

DEPARTMENT OF DEFENSE

PROPOSED AMENDMENTS TO THE UNIFORM CODE OF MILITARY JUSTICE

WITH

INITIAL DOD DRAFT OF COMPLEMENTARY PROPOSED CHANGES TO

THE MANUAL FOR COURTS-MARTIAL:

PART IV, “PUNITIVE ARTICLES” AND

PART II, “RULES FOR COURTS-MARTIAL” AND

PART III, “MILITARY RULES OF EVIDENCE”

**Reference: Section 571, Ronald W. Reagan National Defense Authorization Act
for Fiscal Year 2005**

(Submitted to Congress on April 7, 2005)

TABLE OF CONTENTS

<u>TAB</u>	<u>SUBJECT</u>
A	Summary of Recommended UCMJ Amendments and MCM Changes
B	Background Information
C	Proposed Amendment to Article 120, UCMJ (Rape and Carnal Knowledge)
D	Proposed Article 93a, UCMJ, “Stalking” Offense
E	Proposed Amendment to Article 125, UCMJ (Sodomy)
F	Additional Military Sex Offenses in Part IV, MCM, “Punitive Articles”
G	Proposed Amendment to Article 43, UCMJ (Statute of Limitations)
H	Proposed Amendment to Article 39a, UCMJ (Pretrial Sessions) Proposed Rule for Courts-Martial 804 and 805 (Presence of Parties); Proposed Rule for Courts-Martial 1003A (Sealed Trial Records)
I	Proposed Manual for Courts-Martial Changes to: Military Rule of Evidence 412 (Rape-Shield); Military Rule of Evidence 513 (Psychotherapist-Patient Privilege)

A

SUMMARY OF DOD RECOMMENDATIONS TO AMEND UCMJ AND MODIFY MCM IN RESPONSE TO SECTION 571, NDAA FY'05 REQUEST

- The Joint Service Committee on Military Justice (JSC) conducted this review and provided proposed changes to the Uniform Code of Military Justice (UCMJ) and Manual for Courts-Martial (MCM) as part of an ongoing review of UCMJ sexual offenses which the JSC initiated in March 2004.
- Overall, the JSC review confirmed that the current structure and provisions of the UCMJ and MCM enabled the prosecution of cases involving sexual misconduct. However, the JSC review also concluded that improvements could be achieved in the manner in which sexual assault issues are addressed.
- JSC recommended DoD follow UCMJ process for making changes: (1) measured changes to UCMJ; (2) more in-depth changes to the MCM and guidance by the President's Sect 836 rule-making authority (Executive order).
- Changes to UCMJ (chapter 47 of title 10, United States Code) and Manual for Courts-Martial (MCM) by Presidential Executive order Rule-Making under 10 U.S.C. §§ 836 and 856:
 - **Sect 920 (Art 120) – Rape and Carnal Knowledge**
 - Eliminates the requirement that the government prove that the victim did not consent to sexual intercourse, unless the issue of consent is first raised by the defense--shifts the burden to the defense.
 - Deletes the statutory discussion of “Mistake of Age Defense” for carnal knowledge offenses.
 - Para. 45, Part IV, MCM – Places burden of raising consent on the defense, adds degrees of rape and maximum punishment dependent upon level of force, and accused state of intoxication is not relevant. Threatening includes use of military position, rank, or authority.
 - **Sect 893a (Art 93a) - Stalking**
 - Adds a stalking offense to UCMJ. Previously charged under Art 134, prejudicial to good order & discipline. Modeled after the Federal “Model Anti-stalking Code for the States”
 - Para. 17a, Part IV, MCM – Would be created to explain new Article 93a, lesser included offenses, maximum punishment, and sample specification.
 - **Sect 925 (Art 125) - Sodomy**
 - Limits offense to Forcible Sodomy and sodomy of a child. Requires the prosecution to prove that the act of unnatural copulation was done “by force.”
 - Removes from Sect 925 sodomy between consenting adults and unnatural copulation with an “animal” – offenses to be addressed as proposed “sex-related offenses” in paragraph 62, Part IV, MCM.
 - Para. 51, Part IV, MCM - Amended to be offense of forcible sodomy and sodomy of a child versus all acts of sodomy, consent must be raised by defense (except children under 16 cannot legally consent), degrees of sodomy based on level of force and include use of military position, rank or authority.

- **Sect 843 (Art 43) – Statute of Limitations**
 - Amends statute of limitations (SOL) for murder, rape, & child abuse
 - Clarifies that rape has unlimited SOL
 - Certain child abuse offenses the SOL will now be for life of child or within 5 years of date of offense whichever is longer. This allows for longer period of prosecution in the event the child dies from the abuse.

- **Sect 839 (Art 39) – Sessions**
 - Allows appearance of accused & counsel or military judge by remote (VTC) means during pretrial sessions.
 - Amends Rule for Courts-Martial 804 and 805 defining requirements for parties to the trial to be physically present and allows VTC substitute when accused is represented by a defense counsel physically present.
 - Creates Rule for Courts-Martial 1103A to establish procedures for review and guidance for limiting access to sealed exhibits and court-martial proceedings.

Additional Military Sex Offenses in Part IV, MCM, “Punitive Offenses”

- **Paras. 63 and 87 combined** – “Indecent Assault” & “Indecent Act with a Child” are sexual acts or sexual contact not amounting to intercourse or sodomy and was done by force. Makes defense raise consent. Degrees of indecent assault recognize the variations in level of force used.

- **Multiple paragraphs combined** – “Sex-Related Offenses.” Collects sex-related offenses into one article including adultery, consensual sodomy that is prejudice to good order and discipline, prostitution, patronizing a prostitute, pandering, public intercourse/sodomy, sexual act. A crime if prejudicial to good order and discipline or service discrediting. Additional sex-related offense such as indecent acts, indecent exposure, indecent language, wrongful cohabitation, fraternization, & indecent liberties with a child will also be realigned under this paragraph.

Proposed Changes to Part III, MCM, “Military Rules of Evidence”

- **MRE 412**—The military rape-shield law (Military Rule of Evidence 412) change is to make clear that the protections afforded apply to all cases involving sexual offenses where the focus of the offense is on the offender’s conduct.

- **MRE 513** – Psychotherapist-patient privilege change to allow for confidentiality & privilege communications involving sexual assault and domestic violence during UCMJ and non-UCMJ proceedings. Current rule states it only applies to UCMJ proceedings and exceptions preclude use by domestic violence victims.

- The changes to the UCMJ and MCM make needed changes while preserving executive authority in such military justice matters.

B

BACKGROUND INFORMATION

PART A - Comparison of Title 18 Sexual Offenses with UCMJ Sexual Offenses

<i>Title 18 Offense¹</i>	<i>Similar UCMJ Offense</i>
Aggravated Sexual Abuse—18 USC 2241	Rape—Article 120 Sodomy (By Force)—Article 125 Indecent Assault—Article 134
Sexual Abuse—18 USC 2242	Rape—Article 120 Sodomy (By Force)—Article 125 Indecent Assault—Article 134
Sexual Abuse of a Minor—18 USC 2243 - Unlike UCMJ, it is not a crime to have sexual intercourse with a minor between the ages of 12-15 by adults who are within 4 years of age of the victim (e.g., young service members who have sexual intercourse with dependent high school children who are less than 4 years younger).	Carnal Knowledge—Article 120 Sodomy (w/Child under 16)—Article 125 Indecent Acts w/Child—Article 134
Sexual Abuse of a Ward—18 USC 2243	Not specifically proscribed by UCMJ or MCM; may be charged as either an Article 92 offense (violation of a general order), an Article 134 offense—General Offense (Clause 1 or 2), or an Article 134— Crimes and Offenses of Unlimited Application (Clause 3). <i>Note:</i> Proposed MCM change would allow the military to reach similar conduct as “sex-related offenses”—Article 134
Abusive Sexual Contact—18 USC 2244 - Section 2244(b) includes the concept of “without permission,” which is similar to the “without consent” criterion.	Indecent Act—Article 134 Indecent Acts with a Child—Article 134
Prostitution Near Military and Naval Establishments—18 USC 1384 (Note: Offenses are not proscribed by Title 18 unless they are near military or naval establishments)	Pandering and Prostitution—Article 134 - Unlike title 18, military is proposing a specific offense of “Patronizing a Prostitute – Article 134
Sexual Exploitation and Other Abuse of Children—18 USC, Chapter 110 (Child Pornography)	Crimes and Offenses of Unlimited Application-Article 134 (General Article, Clause 3) (e.g. child pornography) ²

¹ Many sexual abuse offenses under title 18, United States Code, have statutory punishments to confinement that are significant lower than what the UCMJ authorizes. (e.g., compare 2-year confinement punishment for fondling a 12-year-old child’s breast under 18 USC § 2244(b) with the 7-year confinement authorized for similar misconduct under Article 134, UCMJ.)

