee recognizes that this rule will be applicable in situations where there is a factual dispute as to whether a sexual or violent offense occurred and whether a person actually suffered direct physical or emotional harm from such an offense. The fact that such findings have not been judicially established shall not prevent application of this rule to alleged victims reasonably intended to be covered by this rule.

Under subsection (d), *Exceptions,* the exceptions to Mil. R. Evid. 514 are similar to the exceptions found in Mil. R. Evid. 513, and are intended to be applied in the same manner. Mil. R. Evid. 514 does not include comparable exceptions found within Mil. R. Evid. 513(d)(2) and 513(d)(7). In drafting the ''constitutionally required'' exception, the committee intended that communication covered by the privilege would be released only in the narrow circumstances where the accused could show harm of constitutional magnitude if such communication was not disclosed. In practice, this relatively high standard of release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless. If a military judge finds that an exception to this privilege applies, special care should be taken to narrowly tailor the release of privileged communications to only those statements which are relevant and whose probative value outweighs unfair prejudice. The fact that otherwise privileged communications are admissible pursuant to an exception of Mil. R. Evid. 514 does not prohibit a military judge from imposing reasonable limitations on cross-examination. *See Delaware* v. *Van Arsdall,* 475 U.S. 673, 679 (1986); *United States* v. *Gaddis,* 70 M.J. 248, 256 (C.A.A.F. 2011); *United States* v. *Ellerbrock,* 70 M.J. 314 (C.A.A.F. 2011).''

SECTION VI—WITNESSES

(fff) The title of the analysis section of M.R.E. 601 is changed to ''Competency to Testify in General.''

(ggg) The analysis following M.R.E. 601 is amended to add the following language:

''2012 Amendment: The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(hhh) The title of the analysis section of M.R.E. 602 is changed to ''Need for Personal Knowledge.''

(iii) The analysis following M.R.E. 602 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(jjj) The title of the analysis section of M.R.E. 603 is changed to ''Oath or Affirmation to Testify Truthfully.''

(kkk) The analysis following M.R.E. 603 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(lll) The analysis following M.R.E. 604 is amended to add the following language:

''*2012 Amendment:* The committee amended this rule to match the Federal Rules of Evidence. However, the word ''qualified'' is undefined both in these rules and in the Federal Rules. R.C.M. 502(e)(1) states that the Secretary concerned may prescribe qualifications for interpreters. Practitioners should therefore refer to the Secretary's guidance to determine if a translator is qualified under this rule. The committee also revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(mmm) The title of the analysis section of M.R.E. 605 is changed to ''Military Judge's Competency as a Witness.''

(nnn) The analysis following M.R.E. 605 is amended to add the following language:

''*2012 Amendment:* The committee revised subsection (a) for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(ooo) The title of the analysis section of M.R.E. 606 is changed to ''Member's Competency as a Witness.''

(ppp) The analysis following M.R.E. 606 is amended to add the following language:

''*2012 Amendment:* The committee added subsection (c) to this rule to align it with the Federal Rules of Evidence. The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(qqq) The title of the analysis section of M.R.E. 607 is changed to ''Who May Impeach a Witness.''

(rrr) The analysis following M.R.E. 607 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(sss) The title of the analysis section of M.R.E. 608 is changed to ''A Witness's Character for Truthfulness or Untruthfulness.''

(ttt) The analysis following M.R.E. 608 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(uuu) The title of the analysis section of M.R.E. 609 is changed to ''Impeachment by Evidence of a Criminal Conviction.''

(vvv) The analysis following M.R.E. 609 is amended to add the following language:

''*2012 Amendment:* Pursuant to Exec. Order No. 13593, the committee amended subsections (a), (b)(2), and (c)(1) to conform the rule with the Federal Rules of Evidence. The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(www) The analysis following M.R.E. 610 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(xxx) The title of the analysis section of M.R.E. 611 is changed to ''Mode and Order of Examining Witnesses and Presenting Evidence.''

(yyy) The analysis following M.R.E. 611 is amended to add the following language:

''*2012 Amendment:* The committee amended subsection (d)(3) to conform with the United States Supreme Court's holding in *Maryland* v. *Craig,* 497 U.S. 836 (1990) and CAAF's holding in *United States* v. *Pack,* 65 M.J. 381 (C.A.A.F. 2007). In *Craig,* the Supreme Court held that, in order for a child witness to be permitted to testify via closed-circuit one-way video, three factors must be met: (1) The trial court must determine that it is necessary ''to protect the welfare of the particular child witness''; (2) the trial court must find ''that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant''; and (3) the trial court must find ''that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis.*'' *Craig,* 497 at 855–56. In *Pack,* CAAF held that, despite the Supreme Court's decision in *Crawford* v. *Washington,* the Supreme Court did not implicitly overrule *Craig* and that all three factors must be present in order to permit a child witness to testify remotely. *Pack,* 65 M.J. at 384–85. This rule as previously written contradicted these cases because it stated that any one of four factors, rather than all three of those identified in *Craig,* would be sufficient to allow a child to testify remotely. The committee made the changes to ensure that this subsection aligned with the relevant case law.

The language for subsection (5) was taken from 18 U.S.C. § 3509, which covers child victims' and child witnesses' rights. There is no comparable Federal Rule of Evidence but the committee believes that a military judge may find that an Article 39a session outside the presence of the accused is necessary to make a decision regarding remote testimony. The committee intended to limit the number of people present at the Article 39a session in order to make the child feel more at ease, which is why the committee included the language limiting those present to ''a representative'' of the defense and prosecution, rather than multiple representatives.

