Federal Officer, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the Designated Federal Official at least seven business days prior to the meeting to be considered by the committee. The Designated Federal Official will review all timely submitted written comments or statements with the committee Chairperson and ensure the comments are provided to all members of the committee before the meeting. Written comments or statements received after this date may not be provided to the committee until its next meeting.

Pursuant to 41 CFR § 102–3.140d, the committee is not obligated to allow a member of the public to speak or otherwise address the committee during the meeting. However, the committee Designated Federal Official and Chairperson may choose to invite certain submitters to present their comments verbally during the open portion of this meeting or at a future meeting. The Designated Federal Officer, in consultation with the committee Chairperson, may allot a specific amount of time for submitters to present their comments verbally.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2016–26928 Filed 11–7–16; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2016–OS–0110]

Manual for Courts-Martial; Publication of Supplementary Materials

AGENCY: Joint Service Committee on Military Justice (JSC), Department of Defense.

ACTION: Publication of Discussion and Analysis (Supplementary Materials) accompanying the Manual for Courts-Martial, United States (2012 ed.) (MCM).

SUMMARY: The JSC hereby publishes Supplementary Materials accompanying the MCM as amended by Executive Orders 13643, 13669, 13696, 13730, and 13740. These 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. These Supplementary Materials have been approved by the JSC and the General Counsel of the Department of Defense, and shall be applied in conjunction with the rule with which they are associated. The Discussions are effective insofar as the Rules they supplement are effective, but may not be applied earlier than the date of publication in the **Federal Register**.

DATES: These Supplementary Materials are effective as of November 8, 2016.

FOR FURTHER INFORMATION CONTACT: Major Harlye S. Carlton, USMC, (703) 963–9299 or *harlye.carlton@usmc.mil.* The JSC Web site is located at: *http://jsc.defense.gov.*

SUPPLEMENTARY INFORMATION:

Public Comments: The JSC solicited public comments for these changes to the MCM via the **Federal Register** on October 23, 2012 (77 FR 64854–64887, Docket ID: DoD–2012–OS–0129), held a public meeting on December 11, 2012, and published the JSC response to public comments via the **Federal Register** on March 5, 2013 (78 FR 14271–14272, Docket ID: DoD–2012–OS–0129).

The amendments to the Discussion and Analysis of the MCM are as follows:

Annex

Section 1. Appendix 12 of the Manual for Courts-Martial, United States, is amended as follows:

(a) Article 120 is amended to read as follows:

''120 Rape and sexual assault generally

Offense	Discharge	Confinement	Forfeiture
Rape	*Mandatory* DD [5]	Life [4]	Total.
Sexual Assault	*Mandatory* DD [5]	30 yrs	Total.
Aggravated Sexual Contact	DD, BCD	20 yrs	Total.
Abusive Sexual Contact	DD, BCD	7 yrs	Total.''

(b) Article 120b is inserted to read as follows:

''120b Rape and sexual assault of a child

Offense	Discharge	Confinement	Forfeiture
Rape of a Child	*Mandatory* DD [5]	Life [4]	Total.
Sexual Assault of a Child	*Mandatory* DD [5]	30 yrs	Total.
Sexual Abuse of a Child:			
Cases Involving Sexual Contact	DD, BCD	20 yrs	Total.
Other Cases	DD, BCD	15 yrs	Total.''

(c) Article 120c is inserted to read as follows:

''120c Other sexual misconduct

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

Offense	Discharge	Confinement	Forfeiture
Forcible Pandering	DD, BCD	12 yrs	Total.
Indecent Exposure	DD, BCD	1 yr	Total.''

(d) The following Note is inserted after Article 120c to read as follows:

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

(e) Article 125 is amended to read as follows:

''125 Forcible sodomy; bestiality

Offense	Discharge	Confinement	Forfeiture
Forcible sodomy	*Mandatory* DD [5]	Life [4]	Total.
Bestiality	DD, BCD	5 yrs	Total.''

(f) Article 134 abusing public animal is amended to read as follows:

''134 Animal abuse

Offense	Discharge	Confinement	Forfeiture
Abuse, neglect, or abandonment of an animal	BCD	1 yr	Total.
Abuse, neglect, or abandonment of a public animal	BCD	2yrs	Total.
Sexual act with an animal or cases where the accused caused the serious injury or death of the animal.	DD, BCD	5 yrs	Total.''