² In addition to the UCMJ’s flexibility allowing for the assimilation of other Federal and State laws under Article 134, as applicable, the UCMJ allows for any other misconduct of a sexual nature not specifically enumerated to be charged as a violation of Article 134 when it is considered to be prejudicial to good order and discipline or service-discrediting.

PART B - Comparison of UCMJ Sexual Offenses wit Title 18 Sexual Offenses

<i>UCMJ Offense</i>	<i>Similar Title 18 Offense³</i>
Rape—Article 120	Aggravated Sexual Abuse—18 USC 2241 <ul style="list-style-type: none"> • By force/threat of death, serious bodily injury, or kidnapping • By other means • Victim under 12 Sexual Abuse—18 USC 2242 <ul style="list-style-type: none"> • threat less than of death, serious bodily injury, or kidnapping
Carnal Knowledge—Article 120	<ul style="list-style-type: none"> • If victim is under 12, Aggravated Sexual Abuse—18 USC 2241 • If victim is at least 12 but under 16, Sexual Abuse of a Minor—18 USC 2243
Sodomy (By Force)—Article 125	Aggravated Sexual Abuse—18 USC 2241 Sexual Abuse—18 USC 2242
Sodomy (w/Child under 16)—Article 125	<ul style="list-style-type: none"> • If victim is under 12, Aggravated Sexual Abuse—18 USC 2241 • If victim is at least 12 but under 16, Sexual Abuse of a Minor—18 USC 2243 <p>- Unlike UCMJ, it is not a crime to have sexual intercourse with a minor between the ages of 12-15 by adults who are within 4 years of age of the victim (e.g., young service members who have sexual intercourse with dependent high school children who are less than 4 years younger).</p>
Sodomy (No Force/No Child)—Article 125	Not Proscribed*
Sodomy (w/Animal)—Article 125	Not Proscribed*
Adultery—Article 134	Not Proscribed*
Indecent Assault—Article 134	Aggravated Sexual Abuse—18 USC 2241 Sexual Abuse—18 USC 2242 Abusive Sexual Contact—18 USC 2244 - Section 2244(b) includes the concept of “without permission,” which is similar to the “without

³ Many sexual abuse offenses under title 18, United States Code, have statutory punishments to confinement that are significant lower than what the UCMJ authorizes. (e.g., compare 2-year confinement punishment for fondling a 12-year-old child’s breast under 18 USC § 2244(b) with the 7-year confinement authorized for similar misconduct under Article 134, UCMJ.)

	consent” criterion.
Indecent Acts w/Child—Article 134	<ul style="list-style-type: none"> • If direct touching of “sexual body part” and victim under 12, Aggravated Sexual Abuse—18 USC 2241 • If direct touching of “sexual body part” and victim at least 12 but under 16, Sexual Abuse of a Minor—18 USC 2243 • If indirect touching of “sexual body part,” Abusive Sexual Contact—18 USC 2244
Indecent Liberties w/Child—Article 134 (e.g. masturbating in the presence of a child)	Not Proscribed*
Indecent Exposure—Article 134	Not Proscribed*
Indecent Language—Article 134	Not Proscribed*
Indecent Acts w/Another—Article 134 (e.g. public sex)	Not Proscribed*
Pandering and Prostitution—Article 134 - Unlike title 18, military is proposing a specific offense of “Patronizing a Prostitute – Article 134 ⁴	Prostitution Near Military and Naval Establishments—18 USC 1384 (Note: Offenses are not proscribed by Title 18 unless they are near military or naval establishments)

*Federal officials would ostensibly look to military or state to prosecute

⁴ In addition to the UCMJ’s flexibility allowing for the assimilation of other Federal and State laws under Article 134, as applicable, the UCMJ allows for any other misconduct of a sexual nature not specifically enumerated to be charged as a violation of Article 134 when it is considered to be prejudicial to good order and discipline or service-discrediting.

**Federal Prosecutions Under Chapter 109A, 18 USC §§ 2241 – 2247
DOJ – Provided Statistics for 1994 – 2002**

[Sections Not Represented Means No Prosecutions Were Initiated]

§ 2241A – Aggravated Sexual Abuse By Force or Threat (of Death, Serious Bodily Injury, or Kidnapping)

§ 2241B – Aggravated Sexual Abuse By Other Means (incapacitation, intoxication by drugs/alcohol)

§ 2241C – Aggravated Sexual Abuse With Children

§ 2242A – Sexual Abuse By Threat or Placing In Fear (Other than of Death, Serious Bodily Injury, or Kidnapping)

§ 2242 – Sexual Abuse (Other than subsection 2242A)

§ 2243A – Sexual Abuse of a Minor

§ 2243B – Sexual Abuse of a Ward

§ 2244 – Abusive Sexual Contact (in circumstances where sexual acts are punishable under Chapter 109A, USC)

Year	§ 2241A	§ 2241B	§ 2241C	§ 2242A	§ 2242	§ 2243A	§ 2243B	§ 2244
1994 (249)	72	5	78	11	5	34	4	40
1995 (263)	83	8	83	6	5	26	1	51
1996 (265)	76	1	83	15	14	22	2	52
1997 (301)	78	0	97	10	9	47	6	54
1998 (306)	98	3	89	3	12	43	9	49
1999 (293)	78	2	102	10	14	35	3	49
2000 (282)	76	0	94	13	14	42	8	35
2001 (251)	57	0	74	7	15	40	10	48
2002 (288)	62	1	85	15	18	53	5	49
9-Year Total (2,498)	680	20	785	90	106	342	48	427

USA Today, “*Military Takes Rape Seriously*,” February 6, 2004, following the Denver Post criticism of the military in a series of articles -- “*Betrayal in the Ranks*”:

“Regrettably, sexual violence is a problem that challenges American society at large. We in Defense are not immune to the ills of the larger society. We do, however, aim to set a higher standard – and we believe we are succeeding.”

David S. C. Chu, Undersecretary of Defense for Personnel and Readiness.

**AN ANALYSIS OF RAPE CASES WITHIN THE DEPARTMENT OF DEFENSE
(2002)**

<u>Military Department</u>	<u>Rape Cases⁸</u>	<u>Total Population⁵ [Rate / 100,000⁹]</u>	<u>Ages 16 - 54⁶ [Rate / 100,000]</u>	<u>Males Ages 16 - 54⁷ [Rate / 100,000]</u>
Army	196	484,551 [40]	482,084 [41]	407,955 [48]
Air Force	234	364,954 [64]	364,429 [64]	293,669 [80]
Navy-USMC	271 ¹⁰	558,596 [49]	557,826 [49]	492,577 [55]
Total DoD	701	1,408,101 [50]	1,404,339 [50]	1,194,200 [59]

⁵ Defense Manpower Data Center total population of active duty service members as of September 30, 2002; reserve or national guard forces are not included whether or not activated into title 10, US Code federal service.

⁶ Age groups were limited to 16-54 year olds as best comparable with the civilian city and U.S. data that is grouped in age brackets beginning at ages 15-19, 20-24, and up to ages 45-54. Younger and older age groups were eliminated to make the comparison and children and senior citizens are considered unlikely to commit forcible rapes. Including the 15-year-old population in the civilian sector statistics will lower the civilian community’s actual rate per 100,000 in comparison with the military sector that begins with a higher age group bracket of 16, but doing so allows the use of public records population brackets that are closer to the military’s public record brackets. As such, the difference between the civilian and military rates per 100,000 are even greater than represented.

⁷ The age group of 16-54 for military and 15-54 for civilian populations were narrowed to the male population, as it was considered unlikely that females committed the reported forcible rapes.

⁸ Rape cases are those reported to the Military Criminal Investigative Organizations (MCIOs, i.e., CID, OSI, NCIS) in which the suspect was identified as a member of that MCIO’s Service or the identity was unknown. Civilian offender suspects and suspects of another Service were not included since there is no military jurisdiction over civilians and including other Service’s members could result in double counting.

⁹ Rate per 100,000 = Number of cases/population X 100,000.

¹⁰ Navy-USMC rape case data is from 2001 due to a database change preventing the use of 2002 statistics.

**REPORTED FORCIBLE RAPE CASES WITHIN CIVILIAN SOCIETY
(Colorado - 2002)**

Select Cities	Rape¹¹ Cases	Total Population¹² [Rate / 100,000]	Ages 15 - 54¹³ [Rate / 100,000]	Males Ages 15 - 54¹⁴ [Rate / 100,000]
Denver, CO	324	554,636 [56]	348,889 [93] *	177,933 (51% ¹⁵) [182] *
Colorado Springs, CO	275	360,890 [73]	219,363 [125] *	107,488 (49%) [256] *
Aurora, CO	256	276,393 [88]	172,481 [148] *	86,241 (50%) [297] *
Ft Collins, CO	99	118,652 [80]	81,588 [121] *	40,794 (50%) [243] *
Boulder, CO	48	94,673 [48]	69,951 [69] *	36,375 (52%) [132] *
Total for 5 Colorado Cities	1,002	1,405,244 [71]	892,272 [112] *	448,831 (50%) [223] *

* The civilian database that was used from public records includes 15-17 year olds. For true crime rate comparison purposes with the military, the actual civilian communities' rate/100,000 would be higher than shown because the military population does not generally include persons younger than 18 years of age.¹⁶ If those civilian age groups could be extracted for comparison purposes, the number of civilian rape cases would be calculated upon a lower population and the civilian rate/100,000 would be even higher in comparison to the military rate/100,000.

