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*4 ANNUAL REVIEW OF DEVELOPMENTS IN INSTRUCTIONS

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I. Introduction

This article provides military practitioners an overview of recent developments in the area of instructions to members, [FN1] covering cases decided by the Court of Appeals for the Armed Forces (CAAF) during its 2012 term, [FN2] as well as important decisions published by service courts during the same period. Because an article of this nature has not been published for several years, [FN3] this article will also discuss important cases and statutory changes that have occurred during the past three years.

The *Military Judges' Benchbook (Benchbook)* [FN4] remains the primary resource for drafting instructions. Part II of this article addresses instructions on offenses and defenses, including recent changes to the military's statute dealing with sex offenses, [Article 120, Uniform Code of Military Justice](#) (UCMJ). [FN5] Part III discusses instructions on lesser included offenses, to include changes mandated by the CAAF decision of *United States v. Jones*. [FN6] The article ends with discussions of evidentiary and sentencing instructions.

II. Instructions on Offenses and Defenses

A. 2006 Revisions to Sex Offense Statute

In 2006 the U.S. Congress made substantial changes to the military statute dealing with sex offenses, [Article 120 of the UCMJ](#). [\[FN7\]](#) The statutory changes moved many sex offenses previously addressed by other articles of the UCMJ into [Article 120](#). [\[FN8\]](#) They changed the elements of the crime of rape and created many new offenses, to include aggravated sexual assault, aggravated sexual contact and abusive sexual contact. One of the changes scrutinized most closely dealt with the issue of consent. Before 2007, the military crime of rape included the requirement that the sex act be perpetrated “by force” and “without consent.” [\[FN9\]](#) In the 2007 version of the military crime of rape, consent was not an element. [\[FN10\]](#) However, Congress complicated matters by making consent an affirmative defense and creating complex provisions to raise and rebut the defense. [\[FN11\]](#) Consequently, the trial judiciary and appellate courts resorted to the application of “judicial band-aids” [\[FN12\]](#) to ensure that convictions under this new statute passed constitutional scrutiny.

*5 For crimes alleged to have happened between 1 October 2007 and 27 June 2012, the relevant text of [Article 120](#) provided:

(r) Consent and mistake of fact as to consent Consent and mistake of fact as to consent are not an issue, or an affirmative defense ... except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact)

(t)(16) Affirmative defense. The term “affirmative defense” means any special defense that, 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 the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. [\[FN13\]](#)

The U.S. Army Trial Judiciary (USATJ) recognized the problems with the double-burden shifting provision in the 2007 version of [Article 120](#). The *Benchbook* provided the following guidance for instructing panels when “consent” is raised in cases involving rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact:

When a child is not the victim of the alleged rape, consent is an affirmative defense to rape. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that consent did not exist. Because lack of consent is not an element however, the prosecution need not otherwise prove lack of consent. [\[FN14\]](#)

Trial judges facing the issue of consent under the 2007 version of [Article 120](#) dealt with it in three distinctly different ways. Some judges instructed in accordance with the statutory double-burden shift, not following the guidance from the *Benchbook*. [\[FN15\]](#) Some ruled that the double-burden shift made the statute unconstitutional and simply dismissed the affected charge. [\[FN16\]](#) Some instructed in accordance with the modifications suggested by the *Benchbook*. [\[FN17\]](#)

In *United States v. Neal*, [FN18] the CAAF addressed the confusing double-burden shifting language in the 2007 version of [Article 120](#). The accused in *Neal* was charged with aggravated sexual assault by force. The trial judge ruled that the double-burden shift made [Article 120](#) unconstitutional and dismissed the specification. The CAAF disagreed with the trial judge, holding that removal of the element of “without consent” was constitutional. The CAAF held that Congress has broad authority to define and redefine the elements of an offense and “place the burden on the accused to establish an affirmative defense even when the evidence pertinent to an affirmative defense also may raise a reasonable doubt about an element of the offense,” [FN19] as long as it did not shift the burden of proving an element of the offense. An affirmative defense cannot be “an implicit element of the offense” or “element-based.” [FN20] Simply put, an affirmative defense and an element of an offense cannot be “two sides of the same coin,” [FN21] but the evidence pertinent to each may “overlap.” [FN22]

*6 In response, the USATJ revised the *Benchbook* and provided a more specific instruction for when evidence of consent was raised at trial involving rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. In these cases, the judge should provide the following instruction:

The evidence has raised the issue of whether [the alleged victim] consented to the sexual act(s) Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt. [FN23]

In cases where the evidence raised the issue of whether the accused mistakenly believed the alleged victim consented, the *Benchbook* provided similar guidance. [FN24] In these cases, an instruction on mistake of fact should be given that includes the following:

The evidence has raised the issue of mistake on the part of the accused whether [the alleged victim] consented Mistake of fact as to consent is a defense The prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist. [FN25]

The CAAF provided additional guidance in *United States v. Prather* [FN26] and *United States v. Medina*. [FN27] In each of these cases, the accused was convicted of aggravated sexual assault under the 2007 version of [Article 120\(c\)\(2\)](#), an offense involving the substantial incapacitation of the victim. Under these circumstances, the CAAF found that the terms “substantially incapacitated” and “consent” are “two sides of the same coin.” [FN28]

In *Prather*, the trial judge followed the statutory double-burden shift when instructing the panel. [FN29] The CAAF found that this double-burden shift “results in an unconstitutional burden shift to the accused.” [FN30] The court ruled that the second burden shift is a “legal impossibility If the trier of fact has found that the defense has proven an affirmative defense by a preponderance of the evidence, it is legally impossible for the prosecution to then disprove the affirmative defense beyond a reasonable doubt and there must be a finding of not guilty.” [FN31] The CAAF found that once an instruction under the statutory scheme was given, no other instruction could resolve or cure this unconstitutional burden shift. [FN32]

The trial judge in *Medina* followed the *Benchbook* instructions, treating consent as a traditional affirmative defense. [FN33] In *Medina*, since the members were never instructed in accordance with the unconstitutional statutory scheme, the CAAF found that the accused was not prejudiced. [FN34] The CAAF ruled that “in the absence of a legally sufficient explanation, it was error for the military judge to provide an instruction inconsistent with the statute,” [FN35] but that the error was harmless. [FN36] Thus, it affirmed the decision of the trial judge, who had instructed in accordance with the *Benchbook*.

In response to *Medina*, the USATJ amended the *Benchbook* to provide a “legally sufficient explanation”:

This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for [Article 120, UCMJ](#), affirmative defenses. Although [Article 120\(t\)\(16\)](#) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The CAAF has determined the [Article 120\(t\)\(16\)](#) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language “The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden,” in [Article 120\(t\)\(16\)](#) and will apply the burden of *7 proof in accordance with the recommended instructions in the Military Judge's Benchbook, DA Pam 27-9. [\[FN37\]](#)

The CAAF has not ruled whether this note constitutes a “legally sufficient explanation,” but if the judge instructs the panel in accordance with the *Benchbook* on consent and mistake of fact as to consent, a conviction will not be overturned due to unconstitutional burden shifting of [Article 120](#) as it stood between 1 October 2007 and 27 June 2012. [\[FN38\]](#)

B. 2011 Revisions to Sex Offense Statute

In 2011, Congress amended the statute again, [\[FN39\]](#) removing the affirmative defense of consent and its unconstitutional burden shift. The new statute reduced the total number of sex offenses from fourteen to ten and changed a number of the names and definitions of the offenses. To avoid confusion, the new statute retained four adult sex offenses in [Article 120](#): rape, sexual assault, aggravated sexual contact and abusive sexual contact. [\[FN40\]](#) All sex offenses involving children were moved to a new article: Article 120b. [\[FN41\]](#) The new statute only provides for three such offenses: rape of a child, sexual assault of a child and sexual abuse of a child. Three sex offenses--indecent viewing, recording or broadcasting; forcible pandering; and indecent exposure-- were moved to a third article: Article 120c. [\[FN42\]](#)

The 2011 amendment of the sex offense statutes went into effect on 28 June 2012. Thus, the instructions to be given depend on the date the crime is alleged to have happened. In some cases, the trial judge must instruct on offenses under all three versions of the sexual offense statute: the statute effective prior to 2007, the statute effective between 2007 and 2012 and the statute effective from 2012 to the present.