The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(zzz) The title of the analysis section of M.R.E. 612 is changed to ''Writing Used to Refresh a Witness's Memory.''

(aaaa) The analysis following M.R.E. 612 is amended to add the following language:

''*2012 Amendment:* The committee revised subsection (b) of this rule to align with the Federal Rules of Evidence. The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(bbbb) The title of the analysis section of M.R.E. 613 is changed to ''Witness's Prior Statement.''

(cccc) The analysis following M.R.E. 613 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(dddd) The title of the analysis section of M.R.E. 614 is changed to ''Court-Martial's Calling or Examining a Witness.''

(eeee) The analysis following M.R.E. 614 is amended to add the following language:

''*2012 Amendment:* In subsection (a), the committee substituted the word ''relevant'' for ''appropriate'' because relevance is the most accurate threshold for admissibility throughout these rules. Additionally, the committee added the phrase ''Following the opportunity for review by both parties'' to subsection (b) to align it with the standard military practice to allow the counsel for both sides to review a question posed by the members, and to voice objections before the military judge rules on the propriety of the question. The committee also revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(ffff) The title of the analysis section of M.R.E. 615 is changed to ''Excluding Witnesses.''

(gggg) The analysis following M.R.E. 615 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

SECTION VII—OPINIONS AND EXPERT TESTIMONY

(hhhh) The analysis following M.R.E. 701 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(hhhh) The title of the analysis section of M.R.E. 702 is changed to ''Testimony by Expert Witnesses.''

(iiii) The analysis following M.R.E. 702 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(kkkk) The title of the analysis section of M.R.E. 703 is changed to ''Bases of an Expert's Opinion of Testimony.''

(llll) The analysis following M.R.E. 703 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule to align with the Federal Rules of Evidence but in doing so the committee did not intend to change any result in any ruling on evidence admissibility.''

(mmmm) The analysis following M.R.E. 704 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(nnnn) The title of the analysis section of M.R.E. 705 is changed to ''Disclosing the Facts or Data Underlying an Expert's Opinion.''

(oooo) The analysis following M.R.E. 705 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(pppp) The title of the analysis section of M.R.E. 706 is changed to ''Court-Appointed Expert Witnesses.''

(qqqq) The analysis following M.R.E. 706 is amended to add the following language:

''*2012 Amendment:* The committee removed subsection (b) because the committee believes that the authority of the military judge to tell members that he or she has called an expert witness is implicit in his or her authority to obtain the expert, and therefore the language was unnecessary. Although the language has been removed, the committee intends that the military judge may, in the exercise of discretion, notify the members that he or she called the expert. The committee also revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(rrrr) The analysis following M.R.E. 707 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons but in doing so did not intend to change any result in any ruling on evidence admissibility.''

SECTION VIII—HEARSAY

(ssss) The title of the analysis section to M.R.E. 801 is changed to ''Definitions that Apply to this Section; Exclusions from Hearsay.''

(tttt) The analysis following M.R.E. 801 is amended to add the following language:

''*2012 Amendment:* The committee changed the title of subsection (2) from ''Admission by party-opponent'' to ''An Opposing Party's Statement'' to conform to the Federal Rules of Evidence. The term ''admission'' is misleading because a statement falling under this exception need not be an admission and also need not be against the party's interest when spoken. In making this change, the committee did not intend to change any result in any ruling on evidence admissibility.''

(uuuu) The title of the analysis section of M.R.E. 802 is changed to ''The Rule Against Hearsay.''

(vvvv) The analysis following M.R.E. 802 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(wwww) The title of the analysis section of M.R.E. 803 is changed to ''Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness.''

(xxxx) The analysis following M.R.E. 803 is amended to add the following language:

''*2012 Amendment:* The committee removed subsection (24), which stated: ''Other Exceptions: [Transferred to M.R.E. 807]'' because practitioners are generally aware that Mil. R. Evid. 807 covers statements not specifically covered in this rule, and therefore the subsection was unnecessary. The committee also revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(yyyy) The title of the analysis section of M.R.E. 804 is changed to ''Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness.''

(zzzz) The analysis following M.R.E. 804 is amended to add the following language:

''*2012 Amendment:* In subsection (b)(3)(B), the committee intentionally left undisturbed the phrase ''and is offered to exculpate the accused,'' despite the fact that it is not included in the current or former versions of the Federal Rules of Evidence. Unlike in Mil. R. Evid. 803, the committee did not remove subsection (5), which directs practitioners to the residual exception in Mil. R. Evid. 807, because doing so would cause the remaining subsections to be renumbered. Although subsection (5) is not necessary, renumbering the subsections within this rule would have a detrimental effect on legal research and also would lead to inconsistencies in numbering between these rules and the Federal Rules. The committee also revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(aaaaa) The analysis following M.R.E. 805 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(bbbbb) The title of the analysis section of M.R.E. 806 is changed to ''Attacking and Supporting the Declarant's Credibility.''

(ccccc) The analysis following M.R.E. 806 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(ddddd) The analysis following M.R.E. 807 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

SECTION IX—AUTHENTICATION AND IDENTIFICATION

(eeeee) The title of the analysis section of M.R.E. 901 is changed to ''Authenticating or Identifying Evidence.''