¹¹ Based on 2002 Federal Bureau of Investigation Crime Reports.

¹² As reported on the internet, the population data used for calculations of rate per 100,000 is based on the crime collection area indicated and may not match U.S. census data.

¹³ FBI Crime Statistics of male and female population by age groups indicated in the crime collection area.

¹⁴ FBI Crime Statistics of male-only population by age groups indicated in the crime collection area.

¹⁵ Percentage of male population reported in the crime collection area according to the FBI Crime Statistics.

¹⁶ Persons under the age of 17 years old are ineligible for original enlistment in the regular forces and persons under age 18 may only enlist with parental consent. 10 U.S.C. § 505(a).

**REPORTED FORCIBLE RAPE CASES WITHIN CIVILIAN SOCIETY
(2002)**

<u>Select Cities</u>	<u>Rape Cases</u>	<u>Total Population [Rate / 100,000]</u>	<u>Ages 15 - 54 [Rate / 100,000]</u>	<u>Males Ages 15 - 54 [Rate / 100,000]</u>
Philadelphia, PA	1,035	1,517,550 ¹⁷ [68]	855,614 [121] *	393,582 (46%) [263] *

United States	95,136	281,421,906 ¹⁸ [33]	161,902,094 [59] *	80,951,047 (50%) [118] *

* The civilian database that was used from public records includes 15-17 year olds. For true crime rate comparison purposes with the military, the actual civilian communities' rate/100,000 would be higher than shown because the military population does not generally include persons younger than 18 years of age.¹⁹ If those civilian age groups could be extracted for comparison purposes, the number of civilian rape cases would be calculated upon a lower population and the civilian rate/100,000 would be even higher in comparison to the military rate/100,000.

2002 SUMMARY

	<u>Total Population Rate/100,000</u>	<u>Ages 15 - 54 Rate/100,000</u>	<u>Males Ages 15 - 54 Rate/100,000</u>
DOD:	50	50	59
Colorado Cities:	71	112	223
Philadelphia, PA:	68	121	263
United States:	33	59	118

¹⁷ Philadelphia selected as a city listed in the internet Crime Statistic (2002) with a total population approximating that of the Department of Defense for 2002.

¹⁸ Population figures for United States is based on 2000 Census figures.

¹⁹ Persons under the age of 17 years old are ineligible for original enlistment in the regular forces and persons under age 18 may only enlist with parental consent. 10 U.S.C. § 505(a).

C

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

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

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

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

Section-By-Section Analysis

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

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

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

The complementary MCM change corresponding to this offense is proposed as:

Initial JSC Draft (2/28/05)

Modifications to Part IV, MCM, “Punitive Articles”

45. Article 120—Rape and carnal knowledge

a. *Text.*

“(a) Any person subject to this chapter who commits an act of sexual intercourse by force is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.”



(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person--

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

(2) who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

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

(d)(1) In a prosecution under subsection (b), it is an affirmative defense that--

(A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and

(B) the accused reasonably believed that the person had at the time of the alleged offense attained the age of 16 years.

(2) The accused has the burden of proving a defense under subparagraph (d)(1) by a preponderance of the evidence.

b. *Elements.*

(1) *Rape.*

(a) That the accused committed an act of sexual intercourse; and

(b) That the act of sexual intercourse was done by force.

(2) *Carnal knowledge.*

(a) That the accused committed an act of sexual intercourse with a certain person;

(b) That the person was not the accused's spouse; and

(c) That at the time of the sexual intercourse the person had attained the age of 12 but was under the age of 16.

c. *Explanation.*

(1) *Rape.*

(a) *Nature of offense.* Rape is sexual intercourse by a person, executed by force, on the victim. Any penetration, however slight, is sufficient to complete the offense. Rape may be committed on a victim of any age. A person under twelve years of age is legally incapable of appraising the nature of sexual intercourse, therefore, there is no requirement to prove that the act of sexual intercourse was committed by force. Sexual intercourse with a person under the age of twelve is rape. Any penetration of a person under the age of twelve, however slight, is sufficient to complete the offense. Depending on the nature of the force used, the status of the victim, or the age of the victim, rape may have varying degrees of punishment.

(b) *Defenses.* Consent and mistake of fact as to consent may be an affirmative defense in a prosecution for rape, except for rape of a child who has not attained the age of 12. When raised as an affirmative defense, “consent” means words or overt acts indicating a freely given agreement to the sexual intercourse at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual intercourse shall not constitute consent. A person cannot consent to sexual intercourse if they are substantially incapable of appraising the nature of sexual intercourse due to mental impairment or unconsciousness due to consumption of alcohol, drugs, or similar substance, or due to mental disease or defect which renders the person unable to understand the nature of sexual intercourse. Likewise, a person cannot consent if they are physically unable to decline participation in sexual intercourse or physically unable to communicate unwillingness to engage in sexual intercourse. When raised as a defense, “mistake of fact as to consent” means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in sexual intercourse consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. The accused’s actual state of intoxication, if any, at the time of the offense is not relevant to mistake of fact.

(c) *Force and degrees of rape.* There are degrees of rape under Article 120 which recognize variations in the level of force or coercion applied to overcome the victim’s will. The maximum punishment is dependent upon the force alleged and proven. The degrees of rape are divided by categories of force listed in subparagraphs (1-8) below. For purposes of this paragraph, **force means** the act of:

(1) compelling submission of the victim or overcoming or preventing the victim’s resistance by—

(A) the use or display of a dangerous weapon or object;

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause the victim to believe it is a dangerous weapon or object; or

(C) physical violence, strength, power, or restraint applied to victim, sufficient that the victim could not avoid or escape the sexual act;

(2) compelling submission of the victim or overcoming or preventing the victim's resistance by threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping;

(3) rendering the victim unconscious;

(4) administering to the victim, by physical violence, strength, power, or restraint or threat of the same, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the victim's ability to appraise or control the victim's conduct;

(5) compelling submission of the victim or overcoming or preventing the victim's resistance by threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping);

(6) causing bodily harm to the victim;

(7) engaging in sexual intercourse with the victim if the victim is substantially incapacitated, substantially incapable, or legally incapable of —

(A) appraising the nature of the sexual intercourse;

(B) declining participation in the sexual intercourse; or

(C) communicating unwillingness to engage in the sexual intercourse; or

(8) any force not otherwise specified or alleged.

(d) ***Threat of Force***. See subparagraphs, *Force*, (c)(1)(c)(2), (c)(1)(c)(4), and (c)(1)(c)(5) above.

(1) "Threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(2) "Threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping)" means a communication or action that is of

sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to less harm than death, grievous bodily harm, or kidnapping. Such harm includes physical injury to another person or substantial damage or destruction of another person's property. It also includes a threat to accuse any person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or through the use or abuse of military position, rank, or authority, to affect, threaten to affect, either positively or negatively, the military career of some person. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(e) *Age*. For purposes of defining "rape," a person under the age of twelve is legally incapable of appraising the nature of sexual intercourse.

(f) *Character of victim*. See Mil. R. Evid. 412 concerning rules of evidence relating to an alleged rape victim's character.

(g) *Evidence of similar crimes*. See Mil. R. Evid. 413 concerning rules of evidence relating to similar crimes of the accused in sexual assault cases.

(h) *Burden in Affirmative defense cases*. An affirmative defense means any special defense which, although not denying that the accused committed the objective act constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After a defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. The accused may not submit an affirmative defense for sexual intercourse with a person under the age of twelve.

Carnal knowledge. Recognizing that all sexual intercourse with a person under the age of 12 is rape, there is a separate offense of "carnal knowledge". "Carnal knowledge" is sexual intercourse under circumstances not amounting to rape, with a person who is not the accused's spouse and who is at least 12 years of age but who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense.. It is a defense, however, which the accused must prove by a preponderance of the evidence, that at the time of the act of sexual intercourse, the person with whom the accused committed the act of sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this same person was at least 16 years of age.

Lesser included offenses.

(1) *Rape*.

- (a) Article 128--assault; assault consummated by a battery
- (b) Article 134--assault with intent to commit rape
- (c) Article 134--indecent assault
- (d) Article 80--attempts
- (e) Article 120(b)--carnal knowledge

(1) **Carnal knowledge**.