For crimes alleged to have occurred on or after 28 June 2012, Congress did not restore lack of consent as an element of forcible rape or sexual assault in the new statute. However, consistent with the CAAF's decision in *Neal*, [\[FN43\]](#) the *Benchbook* currently instructs the panel that consent is relevant to the question of force or threat of force under the 2012 version of the rape statute:

Evidence of consent to the sexual act is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual act, either alone or in conjunction with the other evidence in this case, may cause a reasonable doubt as to whether the accused used unlawful force [\[FN44\]](#)

Similarly, in accordance with *Prather* [\[FN45\]](#) and *Medina*, [\[FN46\]](#) the *Benchbook* currently instructs the panel that consent is relevant to the question of whether the accused knew the alleged victim was incapacitated under the 2012 version of the sexual assault statute:

Evidence of consent to the sexual act is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual act, either alone or in conjunction with the other evidence in this case, may cause a reasonable doubt as to whether the accused ... (knew or reasonably should have known that the alleged victim was (asleep) (or) (unconscious) (or) (otherwise unaware that the sexual act was occurring)) (knew or reasonably should have known that the alleged victim was incapable of consenting to the sexual act due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)). [FN47]

*8 The 2012 version of the statute expressly restores lack of consent as an element in rape cases in which a substance causing the impairment is administered “without the knowledge or consent” of the victim. [FN48] The *Benchbook* provides for the following instruction when the accused is charged with this offense:

[T]he accused is charged with the offense of rape by administering a drug, intoxicant, or other similar substance without the knowledge or consent of the alleged victim, thereby substantially impairing the ability of that other person to appraise or control conduct. For this offense, lack of consent to the administration of the drug, intoxicant, or other similar substance is an element of the offense. [FN49]

Under the 2012 version of the sexual assault statute, it is possible for the prosecution to make consent an element based on the way the charges are drafted. If sexual assault is alleged to be based on bodily harm, [FN50] consent ordinarily is not an element. However, it may become an element if the sexual act itself is also charged as the act that caused bodily harm. The following is an example of such a specification where the identical language in italics is charged as both the sexual act and the bodily harm:

In that John Doe, U.S. Army, did, at or near Baumholder, Germany, on or about 6 September 2013, commit a sexual act upon Anne Victim, to wit: *penetrating her vulva with his penis*, by causing bodily harm to her, to wit: *penetrating her vulva with his penis*.

Similarly, it is possible for the prosecution to make consent an element of an abusive sexual contact by causing bodily harm [FN51] if the act that constitutes the sexual contact is also charged as the act that caused bodily harm. These unusual charges contain consent as an element because the 2011 statute defines bodily harm as “any offensive touching of another, however slight, including any *nonconsensual* sexual act or *nonconsensual* sexual contact.” [FN52] The definition specifically includes consent where the bodily harm and the sexual act or contact are identical. A simple way for prosecutors to avoid this trap is to list some bodily harm other than the sexual act or contact. The following specification is an example of how to do this:

In that John Doe, U.S. Army, did, at or near Baumholder, Germany, on or about 6 September 2013, commit a sexual act upon Anne Victim, to wit: *penetrating her vulva with his penis*, by causing bodily harm to her, to wit: *holding her down with his hands and body*.

For crimes that occurred on or after 28 June 2012, mistake as to consent may still be an issue. In these cases, the *Benchbook* advises that the judge must decide “whether, based upon the evidence presented and the elements of the offense charged, mistake of fact as to consent to the sexual act is an applicable defense.” [FN53] In these cases, the judge should provide an instruction on mistake of fact that includes the following language:

The evidence has raised the issue of mistake on the part of the accused whether [the alleged victim] consented Mistake of fact as to consent is a defense The prosecution has the burden of proving beyond a reasonable doubt that

the mistake of fact as to consent did not exist [FN54]

Only time will tell if the new *Benchbook* instructions adequately address the issues raised by the 2012 version of the sex offense statute, especially the issue of consent. As the courts issue opinions interpreting the 2012 version, the *Benchbook* instructions will change in response. It is important for practitioners to keep track of changes in case law and to ensure that they have the most up-to-date version of the *Benchbook*.

C. Consensual Sodomy Under Article 125

In *United States v. Castellano*, [FN55] the CAAF again discussed the constitutional protections provided for consensual sodomy under Article 125 of the UCMJ. [FN56] In *Lawrence v. Texas*, [FN57] the Supreme Court overruled a Texas law criminalizing consensual homosexual sodomy, recognizing a constitutional liberty interest for such conduct *9 under the Due Process Clause. [FN58] In *United States v. Marcum*, [FN59] the CAAF applied this ruling to consensual sodomy in the military context under Article 125 of the UCMJ. In *Marcum*, the court ruled that certain factors, such as coercion, can remove consensual sodomy from the protections provided by *Lawrence*. [FN60] *Castellano* made it clear that in a trial by members, the trier of fact (the members), rather than the judge, decides whether these “%7FMarcum” factors exist. [FN61]