(g) Article 134 Assault with intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary is amended to read as follows:

Offense	Discharge	Confinement	Forfeiture
134 With intent to commit voluntary manslaughter, robbery, forcible sodomy, arson, or burglary.	DD, BCD	10 yrs	Total.''

(h) Article 134 Indecent conduct is inserted to read as follows:

Offense	Discharge	Confinement	Forfeiture
134 Indecent conduct	DD, BCD	5 yrs	Total.''

(i) The Notes are amended by adding note [5] after note [4].

'' [5]. A dishonorable discharge can be reduced to a bad-conduct discharge by the convening authority in accordance with a pretrial agreement.''

Section 2. Appendix 12A of the Manual for Courts-Martial, United States, is inserted to read as follows:

''APPENDIX 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	Conviction of 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.	

Article	Offense	Lesser included offense
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 (*simple assault; assault consummated by a battery; assault with a dangerous weapon; assault or assault consummated by a 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 (*simple assault; assault with a 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 (*simple 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 (*simple 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 (*simple assault; assault consummated by a battery*).
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 a 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 statement.	
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*).

Article	Offense	Lesser included offense
	—*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.
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 (*simple assault; assault consummated by a 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 (*simple assault; assault consummated by a battery; aggravated assault*).
	—*Involuntary manslaughter*	Art. 128 (*simple assault; assault consummated by a 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 (*simple assault; assault consummated by a 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 (*simple assault; assault consummated by a 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).
	—*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, or other similar substance*.	Art. 120(c); Art. 128 (*simple assault; assault consummated by a 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 (*simple assault; assault consummated by a battery*).
	—*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 knows 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*.	

Article	Offense	Lesser included offense
	—By unlawful force	Art. 120(d); Art. 128 (*simple assault; assault consummated by a battery*).
	—By force causing or likely to cause death or grievous bodily harm to any person.	Art. 120(d); Art. 128 (*simple assault; assault consummated by a 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 (*simple assault; assault consummated by a battery*).
	—By administering to that person a drug, intoxicant, or other similar substance.	Art. 120(d); Art. 128 (*simple assault; assault consummated by a battery*).
	—Abusive sexual contact	Art. 128 (*simple assault; assault consummated by a 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 a 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 a battery upon a child under 16 years*).
	—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 a 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 or anus or mouth by any part 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 (*simple assault; assault consummated by a 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 (*simple assault; assault consummated by a battery; assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm*)
125	Forcible sodomy; bestiality.	
	—Forcible sodomy	Art. 128 (*simple assault; assault consummated by a battery*).
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 a battery*).
	—Assault upon a sentinel or lookout in the execution of duty	Art. 128 (*simple assault; assault consummated by a battery*).
	—Assault consummated by a battery upon a child under 16 years.	Art. 128 (*simple assault; assault consummated by a 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 a battery; (when committed upon a child under the age of 16 years; assault consummated by a 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 a battery; assault with a dangerous weapon (when committed upon a child under the age of 16 years; assault consummated by a 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 a gentleman.	
134	Animal abuse.	
134	Adultery.	

Article	Offense	Lesser included offense
134	Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, forcible sodomy, arson, burglary, or housebreaking.	
	—*Assault with intent to murder*	Art. 128 (*simple assault; assault consummated by a 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 (*simple assault; assault consummated by a 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 forcible sodomy*	Art. 128 (*simple assault; assault consummated by a battery; assault with a dangerous weapon*).
	—*Assault with intent to commit burglary*	Art. 128 (*simple assault; assault consummated by a 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 (*simple assault; assault consummated by a 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*).
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	Drunk 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 a subordinate.	
134	Homicide, negligent.	
134	Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official.	
134	Indecent conduct.	
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*).

Article	Offense	Lesser included offense
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.	
134	Unlawful entry.	
134	Weapon: Concealed, carrying.	
134	Wearing unauthorized insignia, decoration, badge, ribbon, device or lapel button''.	

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

Section 3. 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, the Military Rules of Evidence, 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(4). 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) that 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 of May 12, 1995. Beginning in 1995, the Manual was to be referred to as ''Manual for Courts-Martial, United States (19xx edition).'' In 2013, the Preamble was amended to identify new Manuals based on their publication date.