- (a) Article 134--indecent acts or liberties with a person under 16

(b) Article 80--attempts

e. *Maximum punishment.*

(1) *Rape.*

- (a) When committed under circumstances (c)(1)(c)(1-4) or with a person under 12 years of age. Death or such other punishment as a court-martial may direct.
- (b) When committed under circumstances (c)(1)(c)(5-7). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.
- (c) When committed under circumstances (c)(1)(c)(8). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) *Carnal knowledge.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

f. *Sample specifications.*



(1) *Rape.*

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20 ___, rape ___, (a person under the age of 12) (by force, to wit: add appropriate force factors from subparagraph (c)(3))

(2) *Carnal knowledge.*

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20 ___, commit the offense of carnal knowledge with ___ a person who had attained the age of 12 but was under the age of 16.

D

Proposed Amendments to the Uniform Code of Military Justice

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

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

"§ 893a. Art. 93a. Stalking

"(a) Any person subject to this chapter—

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

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

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

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

"(c) For purposes of this section:

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

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

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

[NOTE: Upon further review following HASC staff questions, subsection (c) above should instead be placed in the Manual for Courts-Martial, Part IV, "Punitive Articles," as a new paragraph "17a. Article 93a – Stalking" along with the provisions that will be added in explanation of the offense, lesser included offenses, maximum punishment, and sample specification.]

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

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

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

Section-By-Section Analysis

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

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

The DoD has modeled this section after the Federal "Model Antistalking Code for the States" by (1) requiring a "course of conduct;" (2) specifically including "sexual assault" as but one example of "bodily harm;" and (3) including members of the victim's immediate family

among those persons who can be threatened with such bodily harm or death. Unlike the Federal statute at 18 U.S.C. 2261A, and consistent with the military's worldwide jurisdiction, this section lacks the requirement that the conduct involve traveling in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States.

And a

Military Proposal for a “Stalking Offense”

References: (a) Federal Anti-Stalking Offense, 18 U.S.C. § 2261A

(b) Federal “Model Antistalking Code for the States.”

<http://www.ojp.usdoj.gov/ocpa/94Guides/DomViol/appendb.htm>

(c) *U. S. v Saunders*, 39 M.J. 1 (2003)

(d) *U. S. v Rowe* (unpublished, A.F.Ct.Crim.App., ACM No. 32852, 1999 CCA LEXIS 125

- It is not clear from *Saunders* whether CAAF considered substantial emotional distress as the embodiment of fear of bodily injury or as a separate basis for criminal liability.
 - The Georgia State statute that was used as the basis of the 134 offense required a willful course of conduct "which causes emotional distress by placing such person in reasonable fear of death or bodily harm." The novel 134 specification changed "by" to "and" and added the adjective "substantial": "causing the said Ms. [H] substantial emotional distress and reasonable fear of bodily injury." The military judge then changed the "and" to "or" in the instructions: "The term 'harassed' means a knowing and willful course of conduct directed at a specific person which would cause substantial emotional distress in a reasonable person or which placed that person in reasonable fear of bodily injury."
 - CAAF Summarized the state and federal statutes as criminalizing "the act of knowingly pursuing a course of conduct that would produce emotional distress in a reasonable person or create a reasonable fear of death or injury to that person or an immediate family member when that course of conduct in fact causes emotional distress *and* reasonable fear in the targeted person." (Emphasis added).
 - But the court also expressed the core concept in all the statutes as "a knowing and willful course of intimidation or harassment that places a reasonable person in fear of death or bodily harm *or* that causes emotional distress." (Emphasis added). So it is not clear whether CAAF endorsed a broad or narrow construction of stalking.
- The draft statute is much broader than a narrow anti-stalking statute, such as the DOJ model or 18 USC 2261A. Both 18 USC 2261A and the DOJ model require a reasonable fear of bodily injury or death; i.e., the reasonable fear is the significant emotional distress - but its only fear of bodily injury or death. HR 5416/HR1203 contain various theories: emotional distress to a reasonable person; fear of injury to person; fear of injury to property; and fear of injury to reputation.
- Limiting the offense to fear of death or injury (to include fear of sexual assault) is more consistent with the concept of stalking which denotes a threatening or menacing pursuit.

- The other theories in HR 5416/HR 1203 address different, but related, offenses. Emotional distress or significant emotional distress is more akin to harassment which conveys irritation or torment, something less than fear of death or bodily injury. Adding "significant" raises the amount of emotional distress, but the two concepts are still distinct.
- Fear of damage to property or reputation is historically a civil offense - vice criminal. Washington State includes a fear of harm to livelihood and reputation in their stalking statute RCWA 9A.46.110 because it imports the definition of harassment from the civil unlawful harassment statute RCW 9A.46.110(6)(b). See *State v. Askham*, 86 P.3d 1224, 120 Wash.App. 872 (Wash. Ct. App. 2004).
- Regarding the term "or fear of injury to property or reputation of that person or any other person", it is clearly the minority view. All 50 state statutes were not researched, but Westlaw searches were conducted for the various terms and a 1998 DOJ Stalking and Domestic Violence report was available on the web: www.ojp.usdoj.gov/vawo/grants/stalk98. The only state that could be found that included injury to reputation was Washington State, and, as described above, it is included because of a reference to the civil code.
- Chapter 2 of the DOJ report on stalking and Domestic Violence contains a state-by-state analysis and summary of the state laws. The DOJ report states: a review of State statutory agreement with the *Model Code's* criminal law provisions shows that:
 - Only 16 States, Guam, and the Virgin Islands make stalking a felony offense as recommended by the *Model Code*; an additional 16 States make only the most serious stalking incidents a felony.
 - Forty-four States, the District of Columbia, Guam, and the Virgin Islands match the *Code's* use and definition of "course of conduct" involving physical proximity.
 - Twenty-five States use the *Code's* definition of two or more incidents to specify how many incidents are required to demonstrate repeated behavior as part of a course of conduct; 24 States, the District of Columbia, and the Virgin Islands do not use this definition, although several of these States use the undefined term "repeated" in their laws. One State defines repeated behavior as at least three acts.
 - Only 12 States and the Virgin Islands explicitly define "threat" to include implied threats.
 - Thirty-two States, the District of Columbia, Guam, and the Virgin Islands make intent to instill fear an element of the crime of stalking. Of those that do not, 14 States adopted the *Code's* requirement that the acts constituting stalking be done purposefully. Only four States do not require some proof of intentional behavior as part of their stalking laws.
 - Six States require using a "reasonable person" test to determine the reasonableness of any victim's fear resulting from the stalking behavior.

- Twenty-six States, the District of Columbia, Guam, and the Virgin Islands require fear of death or bodily injury, as recommended by the *Model Code*; five States use similar language to define fear, such as fear for one's physical safety; five other States add fear of sexual assault or battery, as recommended in the commentary to the *Model Code*; nine States protect against emotional distress and related responses, including feelings of annoyance or being threatened. Only six States' statutes do not require that the stalking result in victim fear or some lesser response to the stalking.
- Twenty-six States and Guam extend the scope of fear to include the victim's family, as recommended by the *Model Code*.

The DOJ report also contains a table that provides a state-by-state analysis based on the model code, it also identifies the nine states that protect against emotional distress.

- The DoD view is that fear of injury to property and reputation should not be called "stalking," but rather, harassment (or something akin).
- The Saunders case recognized that "reasonable fear of sexual assault" warranted some consideration since such might not be viewed as "bodily injury". DoD believes the specific reference to "sexual assault" should be considered. "Fear of sexual assault" is included within the "fear of bodily injury or death," but it is also proper to explicitly state that it is included. As the analysis and commentary to the DOJ model states:

"It is likely that victims who fear that a defendant may sexually assault them most likely also fear that the defendant would physically injure them if they resisted. Furthermore, because the human immunodeficiency virus (HIV), which causes acquired immunodeficiency syndrome (AIDS), could be contracted through a sexual assault, a victim is more likely to fear bodily injury or death, as well as psychological injury. Nevertheless, due to the nature of stalking offenses, states may want to consider expanding the language of their felony stalking statutes to include explicitly behavior that would cause a reasonable person to fear sexual assault in addition to behavior that would cause a reasonable person to fear bodily injury or death."
- If making "harassment" an enumerated offense should be considered at all, it can be covered as conduct that is prejudicial to good order and discipline or service-discrediting within the purview of Article 134, UCMJ, as (non-sexual) harassment, but which falls short of "stalking." The *Saunders* case makes clear that the word "harassment" is used in a context that is distinct from "sexual harassment" situations.
- The conduct should be directed toward a specific person, not persons generally, and that the conduct must be knowing and willingly engaged in, albeit not required to be specifically intended to intimidate or harass him or her.
 - For example, he intended to act thinking that doing so would help him gain or regain her affection/love (as discussed in the Model Antistalking Code explanation: "A suspected stalker often suffers under a delusion that the victim actually is in love with him or that, if properly pursued, the victim will begin to love him. Therefore, a stalking defendant actually may not intend to cause fear; he may intend to establish a relationship with the

victim. Nevertheless, the suspected stalker's actions cause fear in his victim. As long as a stalking defendant knows or should know that his or her actions cause fear, the alleged stalker can be prosecuted for stalking.")