(fffff) The analysis following M.R.E. 901 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule to align with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(ggggg) The title of the analysis section M.R.E. 902 is changed to ''Evidence that is Self-Authenticating.''

(hhhhh) The analysis following M.R.E. 902 is amended to add the following language:

''*2012 Amendment:* The committee added language to subsection (11) to permit the military judge to admit non-noticed documents even after the trial has commenced if the offering party shows good cause to do so. The committee also revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(iiiii) The title of the analysis section of M.R.E. 903 is changed to ''Subscribing Witness's Testimony.''

(jjjjj) The analysis following M.R.E. 903 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

SECTION X—CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

(kkkkk) The title of the analysis section of M.R.E. 1001 is changed to ''Definitions that Apply to this Section.''

(lllll) The analysis following M.R.E. 1001 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule to align with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(mmmmm) The analysis following M.R.E. 1002 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(nnnnn) The analysis following M.R.E. 1003 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(ooooo) The analysis following M.R.E. 1004 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(ppppp) The title of the analysis section of M.R.E. 1005 is changed to ''Copies of Public Records to Prove Content.''

(qqqqq) The analysis following M.R.E. 1005 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(rrrrr) The title of the analysis section of M.R.E. 1006 is changed to ''Summaries to Prove Content.''

(sssss) The analysis following M.R.E. 1006 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(ttttt) The title of the analysis section of M.R.E. 1007 is changed to ''Testimony or Statement of a Party to Prove Content.''

(uuuuu) The analysis following M.R.E. 1007 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(vvvvv) The analysis following M.R.E. 1008 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

SECTION XI—MISCELLANEOUS RULES

(wwwww) The analysis following M.R.E. 1101 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule to align with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(xxxxx) The analysis following M.R.E. 1102 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

(yyyyy) The analysis following M.R.E. 1103 is amended to add the following language:

''*2012 Amendment:* The committee revised this rule for stylistic reasons and to align it with the Federal Rules of Evidence but in doing so did not intend to change any result in any ruling on evidence admissibility.''

Changes to Appendix 23, Analysis of the Punitive Articles

(a) Paragraph 3, Article 79, Lesser included offenses, subparagraph b(4) *Specific lesser included offenses,* delete the paragraphs beginning with the words ''2012 Amendment'' and ending with ''(''C.A.A.F. 2008).'' and insert in their place:

''*2013 Amendment.* See analysis in paragraph 3b(1) above. Lesser included offenses (LIO) listings were removed from each punitive article in paragraphs 1–113 (except paragraphs 1 and 3), Part IV, and were moved to a new Appendix 12A. The LIO listings are determined based on the elements of the greater offense, but are not binding. The President does not have the authority to create LIOs by simply listing them in the Manual. *United States* v. *Jones,* 68 M.J. 465, 471–12 (C.A.A.F. 2010). Therefore, practitioners should use Appendix 12A only as a guide. To determine if an offense is lesser included, the elements test must be used. *Id.* at 470. The offenses are not required to possess identical statutory language; rather, the court uses normal principles of statutory construction to determine the meaning of each element. *See Jones,* 68 M.J. at 470–73; *United States* v. *Oatney,* 45 M.J. 185 (C.A.A.F. 1996); and *Schmuck* v. *United States,* 489 U.S. 705 (1989).

Article 134 offenses generally will not be lesser included offenses of enumerated offenses in Articles 80–133. *See United States* v. *Girouard,* 70 M.J. 5 (C.A.A.F. 2011); *United States* v. *McMurrin,* 70 M.J. 15 (C.A.A.F. 2011). Article 134 specifications must contain the ''terminal element.'' *See* paragraphs 60b and 60c(6)(a) in Part IV. *See also United States* v. *Fosler,* 70 M.J. 225 (C.A.A.F. 2011); *United States* v. *Ballan,* 71 M.J. 28 (C.A.A.F. 2012); R.C.M. 307(c)(3).''

(b) Paragraph 43, Article 118, Murder, subparagraph a. is amended as follows:

''*2012 Amendment:* This statute was modified pursuant to the National Defense Authorization Act for Fiscal Year 2012, P.L. 112–81, 31 December 2011, to conform to renamed sexual assault offenses in Article 120 and Article 120b. The changes took effect on 28 June 2012.''

(c) Paragraph 45, Article 120, Rape and sexual assault generally, the first paragraph of the analysis beginning with the word ''2012'' and ending with the number ''28'' is amended as follows:

''*2012 Amendment:* This paragraph was substantially revised by section 541 of the National Defense Authorization Act for Fiscal Year 2012 [FY12 NDAA], P.L. 112–81, 31 December 2011. Amendments contained in this section took effect on 28 June 2012. Sec. 541(f), Pub. L. 112–81. On 28 June 2012, a modified paragraph 45, ''Rape and sexual assault generally,'' replaced the 2007 version of paragraph 45, ''Rape, sexual assault, and other sexual misconduct.'' The analysis related to prior versions of Article 120 is located as follows: for offenses committed on or before 30 September 2007, *see* Appendix 27; for offenses committed during the period 1 October 2007 through 27 June 2012, *see* Appendix 28.''

(d) Paragraph 45, Article 120, Rape and sexual assault generally, is amended as follows:

Subparagraphs b, c, d, e, and f are deleted.