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.

Section 4. The Discussion to Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) The Discussion immediately following R.C.M. 307(c)(3) is amended by deleting the first two Notes.

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

(c) The Discussion immediately following R.C.M. 307(c)(3) is amended by deleting the Note directly following the words ''(G) *Description of offense.*''

(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 60.c.(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 3.b.(1)(c) in Part IV and the related analysis in Appendix 23.''

(f) The note immediately following R.C.M. 307(c)(4) is deleted and Discussion is inserted 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 charge 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, paragraph 3, and R.C.M. 601(e)(2) concerning referral of several offenses.''

(g) The Discussion immediately following R.C.M. 701(e) is amended by

adding the following after ''retribution for such testimony'':

''Counsel must remain cognizant of professional responsibility rules regarding communicating with represented persons.''

(h) 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) of this Rule. 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 contempt are more extensive. *See* subsection (b)(2) of this Rule.

The words ''any person,'' as used in Article 48, include all persons, whether or not subject to military law, except the military judge 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 finding of 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; s*ee also* Article 98. The 2011 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.''

(i) 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).''

(j) 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 the 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 charge in the alternative based on exigencies of proof, a ruling on this motion ordinarily should be deferred until after findings are entered.''

(k) 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 those violations 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; 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 Congress intended to impose multiple convictions and punishments for the same act. When there is no overt expression of congressional intent in the relevant statutes, such intent may be inferred based on the elements of the charged statutes and their relationship to each other or other principles of statutory interpretation. 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 statute 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.''

(l) 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).''

(m) 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.''

(n) 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 fact finder 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).''

(o) The note immediately following R.C.M. 1003(c)(1)(C) is deleted, and the following is added immediately following the last paragraph of the Discussion:

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

Section 5. The Discussion to Part IV of the Manual for Courts-Martial, United States, is amended as follows:

(a) The Discussion immediately following paragraph 3.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); *Schmuck* v. *United States,* 489 U.S. 705 (1989); Appendix 23 of this Manual, Art. 79. Paragraph 3.b.(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 use of normal principles of statutory interpretation is permitted. The elements test is necessary to safeguard the due process requirement of notice to a criminal defendant.''

(b) The following Discussion is added immediately after paragraph 3.b.(5):

''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 3.b.(1)(c) above. The lesser included offenses listed in Appendix 12A were amended in 2016 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, Article 79.''

(c) The following Discussion is added immediately after paragraph 60.b:

''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 added immediately after paragraph 60.c.(6)(a):

''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 of this Manual, Art. 79. 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 of this Manual, Art. 134.''

(e) The following replaces the paragraph below ''Discussion'' following paragraph 60.c.(6)(b):

''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 statute, practitioners should consider including, when appropriate and necessary, words of criminality (*e.g.,* wrongfully, knowingly, or willfully).''

Section 6. Appendix 21 of the Manual for Courts-Martial, United States, is amended as follows:

(a) R.C.M. 306, the last paragraph beginning with ''*2016 Amendment,*'' is amended to read as follows:

''*2016 Amendment:* R.C.M. 306(e) implements Section 534(b) of the National Defense Authorization Act for Fiscal Year 2015, P.L. 113–291, 19 December 2014.''

(b) R.C.M. 307(c)(3), after the paragraph beginning with the words, ''2012 Amendment,'' and prior to the line beginning with the words, ''The sources of the lettered subsection'' add the following:

''*2016 Amendment:* The two notes added in 2012 are removed. The notes were originally 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. 465 (C.A.A.F. 2010). In 2016, the Manual was amended to require the terminal element be expressed in Article 134 specifications and to alter the definition of lesser included offenses under Article 79. *See* paragraphs 3 and 60.c.(6) in Part IV of this Manual.''

(c) R.C.M. 307(c)(3)(A), after the paragraph beginning with the words ''*Sample specifications*'' delete the paragraph beginning with the words the ''*2012 Amendment.*''

(d) R.C.M. 307(c)(3)(G), after the paragraph beginning with the words ''*Description of offense.*'' delete the paragraph beginning with the words the ''*2012 Amendment,*'' and insert in its place:

''*2016 Amendment:* The note added in 2012 is removed. The note was originally added to address the requirement to expressly state the terminal element in Article 134 specifications. *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) R.C.M. 307(c)(3)(G)(i), insert the following language as a new paragraph after the existing paragraph:

''*2016 Amendment:* This subparagraph was amended and reflects the removal of a note.''