- The conduct should be directed to a specific individual or immediate family, as is done in the DOJ model.
 - As the analysis and commentary to the DOJ model states "If states want to consider further expanding the definition of 'immediate family,' they should be aware that broadening it too much may lead to challenges that the statute is overly broad." Even the DOJ language of immediate family, which includes "any other person who resides in the household or who within the prior six months regularly lived in the household," is problematic in the military context. DoD recommends limiting the definition to: "any other family member or relative who within the prior six months regularly resided in the household."

RECOMMENDATION. With the above comments in mind, a proposed revised statute that is considered to be better-suited for the military is that proposed by the Joint Service Committee on Military Justice, as a new Article 93a (10 U.S.C. § 893a) offense of "Stalking."

E

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

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

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

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

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

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

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

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

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

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

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

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

19

Section-By-Section Analysis

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

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

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

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

The complementary MCM change corresponding to this offense is proposed as:

Initial JSC Draft (2/28/05)

Modifications to Part IV, MCM, "Punitive Articles"

51. Article 125—Forcible sodomy and sodomy of a child

a. *Text.*

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

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

- (1) who is not his or her spouse; and
- (2) who has not attained the age of sixteen years, is guilty of sodomy with a child and shall be punished as a court-martial may direct.

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

b. *Elements.*

(1) Forcible Sodomy

- (a) That the accused engaged in unnatural carnal copulation with a certain other person; and
- (b) That the act of unnatural carnal copulation was done by force.

(2) Sodomy of a Child

- (a) That the accused engaged in unnatural carnal copulation with a certain other person;
- (b) That the person was not the accused's spouse; and
- (c) That at the time of the unnatural carnal copulation the person had attained the age of 12 but was under the age of 16.

c. *Explanation.* The offense of sodomy is now divided into three categories. First, forcible sodomy includes unnatural carnal copulation with another person by force or unnatural carnal copulation with a person under the age of twelve. Second, sodomy of a child is unnatural carnal copulation with a person who has attained the age of twelve but has not attained the age of sixteen, regardless of whether or not any level of force or coercion has been applied. Third, unnatural carnal copulation with another person, where force is not applied, may be charged under Article 134, "Sex-related offenses."

(1) Forcible sodomy.

(a) Nature of offense. It is unnatural carnal copulation (sodomy) for a person to take into that person's mouth or anus the sexual organ of another person; or to place that person's sexual organ in the mouth or anus of another person; or to have carnal copulation in any opening of the body, except the sexual parts, with another person. Depending on the nature of the force or coercion used, the victim's capacity, or the age of the victim, forcible sodomy may have varying degrees of punishment.

(b) *Defenses.* Consent and mistake of fact as to consent may be an affirmative defense in a prosecution for forcible sodomy, except for sodomy of a child who has not attained the age of 12. For purposes of "forcible sodomy," an individual under twelve years of age is legally incapable of appraising the nature of sodomy. When raised as an affirmative defense, "consent" means words or overt acts indicating a freely given agreement to the sodomy at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sodomy shall not constitute consent. A person cannot consent to sodomy if they are substantially incapable of appraising the nature of sodomy due to mental impairment or



unconsciousness due to consumption of alcohol, drugs, or similar substance, or due to mental disease or defect which renders the person unable to understand the nature of sodomy. Likewise, a person cannot consent if they are physically unable to decline participation in sodomy or physically unable to communicate unwillingness to engage in sodomy. When raised as a defense, “mistake of fact as to consent” means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in sodomy consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. The accused’s actual state of intoxication, if any, at the time of the offense is not relevant to mistake of fact.

(c) ***Force and Degrees of Forcible Sodomy.*** There are degrees of forcible sodomy under Article 125 which recognize variations in the level of force or coercion applied to overcome the victim’s will. The maximum punishment is dependent upon the force alleged and proven. The degrees of forcible sodomy are divided by categories of force listed in subparagraphs (1-8) below. For purposes of this paragraph, force means the act of:

- (1) compelling submission of the victim or overcoming or preventing the victim’s resistance by—
 - (A) the use or display of a dangerous weapon or object;
 - (B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause the victim to believe it is a dangerous weapon or object;or
 - (C) physical violence, strength, power, or restraint applied to victim, sufficient that the victim could not avoid or escape the sexual act;
- (2) compelling submission of the victim or overcoming or preventing the victim’s resistance by threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping;
- (3) rendering the victim unconscious;
- (4) administering to victim, by physical violence, strength, power, or restraint or threat of the same, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the victim’s ability to appraise or control the victim’s conduct;

(5) compelling submission of the victim or overcoming or preventing the victim's resistance by threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping)

(6) causing bodily harm to the victim;

(7) engaging in the sodomy with the victim if the victim is substantially incapacitated, substantially incapable, or legally incapable of —

(A) appraising the nature of the sodomy;

(B) declining participation in the sodomy; or

(C) communicating unwillingness to engage in the sodomy; or

(8) any force not otherwise specified or alleged.

(d) *Threat of force.* See subparagraphs, *Force*, (c)(1)(c)(2), (c)(1)(c)(4), and (c)(1)(c)(5) above.

(1) "Threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(2) "Threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping)" means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to less harm than death, grievous bodily harm, or kidnapping. Such harm includes physical injury to another person or substantial damage or destruction of another person's property. It also includes a threat to accuse any person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or through the use or abuse of military position, rank, or authority, to affect, threaten to affect, either positively or negatively, the military career of some person. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(e) *Age.* For purposes of defining "forcible sodomy," a person under the age of twelve is legally incapable of appraising the nature of the sexual conduct.

(f) *Character of victim.* See Mil. R. Evid. 412 concerning rules of evidence relating to an alleged rape victim's character.

(g) *Evidence of similar crimes.* See Mil. R. Evid. 413 concerning rules of evidence relating to similar crimes of the accused in sexual assault cases.

(h) *Burden in Affirmative defense cases.* An affirmative defense means any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After a defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. The accused may not submit an affirmative defense regarding consent for unnatural carnal c[redacted]lation with a person under the age of twelve. The accused may not submit an affirmative defense of mistake of fact as to age for the offense of sodomy with a person under the age of 16.

d. *Lesser included offenses.*

(1) Forcible Sodomy

- (a) Article 125—sodomy of a child
- (b) Article 134—assault with intent to commit sodomy
- (c) Article 134—sexual related offenses
- (d) Article 134—indecent assault
- (e) Article. 80--attempts

 Sodomy of a Child

- (a) Article 134 - indecent acts or liberties with a child
- (b) Article 80—attempts

e. *Maximum punishment.*

(1) Forcible Sodomy

(a) When committed under circumstances (c)(1)(c)(1) through (c)(1)(c)(4) or with a child under 12 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

(b) When committed under circumstances (c)(1)(c)(5) through (c)(1)(c)(7). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(c) When committed under circumstances (c)(1)(c)(8). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) Sodomy of a Child. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

f. *Sample specification.*

(1) Forcible Sodomy.

In that ----- (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ----- 20---, commit sodomy with -- -----, (a person who has not attained the age of 12)(by force, to wit: ----- add force elements from paragraph (c)(1)(c)(1-8) as applicable).

(2) Sodomy of a Child.

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on ___ or about ___ 20 ___, commit the offense of sodomy of a child with ___ (a person who had attained the age of 12 but was under the age of 16).

F

ADDITIONAL MILITARY SEX OFFENSES

Initial JSC Draft (2/28/05) Modifications to Part IV, MCM, “Punitive Articles”

63. Article 134--(Indecent assault and indecent acts with a child)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) Indecent Assault

(a) That the accused engaged in a sexual act or a sexual contact not amounting to sexual intercourse or sodomy with a certain person;

(b) That the sexual act or sexual contact was done by force or with a child under the age of 12;

(c) That the sexual act or sexual contact was done with the intent to abuse, humiliate, or degrade another person, or to arouse or gratify the sexual desires of any person; and

(d) 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.

(2) Indecent Act with a Child

(a) That the accused engaged in a sexual act or a sexual contact not amounting to sexual intercourse or sodomy with a certain person;

(b) That the act was done with a child who had attained the age of 12 but was under the age of 16;

(c) That the acts were done with the intent to abuse, humiliate, or degrade another person, or to arouse or gratify the sexual desires of any person; and

(d) 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.* See paragraph 54c for a discussion of assault. Specific intent is an element of this offense. For one of the definitions of “indecent”, see paragraph 90 c.