(e) Paragraph 45c, Article 120c, Other sexual misconduct, the first paragraph of the analysis beginning with the word ''2012'' and ending with the number ''registration'' is amended as follows:

''*2012 Amendment:* This paragraph is new and is based on section 541 of the National Defense Authorization Act for Fiscal Year 2012 [FY12 NDAA], Pub. L. 112–81, 31 December 2011. This section took effect on 28 June 2012. Sec. 541(f), Pub. L. 112–81. The new Article 120c. encompasses offenses contained in the 2007 version of Article 120(k), Article 120(l), and Article 120(n), and is intended to criminalize non-consensual sexual misconduct that ordinarily subjects an accused to sex offender registration.''

(f) Paragraph 45c, Article 120c, Other sexual misconduct, is amended as follows:

Subparagraphs b, c, d, e, and f are deleted.

(g) Paragraph 51, Article 125, Sodomy, subparagraph c. is amended as follows:

''c. *Explanation.* This paragraph is based on paragraph 204 of MCM, 1969 (Rev.). Fellatio and cunnilingus are within the scope of Article 125. *See United States* v. *Harris,* 8 M.J. 52 (C.M.A. 1979); *United States* v. *Scoby,* 5 M.J. 160 (C.M.A. 1978). In 2003, the Supreme Court recognized a constitutional liberty interest under the Due Process Clause to engage in consensual, private, adult sexual behavior. *Lawrence* v. *Texas,* 539 U.S. 558 (2003). The Court assigned that liberty interest to those adults ''with full and mutual consent from each other'' and did not extend that interest to cases involving minors, public conduct, prostitution, persons who might be injured or coerced, and persons who are situated in relationships where consent might not easily be refused. *Id.* at 578. In essence, *Lawrence* endorsed the notion that the Fifth Amendment liberty interest embraces the autonomy of individual choices involving intimate and personal decisions that do not infringe on the bodily integrity of another. *Id.* However, the Court made clear that not all sodomy was protected under an individual's substantive due process rights. *Id.*

Following the Supreme Court's decision, the Court of Appeals for the Armed Forces (CAAF) acknowledged the application of *Lawrence* in the military but with noted exceptions. *United States* v. *Marcum,* 60 M.J. 198 (C.A.A.F. 2004). In *Marcum,* the Court adopted a tripartite framework for addressing *Lawrence* issues within the military context by distinguishing between conduct constitutionally protected and conduct that may be criminal under Article 125 of the UCMJ. *Id.* Whether a conviction under Article 125 is constitutional as applied would be analyzed by asking: ''First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence?* Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?'' *Id.* at 206–07 (internal citations omitted).

In *United States* v. *Hartman,* 69 M.J. 467, 468 (C.A.A.F. 2011), CAAF explained that when considering charges under Article 125, the ''distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance.' '' In the context of guilty pleas, a provident plea to Article 125 must include an ''appropriate discussion and acknowledgment on the part of the accused

of the distinction between what is permitted and what is prohibited behavior.'' *Id.* As pointed out in the holding, CAAF imposed this ''critical distinction'' colloquy during a plea ''[w]hen a charge against a servicemember *may implicate* both criminal and constitutionally protected conduct.'' *Id.* (emphasis added).''

(h) Paragraph 51, Article 125, Sodomy, subparagraph d. is amended as follows:

''d. *Lesser included offenses. 1994 Amendment.* One of the objectives of the Sexual Abuse Act of 1986, 18 U.S.C. 2241–2245, was to define sexual abuse in gender-neutral terms. Since the scope of Article 125, UCMJ, accommodates those forms of sexual abuse other than the rape provided for in Article 120, UCMJ, the maximum punishments permitted under Article 125 were amended to bring them more in line with Article 120 and the Act, thus providing sanctions that are generally equivalent regardless of the victim's gender. Subparagraph e(1) was amended by increasing the maximum period of confinement from 20 years to life. Subparagraph e(2) was amended by creating two distinct categories of sodomy involving a child, one involving children who have attained the age of 12 but are not yet 16, and the other involving children under the age of 12. The latter is now designated as subparagraph e(3). The punishment for the former category remains the same as it was for the original category of children under the age of 16. This amendment, however, increases the maximum punishment to life when the victim is under the age of 12 years.

2007 Amendment: The former Paragraph 87(1)(b), Article 134 Indecent Acts or Liberties with a Child, has been replaced in its entirety by paragraph 45. The former Paragraph 63(2)(c), Article 134 Assault—Indecent, has been replaced in its entirety by paragraph 45. The former Paragraph 90(3)(a), Article 134 Indecent Acts with Another, has been replaced in its entirety by paragraph 45. Lesser included offenses under Article 120 should be considered depending on the factual circumstances in each case.

2013 Amendment: Section 541 of the National Defense Authorization Act for Fiscal Year 2012, P.L. 112–81, 31 December 2011, supersedes the previous paragraph 45, ''Rape, sexual assault and other sexual misconduct'', in its entirety and replaces paragraph 45 with ''Rape and sexual assault generally.'' In addition, it adds paragraph 45b., ''Rape and sexual assault of a child'', and paragraph 45c., ''Other sexual misconduct.'' These changes affect lesser included offenses (LIOs), but LIOs should still be determined based on the elements of each offense. *See* Article 79 and Appendix 12A.''