(f) R.C.M. 307(c)(3)(G)(v), insert the following language:

''*2016 Amendment:* Subparagraph (v) was added to address lesser included offenses and refer practitioners to Article 79 and new Appendix 12A. *See* paragraph 3 in Part IV and Appendix 12A.''

(g) R.C.M. 307(c)(4), after the paragraph beginning with the words ''*2005 Amendment*'' delete the paragraph beginning with the words the ''*2012 Amendment,*'' and insert in its place:

''*2016 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) in this Appendix. For analysis related to unreasonable multiplication of charges, see R.C.M. 906(b)(12) in this Appendix.

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. 2010). The discussion section emphasizes that a prosecutor is not overreaching or abusing his or her discretion merely because he or she 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 *United States* v. *Campbell,* 71 M.J. 19 (C.A.A.F. 2012), 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.''

(h) R.C.M. 701(e), after the paragraph beginning with the words, ''*1986 Amendment,*'' and immediately before subparagraph (f), insert the following language:

''*2016 Amendment:* This rule implements Article 46(b), enacted by section 1704 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, as amended by section 531(b) of the Carl Levin and Howard P. ''Buck'' McKeon National Defense Authorization Act for Fiscal Year 2015, P.L. 113–291, 19 December 2014.''

(i) R.C.M. 906(b)(12), delete the paragraph beginning with the words the ''2012 Amendment,'' and insert in its place:

''*2016 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. The Court of Appeals for the Armed Forces 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, 337–38 (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. They 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 (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(c)(1) 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(c)(1)(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, at 46.

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.''

(j) R.C.M. 907(b)(3)(B), insert the following language as a new paragraph after the existing paragraph:

''*2016 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, which was added in 2016, signifies 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 *Blockburger* 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 *Blockburger* 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 offenses or only one, is whether each provision requires proof of a fact which the other does not.'' *Blockburger,* 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 *Blockburger/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 each does not require proof of an element not required to prove the other, if the intent of Congress was that an accused could be convicted of and punished for both offenses arising out of the same act. The *Blockburger/Teters* analysis applies only when Congress did not intend that the offenses be treated as separate. If Congress intended to subject an accused to multiple punishments for the same transaction, and that intent is clear, the *Blockburger/Teters* elements comparison is unnecessary. *See, e.g., Missouri* v. *Hunter,* 459 U.S. 359, 368–69 (1983) (''[S]imply 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.''

(k) R.C.M. 916(b), insert the following language immediately following the paragraph beginning with the words ''*2007 Amendment*'*:*

''*2016 Amendment:* Changes to this paragraph are based on section 541 of the National Defense Authorization Act for Fiscal Year 2012, P.L. 112–81, 31 December 2011, which superseded 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, the National Defense Authorization Act for Fiscal Year 2012 added paragraph 45b, ''Rape and sexual assault of a child,'' and paragraph 45c, ''Other sexual misconduct.''

(l) R.C.M. 916(j), insert the following language immediately following the

paragraph beginning with the words ''*2007 Amendment*'':

''*2016 Amendment:* Changes to this paragraph are based on section 541 of the National Defense Authorization Act for Fiscal Year 2012, P.L. 112–81, 31 December 2011, which superseded 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, the National Defense Authorization Act for Fiscal Year 2012 added paragraph 45b, ''Rape and sexual assault of a child,'' and paragraph 45c, ''Other sexual misconduct.''

Paragraph (j)(3) was deleted. The rule reflects changes to Article 120. 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).''

(m) R.C.M. 920(e)(5)(D), insert the following language immediately following the paragraph beginning with the words ''*2007 Amendment*'':

''*2016 Amendment:* Changes to this paragraph are based on section 541 of the National Defense Authorization Act for Fiscal Year 2012, P.L. 112–81, 31 December 2011, which superseded 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, the National Defense Authorization Act for Fiscal Year 2012 added paragraph 45b, ''Rape and sexual assault of a child,'' and paragraph 45c, ''Other sexual misconduct.'' ''

(n) R.C.M. 1003(c)(1)(C), delete the paragraph beginning with the words the ''2012 Amendment'' and insert in its place:

''*2016 Amendment:* This rule was amended. 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 true only 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. Subsections (i) and (ii) were added 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 factors in *United States* v. *Quiroz,* 55 M.J. 334 (C.A.A.F. 2001), 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. Such language 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.''