(1) Indecent Assault

(a) *Scope.* Indecent assault includes all sexual acts, as defined by paragraph 62c(3)(a) and those sexual contacts defined by paragraph 62c(3)(b) that do not constitute sexual intercourse or sodomy (other penetrations). These sexual acts include the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. These sexual contacts include the

intentional touching, either directly or through the clothing of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(b) *Defenses.* Consent and mistake of fact as to consent may be an affirmative defense in a prosecution for indecent assault, except for indecent assault of a child who has not attained the age of 12. For purposes of “indecent assault” an individual under twelve years of age is legally incapable of appraising the nature of sexual contact or any sexual act not amounting to sexual intercourse or sodomy. When raised as an affirmative defense, “consent” means words or overt acts indicating a freely given agreement to the sexual act at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual act or sexual contact shall not constitute consent. A person cannot consent to a sexual act or sexual contact if they are substantially incapable of appraising the nature of the sexual act or sexual contact due to mental impairment or unconsciousness due to consumption of alcohol, drugs, or similar substance, or due to mental disease or defect which renders the person unable to understand the nature of the sexual act or sexual contact. Likewise, a person cannot consent if they are physically unable to decline participation in the sexual act or sexual contact or physically unable to communicate unwillingness to engage in the sexual act or sexual contact. When raised as a defense, “mistake of fact as to consent” means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual act or sexual contact consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense. The accused’s actual state of intoxication, if any, at the time of the offense is not relevant to mistake of fact.

Affirmative Defense. In a prosecution under Indecent Act with a Child, it is an affirmative defense that the person with whom the accused committed the sexual act or sexual contact had at the time of alleged offense attained the age of twelve years and that the accused reasonably believe that the person had at the time of the alleged offense attained the age of 16 years. The accused has the burden of proving this affirmative defense by a preponderance of the evidence.

(c) *Force and degrees of indecent assault.* There are degrees of indecent assault under Article 134 which recognize variations in the level of force

applied to the overcome the victim's will. The maximum punishment is dependent upon the force alleged and proven. The degrees of indecent assault are divided by categories of force listed in subparagraph (1-8) below. For purposes of this paragraph, force means the act of

(1) compelling submission of the victim or overcoming or preventing the victim's resistance by—

(A) the use or display of a dangerous weapon or object;

(B) the suggestion of possession of a dangerous weapon or object that is used in a manner to cause the victim to believe it is a dangerous weapon or object; or

(C) physical violence, strength, power, or restraint applied to victim, sufficient that the victim could not avoid or escape the sexual act;

(2) compelling submission of the victim or overcoming or preventing the victim's resistance by threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping;

(3) rendering the victim unconscious;

(4) administering to victim, by physical violence, strength, power, or restraint or threat of the same, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the victim's ability to appraise or control the victim's conduct;

(5) compelling submission of the victim or overcoming or preventing the victim's resistance by threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping)

(6) causing bodily harm to the victim;

(7) engaging in a sexual act or sexual contact with the victim if the victim is substantially incapacitated, substantially incapable, or legally incapable of —

(i) appraising the nature of the sexual act;

(ii) declining participation in the sexual act; or

(iii) communicating unwillingness to engage in the sexual act; or

(8) any force not otherwise specified or alleged.

(d) *Threat of Force*. See subparagraphs (c)(1)(c)(2), (c)(1)c(4), and (c)(1)c(5) above.

(1) “Threatening or placing the victim in reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping” means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to death, grievous bodily harm, or kidnapping. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(2) “Threatening or placing the victim in reasonable fear (other than by threatening or placing the victim in fear that any person will be subjected to death, grievous bodily harm, or kidnapping)” means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to less harm than death, grievous bodily harm, or kidnapping. Such harm includes physical injury to another person or substantial damage or destruction of another person’s property. It also includes a threat to accuse any person of a crime; expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule; or through the use or abuse of military position, rank, or authority, to affect, threaten to affect, either positively or negatively, the military career of some person. Proof that the accused actually intended to engage in the above conduct is not required, however, the victim must believe that the accused possesses the ability to make good on the threat.

(e) *Age.* For purposes of “indecent assault,” a person under twelve years of age is legally incapable of appraising the nature of sexual acts or sexual contacts.

(f) *Character of victim.* See Mil. R. Evid. 412 concerning rules of evidence relating to the alleged character of the victim of an indecent assault.

(g) *Evidence of similar crimes.* See Mil. R. Evid. 413 concerning rules of evidence relating to similar crimes of the accused in sexual assault cases.

(h) *Burden in Affirmative defense cases.* An affirmative defense means a special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After a defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.

d. *Lesser included offenses.*

(1) Indecent Assault



- (a) Article 128--assault consummated by a battery; assault
- (b) Article 134—indecent acts or indecent liberties
- (c) Article. 134—sexual related offenses
- (d) Article 80—attempts

(2) Indecent Acts with a Child

- (a) Article 128--assault consummated by a battery; assault
- (b) Article 134--indecent acts
- (c) Article 134-- indecent liberties with a child
- (d) Article 80-- attempts

e. *Maximum punishment.*

(1) Indecent Assault when conviction is for sexual act (penetration).

(a) When committed under circumstances (c)(1)(c)(1) through (c)(1)(c)(4) or with a child under 12 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

(b) When committed under circumstances (c)(1)(c)(5) through (c)(1)(c)(7) or with a child who has attained 12 years of age but has not attained 16 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(c) When committed under circumstances (c)(1)(c)(8). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) Indecent Assault when conviction is for sexual contact (non-penetration).

(a) When committed under circumstances (c)(1)(c)(1) through (c)(1)(c)(4) or with a child under 12 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(b) When committed under circumstances (c)(1)(c)(5) through (c)(1)(c)(7) or with a child who has attained 12 years of age but has not attained 16 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(c) When committed under circumstances (c)(1)(c)(8). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) Indecent acts with a child. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

f. *Sample specification.*

(1) Indecent Assault.

In that ----- (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ----- 20---, commit an indecent

assault upon -----, to wit: (type of sexual contact or penetration sexual act) (a child under the age of 12) (by force, to wit: (add forcible indecent assault elements from paragraph (c)(1)(c)(1-8) as applicable) with intent to (abuse)(humiliate)(harass)(degrade)_____ or (arouse or gratify the (lust)(sexual desire) of _____).

(2) Indecent Acts with a child.

In that ___ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ___ 20 ___, commit an indecent act (with (upon the body of) _____, a person who has attained the age of 12 but has not attained the age of 16 years, by (type of sexual contact or sexual act - penetration) , with intent to (abuse)(humiliate)(harass)(degrade)_____ or (arouse or gratify the (lust)(sexual desire) of _____).

[NOTE: The offenses of “Assault with intent to commit rape and sodomy”, in violation of Article 134, UCMJ, currently found in the Manual for Courts-Martial at Part IV, paragraph 64, would be re-aligned with the above offenses due to the fact that they are sexual in nature and involve acts of assault.]

Initial JSC Draft (2/28/05)

Modifications to Part IV, MCM, “Punitive Articles”

62. Article 134—(Sex-related offenses)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Adultery.*

- (a) That the accused wrongfully had sexual intercourse with a certain person;
- (b) That, at the time of the sexual intercourse, the accused or the other person was married to someone else; and
- (c) That,  for the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces

(2) *Sodomy, sexual act or sexual contact.*

- (a) That the accused engaged in unnatural carnal copulation, a sexual act or sexual contact with a certain person; and
- (b) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(3) *Prostitution.* 

- (a) That the accused wrongfully engaged in sexual intercourse, unnatural carnal copulation, sexual act or sexual contact with ther person;
- (b) That the accused did so for the purpose of receiving money or other compensation; and
- (c) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(4) *Patronizing a prostitute.*

- (a) That the accused engaged in sexual intercourse, unnatural carnal copulation, sexual act or sexual contact with another person not the accused’s spouse;
- (b) That the accused induced, enticed, or procured such person to engage in sexual intercourse, unnatural carnal copulation, sexual act or sexual contact in exchange for money or other compensation;
- (c) That this act was wrongful; and
- (d) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

(5) *Pandering by compelling, inducing, enticing, procuring, arranging, or receiving consideration for arranging a sexual act, sexual contact or lewd act.*

(a) That the accused compelled, induced, enticed, procured, arranged, or received consideration for arranging with another person to engage in sexual intercourse, unnatural carnal copulation, sexual act or sexual contact for hire and reward; and

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

(6) *Public offenses. Engaging in sexual intercourse, sodomy, sexual act or sexual contact with another person knowing that a third person is present in the same room or in a public place.*

(a) That the accused wrongfully engaged in sexual intercourse, unnatural carnal copulation, sexual act or sexual contact with a certain person;

(b) That, at the time of the sexual intercourse, unnatural carnal copulation, sexual act or sexual contact, the accused knew a third person was present in the same room; or