(i) Paragraph 60, Article 134, General Article, subparagraph (6)(a) is amended as follows:

''*2013 Amendment.* In 2012 the Manual was amended to address the changes in practice resulting from the holding in *United States* v. *Fosler,* 70 M.J. 225 (C.A.A.F. 2011). In the 2013 Executive Order, the President required that the terminal element be expressly alleged in every Article 134 specification.

The President ended the historical practice of inferring the terminal element in Article 134 specifications, s*ee, e.g. United States* v. *Mayo,* 12 M.J. 286 (C.M.A. 1983), and required the terminal element be expressly alleged to provide sufficient notice to the accused and for uniformity and consistency in practice. *See Fosler,* 70 M.J. at 227–28; *Schmuck* v. *United States,* 489 U.S. 705 (1989). In general, when drafting specifications, the Government must allege every element, either expressly or by necessary implication. *See* R.C.M. 307(c)(3). However, in Article 134 specifications, the accused must be given notice as to which clause or clauses he must defend against; therefore, the terminal element may not be inferred.

Although a single terminal element is required, there are three theories of liability that would satisfy the terminal element: a disorder or neglect to the prejudice of good order and discipline (under clause 1); conduct of a nature to bring discredit upon the armed forces (under clause 2); or a crime or offense not capital (under clause 3). The three clauses are ''distinct and separate.'' *Fosler,* 70 M.J. at 232. A single theory may be alleged, or clauses 1 and 2 may be combined. While it is not prohibited to combine clauses 1, 2, and 3 in one specification, such a combination is not practical.

When charging both clauses 1 and 2, practitioners are encouraged to use the word ''and'' to separate the theories in one specification, rather than using the word ''or'' to separate the theories. Practitioners may also allege two separate specifications. At findings, the Trial Counsel or Military Judge must make certain that the record is clear as to whether clause 1, clause 2, or both clauses were proven beyond a reasonable doubt. Using the word ''and'' to separate clause 1 and 2 in the terminal element allows the trier of fact to except the unproven clause from the specification. This approach forces intellectual rigor in analyzing each clause as distinct and separate. Nothing in this analysis should be read to suggest that a specification connecting the two theories with the disjunctive ''or'' necessarily fails to give the accused reasonable notice of the charge against him. *See United States* v. *Rauscher,* 71 M.J. 225, 226 (C.A.A.F. 2012) (*per curiam*) (citing *Russell* v. *United States,* 369 U.S. 749, 765 (1962)).''

(j) Paragraph 60, Article 134, General Article, subparagraph (6)(b), delete the paragraph beginning with the words ''2012 Amendment'' and ending ''above.'', and insert in its place:

''*2013 Amendment.* New discussion was added in 2012 to address *United States* v. *Fosler,* 70 M.J. 225 (C.A.A.F. 2011). In 2013 that analysis was removed after paragraph 60 was amended by Executive Order. *See* analysis under subparagraph (6)(a) above.''

(k) Paragraph 60, Article 134, Adultery, subparagraph (c)(2) is amended as follows:

''(2) When determining whether adulterous acts constitute the offense of adultery under Article 134, commanders should consider the listed factors. The offense of adultery is intended to prohibit extramarital sexual behavior that directly affects the discipline of the armed forces, respect for the chain of command, or maintenance of unit cohesion. The intent of this provision is to limit the crime of adultery to those situations where the negative impact to the unit is real rather than theorized. This provision is not intended, nor should it be inferred, to criminalize sexual practices between two adults with full and mutual consent from each other, but rather, to punish the collateral negative effects of extramarital sexual activity when there exists a genuine nexus between that activity and the efficiency and effectiveness of the armed forces. *c.f. United States* v. *Marcum,* 60 M.J. 198 (C.A.A.F. 2004) (the court recognized that private sexual behavior between consenting adults may be constitutionally protected as applied in the military context); Appendix 23, para. 51(2).

While each commander has discretion to dispose of offenses by members of the command, wholly private and consensual sexual conduct between adults is generally not punishable under this paragraph. The right to engage in such conduct, however, is tempered in a military context by the mission of the military, the need for cohesive teams, and the need for obedience to orders. Cases involving fraternization or other unprofessional relationships may be more appropriately charged under Article 92 or Article 134—Fraternization. Cases involving abuse of authority by officers may be more appropriately charged under Article 133.

As with any alleged offense, R.C.M. 306(b) advises commanders to dispose of an allegation of adultery at the lowest appropriate level. As the R.C.M. 306(b) discussion states, many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offense, any mitigating or extenuating circumstances, the character and military service of the military member, any recommendations made by subordinate commanders, the interests of justice, military exigencies, and the effect of the decision on the military member and the command. The goal should be a disposition that is warranted, appropriate, and fair. In the case of officers, also consult the explanation to paragraph 59 in deciding how to dispose of an allegation of adultery.''