(o) R.C.M. 1004(c)(7)(B), insert the following language immediately following the paragraph beginning with the words ''*1994 Amendment*'' and immediately prior to the paragraph beginning with the words ''*1986 Amendment*'':

''*2016 Amendment:* Changes to this paragraph reflect section 541 of the National Defense Authorization Act for Fiscal Year 2012, P.L. 112–81, 31 December 2011, which superseded 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, the National Defense Authorization Act for Fiscal Year 2012 added paragraph 45b, ''Rape and sexual assault of a child,'' and paragraph 45c, ''Other sexual misconduct.'' ''

(p) R.C.M. 1004(c)(8), insert the following language immediately following the paragraph beginning with the words ''*1991 Amendment*'':

''*2016 Amendment:* Changes to this paragraph reflect section 541 of the National Defense Authorization Act for Fiscal Year 2012, P.L. 112–81, 31 December 2011, which superseded 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, the National Defense Authorization Act for Fiscal Year 2012 added paragraph 45b, ''Rape and sexual assault of a child,'' and paragraph 45c, ''Other sexual misconduct.'' ''

Section 7. Appendix 23 of the Manual for Courts-Martial, United States, is amended as follows:

(a) Paragraph 3.b.(4), Article 79, Lesser included offenses, *Specific lesser included offenses,* is amended by deleting the paragraphs beginning with the words ''*2012 Amendment*'' and ending with ''(C.A.A.F. 2008).'' and inserting in their place:

''*2016 Amendment:* See analysis in paragraph 3.b.(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. Therefore, practitioners should use Appendix 12A only as a guide. To determine if an offense is lesser included, the elements test must be used. *United States* v. *Jones,* 68 M.J. 465, 470 (C.A.A.F. 2010). 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 id.* at 470–73; *United States* v. *Oatney,* 45 M.J. 185 (C.A.A.F. 1996); *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 60.b and 60.c.(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.a, Article 118, Murder, is amended by adding the following language:

''*2012 Amendment:* This statute was modified pursuant to section 541 of 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 to read as follows:

''*2012 Amendment:* This paragraph was substantially revised by section 541 of the National Defense Authorization

Act for Fiscal Year 2012, P.L. 112–81, 31 December 2011. Amendments contained in this section took effect on 28 June 2012. Sec. 541(f), P.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 prior to 1 October 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 by deleting subparagraphs b, c, d, e, and f.

(e) Paragraph 45, Article 120b, Rape and sexual assault of a child, is amended by inserting ''b'' after ''45''.

(f) Paragraph 45b, Article 120b, Rape and sexual assault of a child, is amended by deleting subparagraphs b, c, d, e, and f.

(g) Paragraph 45c, Article 120c, Other sexual misconduct, is amended by deleting subparagraphs b, c, d, e, and f.

(h) Paragraph 51, Article 125, Sodomy, is amended by changing the title to ''Forcible Sodomy'' and adding the following language at the beginning:

''*2016 Amendment:* Paragraph 51 was amended pursuant to section 1707 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013. Additionally, all applicable references to sodomy throughout the Manual were changed to ''forcible sodomy'' to reflect the decriminalization of consensual sodomy under the UCMJ.''

(i) Paragraph 60.c.(6)(a) is amended to read as follows:

''*2016 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 2016, the President required that the terminal element be expressly alleged in every Article 134 specification.

The President ended the historical practice of allowing the terminal element to be inferred from Article 134 specifications, s*ee, e.g. United States* v. *Mayo,* 12 M.J. 286 (C.M.A. 1982), 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. 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 from a specification.

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 230. 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 the trier of fact found that clause 1, clause 2, or both clauses were proven beyond a reasonable doubt. Using the word ''and'' to separate clauses 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.c.(6)(b) is amended by deleting the paragraph beginning with the words ''*2012 Amendment*'' and ending ''above.'', and inserting in its place:

''*2016 Amendment:* New discussion was added in 2012 to address *United States* v. *Fosler,* 70 M.J. 225 (C.A.A.F. 2011). In 2016, that discussion was removed after paragraph 60 was amended by Executive Order. *See* analysis under subparagraph c.(6)(a) above.''