(c) That, at the time of the sexual intercourse, unnatural carnal copulation, sexual act or sexual contact, the accused was in a public place; and

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

c. *Explanation.*

(1) *Nature of the offenses.* These offenses are clearly unacceptable conduct, and reflect adversely on the military as prejudicial to good order and discipline or service discrediting. “Sex-related offenses” may encompass those acts historically recognized as

(a) “Indecent Acts”

(b) “Adultery”—the act of a married individual having sexual intercourse with someone other than his spouse or the act of an unmarried individual having sexual intercourse with a married individual;

(c) “Consensual” sodomy—consensual unnatural carnal copulation between individuals; and

(d) “Bestiality”—unnatural carnal copulation with an animal; and
if such acts are *prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.*

(2) *Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.* To constitute an offense under the



UCMJ, these offenses must either be directly prejudicial to good order and discipline or service discrediting. Conduct that is directly prejudicial includes conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, or cohesion, or is clearly detrimental to the authority or stature of or respect toward a service member. These offenses may also be service discrediting, even though the conduct is only indirectly or remotely prejudicial to good order and discipline. Discredit means to injure the reputation of the armed forces and includes conduct that has a tendency, because of its open or notorious nature, to bring the service into disrepute, make it subject to public ridicule, or lower it in public esteem. While conduct that is private and discreet in nature, may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline. Commanders should consider all relevant circumstances, including but not limited to the following factors, when determining whether conduct is prejudicial to good order and discipline or is of a nature to bring discredit upon the armed forces:

- (a) The accused's marital status, military rank, grade, or position;
- (b) The co-actor's marital status, military rank, grade, or position, or relationship to the armed forces;
- (c) The military status of the accused's spouse or the co-actor's spouse, or their relationship to the armed forces;
- (d) The impact, if any, of the consensual sexual act on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces;
- (e) The misuse, if any, of government time and resources to facilitate the commission of the consensual sexual act;
- (f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; whether the conduct was accompanied by other violations of the UCMJ;
- (g) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;
- (h) Whether the accused or co-actor was legally separated;
- (i) Whether the misconduct involves an ongoing or recent relationship or is remote in time;
- (j) The location where the conduct occurred (e.g., on board a military vessel, aircraft, or installation);
- (k) Whether the conduct occurred in public;
- (l) Whether the conduct occurred in the presence of a third-party; and
- (m) The nature, if any, of the official and personal relationship between the accused and co-actor.

In a prosecution under paragraph 62, it is an affirmative defense that the accused and the other person engaged in the sexual act or sexual contact

are married to each other. A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction. The accused has the burden of proving an affirmative defense under paragraph 62 by a preponderance of the evidence.

(3) *Definitions.* For purposes of this paragraph the following definitions apply:

(a) *Sexual act.* Sexual act means the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(b) *Sexual contact.* Sexual contact means the intentional touching, either directly or through the clothing of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with the intent to abuse, humiliate, degrade, or arouse or gratify the sexual desire of any person; or intentionally causing or allowing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, degrade, arouse or gratify the sexual desire of any person.

(c) *Sodomy.* See paragraph 51 (c)(1) for the definition of unnatural carnal copulation (sodomy).

d. *Lesser included offenses.*

(1) *Adultery.*—Article 80—attempts

(2) *Sodomy, Sexual act and Sexual contact.*—Article 80—attempts

(3) *Prostitution.*—Article 80—attempts

(4) *Patronizing a prostitute.*—Article 80—attempts

(5) *Pandering by compelling, inducing, enticing, procuring, arranging, or receiving consideration for arranging sexual intercourse, unnatural carnal copulation, sexual act, or sexual contact.*—Article 80—attempts

(6) *Engaging in a sexual intercourse, unnatural carnal copulation, sexual act or, al contact with another person knowing that a third person is present in the same room or in a public place.*—Article 80—attempts

e. *Maximum punishment.*

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

(2) *Sodomy, Sexual act and sexual contact.*

(a) When involving a prisoner or detainee. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(b) In a public place or knowingly in the presence of a third party. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years.

(c) All other cases. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

(3) *Prostitution.*

(a) *Patronizing a prostitute and prostitution.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

(b) *Pandering by compelling, inducing, enticing, procuring, arranging, or receiving consideration for arranging sexual intercourse, unnatural carnal copulation, sexual act or sexual contact.*

Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(4) *Engaging in sexual intercourse, unnatural carnal copulation, sexual act or, sexual contact with another person knowing that a third person is present in the same room or in a public place.* Dishonorable discharge, forfeiture of all pay and allowances and confinement for three years.

f. *Sample specifications.*

(1) *Adultery*

In that _____ (personal jurisdiction data)(a married man/a married woman), did, (at/on board – location) (subject-matter jurisdiction data, if required), on or about ____ 20____, wrongfully have sexual intercourse with _____, a (married) (woman/man) not (his wife)(her husband).

(2) *Sodomy, sexual act, or sexual contact.*

In that _____ (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about ____ 20 ____, engage in a (unnatural carnal copulation)(sexual act) (sexual contact) with _____ (a prisoner or detainee) (in a public place) (in the presence of a third party) by _____.

(3) **Prostitution-related offenses.**

(a) *Prostitution.*

In that _____(personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____20____, engage in (sexual intercourse)(unnatural carnal copulation)(sexual act) (sexual contact) with _____, a person not (his) (her) spouse, for the purpose of receiving (money) (_____).

(b) *Patronizing a prostitute.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, wrongfully induced, enticed, or procured _____, a person not (his) (her) spouse, to engage in (sexual intercourse)(unnatural carnal copulation)(sexual act) (sexual contact) in exchange for (money) (_____).

(c) Pandering by compelling, inducing, enticing, procuring, arranging, or receiving consideration for arranging sexual intercourse, unnatural carnal copulation, sexual acts or contacts.

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, (compel) (induce) (entice) (procure) _____ to engage in (sexual intercourse) (unnatural carnal copulation) (sexual act) (sexual contact) for hire and reward.

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, (arrange for) (receive valuable consideration, to wit: _____ on account of arranging for) _____ to engage in (sexual intercourse)(unnatural carnal copulation) (sexual act) (sexual contact) with _____.

(4) Public offenses. Engaging in sexual intercourse, unnatural carnal copulation, sexual act or, sexual contact with another person knowing that a third person is present in the same room or in a public place.

In that _____ (personal jurisdiction data), did, (at/on board – location) (subject-matter jurisdiction data, if required), on or about _____ 20____, wrongfully engage in (sexual intercourse)(unnatural carnal copulation)(sexual act)(sexual contact) (to wit: (description of sexual act/contact)) with _____ a (woman)(man)(with a third person(s) present in the same room)(in a public place).

[NOTE: Additional sex-related offenses which do not include force provisions, such as “indecent acts,” “indecent exposure,” “indecent language,” “wrongful cohabitation,” “fraternization,” and indecent liberties with a child” will be re-aligned under this paragraph to consolidate all sexually related offenses in one location in the MCM.]

G

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

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

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

and

(2) in subsection (b)(2)—

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

(B) in subparagraph (B)—

(i) by striking "sexual or physical";

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

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

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

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

Section-by-Section Analysis

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

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

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

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

H

SEC. __ . ADMINISTRATIVE SESSIONS OF COURTS-MARTIAL

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

Section-By-Section Analysis

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

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

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

Initial JSC Draft (2/28/05)

Modifications to Part II, MCM, Rules for Courts-Martial

To Complement the Proposed Amendment to Article 39(a), UCMJ, the Joint Service Committee on Military Justice would propose the following changes to RCM 804 and 805:

- a. Amend RCM 804 by inserting new paragraph (b) and re-lettering the current (b),(c), and (d) to (c), (d), and (e) respectively:

“(b) *Presence by remote means.* If permitted by the regulations of the Secretary concerned, the military judge may order the use of video-teleconferencing or similar technology between the parties and the military judge for purposes of Article 39(a) sessions. Use of such video-teleconferencing or similar technology will satisfy the “presence” requirement of the accused, when the accused has a counsel physically present at his location. Such technology may include two or more remote sites as long as all parties can see and hear each other.”

- b. Amend the Discussion to RCM 804 by adding a paragraph immediately before the “Removal for Disruption” paragraph in the Discussion, which reads:

“Presence of the accused by remote means does not require the consent of the accused.”

- c. Amend RCM 805(a) by adding the following after the sole sentence: “If permitted by regulations of the Secretary concerned, for purposes of Article 39(a) sessions solely, the presence of the military judge at Article 39(a) sessions may be satisfied by the use of video-teleconferencing or similar technology.”
- d. Amend RCM 805(c) to read as follows:

(c) *Counsel.*

(1) *Trial Counsel.* As long as at least one qualified trial counsel is present, other trial counsel may be absent from a court-martial session. An assistant trial counsel who lacks the qualifications necessary to serve as trial counsel may not act at a session in the absence of such qualified trial counsel. If permitted by regulations of the Secretary concerned, for purposes of Article 39(a) sessions solely, the presence of a trial counsel may be satisfied by the use of video-teleconferencing or similar technology.