(l) Paragraph 97, Article 134, Pandering and Prostitution, subparagraph (e) is amended to insert the following language after the paragraph beginning with the word ''2007'' and ending with the word ''Pandering'':

''*2013 Amendment:* The act of compelling another person to engage in act of prostitution with another person was replaced under paragraph 97 with a new offense under paragraph 45 in 2007. In 2012, the act was then moved to paragraph 45c, ''Other sexual misconduct.'' *See* Article 120c(b), ''Forcible Pandering.'' ''

Changes to Appendix 21, Analysis of Rules for Courts Martial

(a) RCM 307(c)(3), after the paragraph beginning with the words ''2004 Amendment'' delete the paragraph beginning with the words ''2012 Amendment,'' and insert in its place:

''*2013 Amendment.* In 2012, two new notes were added to address the requirement to

expressly state the terminal element in specifications under Article 134 and to address lesser included offenses. *See United States* v. *Ballan,* 71 M.J. 28 (C.A.A.F. 2012); *United States* v. *Fosler,* 70 M.J. 225 (C.A.A.F. 2011); *United States* v. *Jones,* 68 M.J. at 465 (C.A.A.F. 2010). In 2013, the Manual was amended to require the terminal element be expressed in Article 134 and to alter the definition of lesser included offenses in Article 79. *See* paragraphs 3 and 60c(6) in Part IV of this Manual. The 2012 notes were removed.''

(b) RCM 307(c)(3)(A), after the paragraph beginning with the words ''*Sample specifications''* delete the paragraph beginning with the words ''2012 Amendment.''

(c) RCM 307(c)(3)(G), after the paragraph beginning with the words ''*Description of offense.''* delete the paragraph beginning with the words ''2012 Amendment,'' and insert in its place:

''*2013 Amendment.* In 2012, a new note was added to address the requirement to expressly state the terminal element in specifications under Article 134. *See United States* v. *Ballan,* 71 M.J. 28 (C.A.A.F. 2012); *United States* v. *Fosler,* 70 M.J. 225 (C.A.A.F. 2011).''

(d) RCM 307(c)(3)(G)(i) is amended to insert the following language:

''*2013 Amendment.* In 2012, a new note was added to address the requirement to expressly state the terminal element in specifications under Article 134. *See United States* v. *Ballan,* 71 M.J. 28 (C.A.A.F. 2012); *United States* v. *Fosler,* 70 M.J. 225 (C.A.A.F. 2011).''

(e) RCM 307(c)(3)(G)(v) is inserted to add the following language:

''*2013 Amendment.* Subparagraph (v) was added in 2013 to address lesser included offenses and refer practitioners to Article 79 and new Appendix 12A. *See* paragraph 3 in Part IV and Appendix 12A. *See also* paragraph 3 in this Appendix.''

(f) RCM 307(c)(4), after the paragraph beginning with the words ''2005 Amendment'' delete the paragraph beginning with the words ''2012 Amendment,'' and insert in its place:

''*2013 Amendment.* The discussion section was added to R.C.M. 307(c)(4) to clarify the ambiguity between the two distinct concepts of multiplicity and unreasonable multiplication of charges. For analysis related to multiplicity, *see* R.C.M. 907(b)(3)(B) Analysis section. For analysis related to unreasonable multiplication of charges, *see* R.C.M. 906(b)(12) Analysis section.

Nothing in the Rule or the discussion section should be construed to imply that it would be overreaching for a prosecutor to bring several charges against an accused for what essentially amounts to one transaction if there is a valid legal reason to do so. For example, prosecutors may charge two offenses for exigencies of proof, which is a long accepted practice in military law. *See, e.g., United States* v. *Morton,* 69 M.J. 12 (C.A.A.F. 2009). The discussion section emphasizes that a prosecutor is not overreaching or abusing his discretion merely because he charges what is essentially one act under several different charges or specifications.

The language in the discussion section of the 2012 edition of the Manual referring to the *Campbell* decision was removed because it is no longer necessary, as the Rules themselves have been edited to remove any reference to ''multiplicious for sentencing.'' The example was removed from the discussion section because it overly generalized the concept of unreasonable multiplication of charges.''

(g) RCM 906(b)(12), delete the paragraph beginning with the words ''2012 Amendment,'' and insert in its place:

''*2013 Amendment.* This rule and related discussion is the focal point for addressing unreasonable multiplication of charges. If a practitioner seeks to raise a claim for multiplicity, that concept is addressed in R.C.M. 907(b)(3)(B) and related discussion. This rule has been amended because CAAF has recognized that practitioners and the courts have routinely confused the concepts of multiplicity and unreasonable multiplication of charges. *See, e.g., United States* v. *Campbell,* 71 M.J. 19, 23 (C.A.A.F. 2012) (''the terms multiplicity, multiplicity for sentencing, and unreasonable multiplication of charges in military practice are sometimes used interchangeably as well as with uncertain definition''); *United States* v. *Baker,* 14 M.J. 361, 372 (C.M.A. 1983) (Cook, J. dissenting) (''[t]hat multiplicity for sentencing is a mess in the military justice system is a proposition with which I believe few people familiar with our system would take issue'').

Multiplicity and unreasonable multiplication of charges are two distinct concepts. Unreasonable multiplication of charges as applied to findings and sentence is a limitation on the prosecution's discretion to charge separate offenses. Unreasonable multiplication of charges does not have a foundation in the Constitution but is instead based on the concept of reasonableness and is a prohibition against prosecutorial overreaching. In contrast, multiplicity is based on the Double Jeopardy clause of the Fifth Amendment and prevents an accused from being twice punished for one offense if it is contrary to the intent of Congress. A charge may be found not to be multiplicious but at the same time it may be dismissed because of unreasonable multiplication. *See United States* v. *Quiroz,* 55 M.J. 334, 337 (C.A.A.F. 2001).