(k) Paragraph 62.c.(2) is amended to read 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 should not be interpreted 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. *Cf. United States* v. *Marcum,* 60 M.J. 198, 204–08 (C.A.A.F. 2004) (despite constitutionally protected liberty interest in private sexual behavior between consenting adults, military may regulate sexual conduct to the extent it could affect military order and discipline).

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.

Rule for Courts-Martial 306(b) advises commanders to dispose of alleged offenses 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, 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 of Part IV in deciding how to dispose of an allegation of adultery.''

(l) Paragraph 90 is amended to read as follows:

''90. Article 134—(Indecent Conduct)

Introduction. This offense is new to the Manual for Courts-Martial and was promulgated pursuant to Executive Order 13740 of 16 September 2016. It

includes offenses previously proscribed by ''Indecent acts with another,'' which was deleted pursuant to Executive Order 13447 of 1 October 2007, except that the presence of another person is not required. (m) Paragraph 97, Article 134 (Pandering and prostitution) is amended by adding the following language:

''*2016 Amendment:* Paragraph 97 was amended to broaden the definition of prostitution and pandering to include all sexual acts, not just sexual intercourse. This amendment included the removal of the language in paragraph 97.c suggesting that engaging in sodomy for money or compensation could be charged under paragraph 51 (Article 125—Sodomy). Pursuant to section 1707 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, consensual sodomy is no longer a crime under the UCMJ and Article 125 is not an appropriate charge for the consensual exchange of money for sodomy. The definition of prostitution for this offense differs from the definition of prostitution in Article 120c. Congress provided a broader definition of prostitution when criminalizing forcible pandering.

Dated: November 3, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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DEPARTMENT OF EDUCATION

[Docket No.: ED–2016–ICCD–0125]

Agency Information Collection Activities; Comment Request; Implementation of Title I/II–A Program Initiatives

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a reinstatement of a previously approved information collection.

DATES: Interested persons are invited to submit comments on or before January 9, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0125. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–343, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Erica Johnson, 202–245–7676.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Implementation of Title I/II–A Program Initiatives.

OMB Control Number: 1850–0902.

Type of Review: A reinstatement of a previously approved information collection.

Respondents/Affected Public: State, Local, or Tribal Governments.

Total Estimated Number of Annual Responses: 621.

Total Estimated Number of Annual Burden Hours: 672.

Abstract: The second round of data collection for the Implementation of Title I/II–A Program Initiatives study will continue to examine the implementation of policies promoted through the Elementary and Secondary Education Act (ESEA) at the state and district levels, in four core areas: School accountability and support for low-performing schools, teacher and principal evaluation, state content standards, and assessments. The first round of data collection for this study was conducted in Spring and Summer 2014.

The purpose of this follow-up data collection is to provide policy makers with detailed information on the core policies promoted by Title I and Title II–A being implemented at the state and district levels, and the resources and supports they provide to schools and teachers. The timing of the data collection is critical to provide information prior to the full implementation of the Every Student Succeeds Act (ESSA) in the 2017–18 school year. Although other research studies cover similar topics on recent federal education policy, the breadth of research questions and the depth of responses from all states and a nationally representative sample of 570 school districts sets the Title I/II study apart from other studies.

This study will rely on information collected from existing sources, for which there are no respondents or burden, and on a set of revised state and district surveys, based on the 2014 data collection, in order to address the study's research questions. Extant data sources include (a) the National Assessment of Educational Progress (NAEP) and (b) EDFacts data.

The revised surveys of states and school districts will begin in April 2017. All respondents will have the opportunity to complete an electronic (*e.g.,* web-based) survey (or paper survey, if preferred). The survey respondents are described briefly below:

State Surveys: The state survey will be sent to the chief state school officer in each of the 50 states and the District of Columbia. The state surveys will be administered using an electronic instrument divided into modules corresponding to the four core areas.

School District Surveys. The school district survey will be sent to school superintendents from the same nationally representative sample of 570 school districts that participated in the 2014 survey. The district survey will be web-based and modularized, corresponding to the four core areas, to allow for completion by one or multiple respondents.