(2) *Defense Counsel.* As long as at least one qualified defense counsel is present, other defense counsel may be absent from a court-martial session. A

defense counsel who lacks the qualifications necessary to serve as defense counsel may not act at a session in the absence of such qualified defense counsel. If permitted by regulations of the Secretary concerned, for purposes of Article 39(a) sessions solely, the presence of a defense counsel may be satisfied by the use of video-teleconferencing or similar technology, as long as the accused has one qualified defense counsel physically present at his location.”

Initial JSC Draft (2/28/05)

Modifications to Part II, Manual for Courts-Martial

Rule for Courts-Martial 1103A – Sealed Records of Trial Proceedings

"Rule 1103A. Sealed exhibits and proceedings.

(a) *In general.* If the record of trial contains exhibits, proceedings, or other matter ordered sealed by the military judge, the trial counsel shall cause such materials to be sealed so as to prevent indiscriminate viewing or disclosure. Trial counsel shall ensure that such materials are properly marked, including an annotation that the material was sealed by order of the military judge, and inserted at the appropriate place in the original record of trial. Copies of the record shall contain appropriate annotations that matters were sealed by order of the military judge and have been inserted in the original record of trial.

(b) *Examination of sealed exhibits and proceedings.* Except as provided in the following subsections to this rule, sealed exhibits may not be examined.

(1) *Examination of sealed matters.* For the purpose of this rule, “examination” includes reading, viewing, photocopying, photographing, disclosing, or manipulating the documents in any way.

(2) *Prior to authentication.* Prior to authentication of the record by the military judge, sealed materials may not be examined in the absence of an order from the military judge based on good cause shown.

(3) *Authentication through action.* After authentication and prior to disposition of the record of trial pursuant to Rule for Courts-Martial 1111, sealed materials may not be examined in the absence of an order from the military judge upon a showing of good cause at a post-trial Article 39a session directed by the Convening Authority.

(4) *Reviewing and appellate authorities.*

(A) Reviewing and appellate authorities may examine sealed matters when those authorities determine that such action is reasonably necessary to a proper fulfillment of their responsibilities under the Uniform Code of Military Justice, the Manual for Courts-Martial, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional responsibility.

(B) Reviewing and appellate authorities shall not, however, disclose sealed matter or information in the absence of:

(i) Prior authorization of the Judge Advocate General in the case of review under Rule for Courts-Martial 1201(b); or

(ii) Prior authorization of the appellate court before which a case is pending review under Rules for Courts-Martial 1203 and 1204.

(C) In those cases in which review is sought or pending before the United States Supreme Court, authorization to disclose sealed materials or information shall be obtained under that Court's rules of practice and procedure.

(D) The authorizing officials in paragraph (B)(ii) above may place conditions on authorized disclosures in order to minimize the disclosure.

(E) For purposes of this rule, reviewing and appellate authorities are limited to:

(i) Judge advocates reviewing records pursuant to Rule for Courts-Martial 1112;
(ii) Officers and attorneys in the office of the Judge Advocate General reviewing records pursuant to Rule for Courts-Martial 1201(b);

(iii) Appellate government counsel;

(iv) Appellate defense counsel;

(v) Appellate judges of the Courts of Criminal Appeals and their professional staffs;

(vi) The judges of the United States Court of Appeals for the Armed Forces and their professional staffs;

(vii) The Justices of the United States Supreme Court and their professional staffs; and

(viii) Any other court of competent jurisdiction."

Section–By–Sectional Analysis

"Rule 1103A.

2005 Amendment: The 1998 Amendments to the Manual for Courts-Martial introduced the requirement to seal M.R.E. 412 (rape shield) motions, related papers, and the records of the hearings, to "fully protect an alleged victim of [sexual assault] against invasion of privacy and potential embarrassment." MCM Appendix 22, p. 36. As current Rule 412(c)(2) reads, it is unclear whether appellate courts are bound by orders sealing Rule 412 information issued by the military judge.

The effect and scope of a military judge's order to seal exhibits, proceedings, or materials is similarly unclear. Certain aspects of the military justice system, particularly during appellate review, seemingly mandate access to sealed materials. For example, appellate defense counsel have a need to examine an entire record of trial to advocate thoroughly and knowingly on behalf of a client. Yet there is some uncertainty about appellate defense counsel's authority to examine sealed materials in the absence of a court order. This authority applies to both military and civilian appellate defense counsel.

The rule is designed to respect the privacy and other interests that justified sealing the material in the first place, while at the same time recognizing the need for certain military justice functionaries to review that same information. The rule favors an approach relying on the integrity and professional responsibility of those functionaries, and assumes that they can review sealed materials and at the same time protect the interests that justified sealing the material in the first place. Should disclosure become necessary, then the party seeking disclosure is directed to an appropriate judicial or quasi-judicial official or tribunal to obtain a disclosure order."

I

JSC Initial Draft (2/28/05)

Modifications to Part III, MCM, Military Rules of Evidence

I. "SECTION IV - RELEVANCY AND ITS LIMITS"

"Rule 412. Sexual offenses; relevance of victim's behavior or sexual predisposition

(a) *Evidence generally inadmissible.* The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
- (2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions.*

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(c) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subsection (b) must -

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The victim must be afforded a reasonable

opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subdivision that the evidence that the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term “sexual behavior” includes any sexual behavior not encompassed by the alleged offense. The term “sexual predisposition” refers to an alleged victim’s mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the fact finder.”

SECTION-BY-SECTION ANALYSIS

Modifications to the military’s rape-shield law under Military Rule of Evidence 412 are proposed to correspond to the proposed changes to the Uniform Code of Military Justice and Manual for Courts-Martial in which the focus of the sexual offenses involved is on the actions of the alleged offender, rather than on whether the conduct was without the victim’s consent. Military Rules of Evidence are established by Executive Order pursuant to the President’s rule-making authority in Article 36 (UCMJ; 10 U.S.C. 836). The proposed modifications delete the references in the rule that would serve to limit the protection afforded by the rule to sexual offenses that are nonconsensual in nature. It is being recommended that the word “Nonconsensual” be deleted from the title of the rule, and that the reference and definition of “nonconsensual sexual offense” be deleted at subsection 412(e).”

II. “SECTION V – PRIVILEGES”

"Rule 513. Psychotherapist-patient privilege.

(a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional

condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) Who may claim the privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of child abuse or neglect or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to

commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) Procedure to determine admissibility of patient records or communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or

communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise."

SECTION-BY-SECTION ANALYSIS

Reports and recommendations by a 2002 Defense Task Force on Domestic Violence; a 2003 DoD USAFA Sexual Misconduct Review Panel (The Fowler Commission), and a 2004 DoD Task Force on Care for Victims of Sexual Assault all recommended some form of confidentiality be afforded to victims of either domestic violence or sexual assault, and to the consideration of extending to them the privileged communications of the psychotherapist-patient privilege in Military Rule of Evidence 513. However, several reviewing officials, in not supporting that course of action, referenced the fact that the privilege doesn't apply during investigations and administrative actions because subsection (a) of the rule states that the privilege applies "in a case arising under the UCMJ," and that the privilege cannot be extended to victims of spouse abuse because subsection (d)(2) states that there is no privilege under this rule when the communication is evidence of "spouse abuse" ...".

In order to preserve any "confidentiality" protections that victims of sexual assault and domestic violence may be given during the initial aftermath of the incident, when a completed investigation and disposition decision results in the perpetrator's court-martial where strict rules of evidence apply, arguably the above-referenced provisions would have to be deleted before the rule of privilege can operate for the benefit of such victims.

Military Rules of Evidence, including rules of privilege, are established by Executive Order pursuant to the President's rule-making authority in Article 36 (UCMJ; 10 U.S.C. 836). These modifications would be necessary in the event that the Department of Defense decided to allow for such confidentiality and privilege to communications involving sexual assault and domestic violence victims who chose to consult with psychotherapists and their assistants during UCMJ and non-UCMJ proceedings or circumstances. Deletion of these provisions from the rule will not, by itself, create or establish such privilege or confidentiality in non-UCMJ proceedings, but will remove from the Military Rules of Evidence language that purportedly prohibits or inhibits their establishment for victims of domestic violence or sexual assault in either UCMJ or non-UCMJ circumstances or proceedings.

Any consideration given to extending a communications privilege to any confidentiality that has been afforded a victim of sexual abuse or domestic violence in consultations with a victim advocate, who does not qualify as a psychotherapist or psychotherapist assistant, will also have to be established by a further modification to this rule or by a separate rule of evidence.