Use of the term ''multiplicity (or multiplicious) for sentencing'' is inappropriate. If a charge is multiplicious, meaning that it violates the Constitutional prohibition against Double Jeopardy, it necessarily results in dismissal of the multiplied offenses, therefore obviating any issue on sentencing with respect to that charge. *Campbell,* 71 M.J. at 23. A charge should not be found multiplicious for sentencing but not for findings. Thus, the more appropriate term for the military judge's discretionary review of the charges at sentencing is ''unreasonable multiplication of charges as applied to sentence.'' *Id.* at 24. The Rule was changed to remove ''multiplicity for sentencing'' from the Manual, eliminating confusion and misuse.

Subparagraphs (i) and (ii) were added to the rule to clarify the distinction between unreasonable multiplication of charges as applied to findings and to sentence. Although these concepts have existed for years (*see* Michael J. Breslin & LeEllen Coacher, *Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed,* 45 A.F.L. Rev. 99 (1998) for a history of the terms), they were not defined in previous editions of the Manual. The definitions were adopted from *Quiroz, Campbell,* and recommendations from Christopher S. Morgan, *Multiplicity: Reconciling the Manual for Courts-Martial,* 63 A.F.L. Rev. 23 (2009). It is possible that two offenses are not unreasonably multiplied for findings but are so for sentencing; these additions explain how this can be so. *See, e.g., Campbell,* 71 M.J. at 25 (where CAAF found that the military judge did not abuse his discretion by finding that there was not an unreasonable multiplication of charges as applied to findings but that there was an unreasonable multiplication of charges as applied to sentence).

The discussion sections were added to address concerns that CAAF voiced in dicta in *Campbell.* In previous editions of the Manual, military judges often used the discussion section in R.C.M. 1003(b)(8)(C) to determine when relief was warranted for unreasonable multiplication of charges as applied to sentence. The *Campbell* court stated in a footnote: ''It is our view that after *Quiroz,* the language in the Discussion to R.C.M. 1003(b)(8)(C) regarding 'a single impulse or intent,' is dated and too restrictive. The better approach is to allow the military judge, in his or her discretion, to merge the offense for sentencing purposes by considering the *Quiroz* factors and any other relevant factor * * *'' *Campbell,* 71 M.J. at 24 n.9. The Discussion was changed to address the *Quiroz* factors and remove any reference to the 'single impulse or intent' test, as suggested by CAAF. The Committee also decided to move the Discussion section from R.C.M. 1003(b)(8)(C) to this Rule because R.C.M. 1003 deals exclusively with sentencing and a motion for appropriate relief due to unreasonable multiplication of charges can be raised as an issue for findings or for sentence under this Rule. Therefore, it is more appropriate to address the issue here.

For more information on multiplicity and how it relates to unreasonable multiplication of charges, see Michael J. Breslin & LeEllen Coacher, *Multiplicity and Unreasonable Multiplication of Charges: A Guide to the Perplexed,* 45 A.F.L. Rev. 99 (1998); Christopher S. Morgan, *Multiplicity: Reconciling the Manual for Courts-Martial,* 63 A.F.L. Rev. 23 (2009); Gary E. Felicetti, *Surviving the Multiplicty/LIO Family Vortex,* Army Law., Feb. 2011.

The language in the discussion section of the 2012 edition of the Manual referring to the *Campbell* decision was removed because it is no longer necessary, as the Rules themselves have been edited to remove any reference to ''multiplicious for sentencing'' and additional discussion sections were added to eliminate any confusion with the terms.''

(h) RCM 907(b)(3)(B), is amended to insert the following language:

''*2013 Amendment.* This rule and related discussion is the focal point for addressing claims of multiplicity. If a practitioner seeks to raise a claim for unreasonable multiplication of charges, that concept is addressed in R.C.M. 906(b)(12) and related discussion. The heading of this rule was added to signify that this rule deals exclusively with multiplicity, and not unreasonable multiplication of charges. The discussion section of this rule was amended because the Committee believed that a more thorough definition of multiplicity was appropriate in light of CAAF's suggestion in *United States* v. *Campbell,* 71 M.J. 19, 23 (C.A.A.F. 2012) that the concepts of multiplicity and unreasonable multiplication of charges are often confounded.

The discussion of multiplicity is derived from the Supreme Court's holding in *Blockberger* v. *United States,* 284 U.S. 299 (1932) and CMA's holding in *United States* v. *Teters,* 37 M.J. 370 (C.M.A. 1993). The Court in *Blockberger* wrote: ''[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offense or only one, is whether each provision requires proof of a fact that the other does not.'' *Blockberger,* 284 U.S. at 304. Military courts departed from the *Blockburger* analysis; however, the CMA's decision in *Teters* clearly re-aligned the military courts with the federal courts, and multiplicity is now determined in the military courts by the *Blockberger/Teters* analysis outlined in the discussion section. Any reference to the ''single impulse'' or ''fairly embraced'' tests is outdated and should be avoided.

Two offenses that arise from the same transaction may not be multiplicious, even if they do not require proof of an element not required to prove the other, if the intent of Congress was that an accused could be convicted and punished for both offenses arising out of the same act. The *Blockberger/Teters* analysis applies only when Congress has not made a statement of intent, either expressly in the statute or through legislative history, that the offenses be treated as separate. If it was Congress' intent to draft two statutes that subject an accused to multiple punishments for the same transaction, and that intent is clear, the *Blockberger/Teters* elements comparison is unnecessary. *See, e.g., Missouri* v. *Hunter,* 459 U.S. 359, 368 (1983) (''simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes * * * [Where a] legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger,* a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial'').

The language in the discussion section of the 2012 edition of the Manual referring to the *Campbell* decision was removed because it is no longer necessary, as the Rules themselves have been edited to remove any reference to ''multiplicious for sentencing'' and additional discussion sections were added to eliminate any confusion with the terms.''

(i) RCM 916(b), is amended to insert the following language immediately following the paragraph beginning with the words ''*2007 Amendment*'':

''*2013 Amendment:* Changes to this paragraph are based on section 541 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81, 31 December 2011, which supersedes the previous paragraph 45, ''Rape, sexual assault and other sexual misconduct,'' in its entirety and replaces paragraph 45 with ''Rape and sexual assault generally.'' In addition, it adds paragraph 45b., ''Rape and sexual assault of a child,'' and paragraph 45c., ''Other sexual misconduct.''

(j) RCM 916(j), is amended to insert the following language immediately following the paragraph beginning with the words ''*2007 Amendment*'':

''*2013 Amendment:* Changes to this paragraph are based on section 541 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81, 31 December 2011, which supersedes the previous paragraph 45, ''Rape, sexual assault and other sexual misconduct,'' in its entirety and replaces paragraph 45 with ''Rape and sexual assault generally.'' In addition, it adds paragraph 45b., ''Rape and sexual assault of a child,'' and paragraph 45c., ''Other sexual misconduct.''

Paragraph (j)(3) was deleted based on the changes to Article 120 and in light of the fact that the Court of Appeals for the Armed Forces ruled that the statutory burden shift to the accused in the 2007 version of Article 120 was unconstitutional and the subsequent burden shift to the government to disprove consent beyond a reasonable doubt once the accused had raised the affirmative defense of consent by a preponderance of the evidence resulted in a legal impossibility. *United States* v. *Prather,* 69 M.J. 338 (C.A.A.F. 2011); *United States* v. *Medina,* 69 M.J. 462 (C.A.A.F. 2011).''

(k) RCM 920(e)(5)(D), is amended to insert the following language immediately following the paragraph beginning with the words ''*2007 Amendment*'':

''*2013 Amendment:* Changes to this paragraph are based on section 541 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81, 31 December 2011, which supersedes the previous paragraph 45, ''Rape, sexual assault and other sexual misconduct,'' in its entirety and replaces paragraph 45 with ''Rape and sexual assault generally.'' In addition, it adds paragraph 45b., ''Rape and sexual assault of a child,'' and paragraph 45c., '' 'Other sexual misconduct.' ''

(l) RCM 1003(c)(1)(C), delete the paragraph beginning with words the ''2012 Amendment,'' and insert in its place:

''*2013 Amendment.* This Rule was amended because the language in previous editions of the Manual seemed to suggest that an accused could not be punished for offenses that were not separate. This is only true if there is no express statement from Congress indicating that an accused can be punished for two or more offenses that are not separate. *See* R.C.M. 907(b)(3) and related analysis. The committee added subsections (i) and (ii) to distinguish between claims of multiplicity and unreasonable multiplication of charges. As the two concepts are distinct, it is important to address them in separate subsections. *See* R.C.M. 906(b)(12) for claims of unreasonable multiplication of charges and R.C.M. 907(b)(3)(B) for claims of multiplicity.

Additionally, the Committee decided to move the discussion of the *Quiroz* factors from this Rule to R.C.M. 906(b)(12) because the factors apply to unreasonable multiplication of charges as applied to findings as well as sentence. Because this Rule refers only to sentencing, it is more appropriate to address the military judge's determination of unreasonable multiplication in R.C.M. 906(b)(12), because that Rule covers both findings and sentence. *See* R.C.M. 906(b)(12) and related analysis.

The language in the discussion section of the 2012 edition of the Manual referring to the *Campbell* decision was removed because it is no longer necessary, as the Rules themselves have been edited to remove any reference to ''multiplicious for sentencing'' and the discussion section of R.C.M. 906(b)(12) addresses the *Quiroz* factors.''

(m) RCM 1004(c)(7)(B), is amended to insert the following language immediately following the paragraph beginning with the words ''*2007 Amendment*'':

''*2013 Amendment:* Changes to this paragraph are based on section 541 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81, 31 December 2011, which supersedes the previous paragraph 45, ''Rape, sexual assault and other sexual misconduct'', in its entirety and replaces paragraph 45 with ''Rape and sexual assault generally.'' In addition, it adds paragraph 45b., ''Rape and sexual assault of a child'', and paragraph 45c., 'Other sexual misconduct.' ''

(n) RCM 1004(c)(8), is amended to insert the following language immediately following the paragraph beginning with the words ''*2007 Amendment*'':

''*2013 Amendment:* Changes to this paragraph are based on section 541 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112–81, 31 December 2011, which supersedes the previous paragraph 45, ''Rape, sexual assault and other sexual misconduct,'' in its entirety and replaces paragraph 45 with ''Rape and sexual assault generally.'' In addition, it adds paragraph 45b., ''Rape and sexual assault of a child,'' and paragraph 45c., 'Other sexual misconduct.' ''

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