The accused in *Castellano* was charged with forcible sodomy with his next-door neighbor, another service member, but was found guilty by a panel of only the lesser included offense of consensual sodomy. The trial judge essentially instructed the members that they could find the accused guilty of this lesser offense if they determined that the accused engaged in consensual sodomy; he did not instruct the panel on the *Marcum* factors. The CAAF found that this instruction was in error. While not elements of the offense, the *Marcum* factors were critical because they help determine what made the accused's conduct criminal. Therefore, the existence of these factors was a question for the trier of fact, rather than simply a question of law to be determined by the judge.

In response to *Castellano*, military judges should instruct the members on the *Marcum* factors in all consensual sodomy cases. The *Benchbook* contains the appropriate language, including the following explanation:

Not every act of adult consensual sodomy is a crime. Adult consensual sodomy is a crime only if you find beyond a reasonable doubt that the sodomy alleged: was public behavior; was an act of prostitution; involved persons who might be injured, coerced or who are situated in relationships where consent might not easily be refused; or implicates a unique military interest. [FN62]

D. Insanity Defense

In *United States v. Mott*, [FN63] the CAAF dealt with the insanity defense. Although reversing the accused's conviction on other grounds, the court upheld the trial judge's instruction that the accused's ability to appreciate the wrongfulness of his conduct should be determined based on an objective standard of the term “wrongfulness.”

The accused in *Mott* allegedly thought that the victim, another crew member on board his vessel, had threatened to kill him. The accused approached the victim from behind, slashed his throat and repeatedly stabbed him. It was subsequently determined that the accused suffered from paranoid schizophrenia. The psychiatrist who conducted a mental responsibility examination of the accused [FN64] concluded that the accused believed he was acting in selfdefense and that the only way to stop the victim

from killing the accused was to attack him. At trial, the defense raised the insanity defense and the judge provided the members with the standard instructions on this defense from the *Benchbook*, including the instruction that “[i]f the accused was able to appreciate the nature and quality or the wrongfulness of his conduct, he is criminally responsible” [FN65] When a member asked for a definition of ““wrongfulness,” the judge departed from the *Benchbook* by giving an instruction that included the following language: When the law speaks of wrongfulness[,]

the law does not mean to permit the individual to be his own judge of what is right or wrong. What is right or wrong is judged by societal standards. The standard focuses on the accused's ability to appreciate that his conduct would be contrary to public or societal standards. [FN66]

In upholding this instruction, the CAAF examined the military insanity statute, [FN67] which was based on the federal insanity statute. [FN68] The court pointed out that prior military and federal case law interpreting both statutes were based on the insanity test laid out in M’Naghten’s Case. [FN69] This nineteenth century case stood for the proposition that the accused must be laboring under “such a defect of reason ... *10 as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.” [FN70] The majority of courts interpreting this standard have concluded that “wrongfulness” should be determined using an objective standard. [FN71] The CAAF adopted this majority view. [FN72]

Judges instructing on the insanity defense should follow the *Benchbook* instructions. [FN73] Additionally, the instruction used in *Mott* may be helpful when a further definition of wrongfulness is necessary.

III. Lesser Included Offenses After *Jones*

After years of applying subjective and often confusing tests for determining if one offense is a lesser included offense of another, the CAAF made an abrupt and decided shift back to the “elements test” in April 2010 when it issued its opinion in the case of *United States v. Jones*. [FN74] In doing so, the CAAF expressly overruled all of its prior cases that had applied tests not in strict accord with the elements test. The court noted the elements test was “fully consonant with the Constitution, precedent of the Supreme Court, and another line of [their] own cases.” [FN75] It also had the added benefit of moving away from the more subjective tests the court had applied in the past and adopting a more objective test.

In its simplest form, the elements test requires that one offense's elements be a subset of another offense's elements before it can be considered “necessarily included” [FN76] in that greater offense. The CAAF provided additional guidance when comparing the elements of offenses whose statutory language is similar, but not identical. In *United States v. Alston*, [FN77] the court stated there was no requirement the elements contain identical language. Rather, the meaning of an element is determined by applying the “normal principles of statutory construction.” [FN78] These principles include “[a]pplying the common and ordinary understanding of the words in the statute.” [FN79] If an uncharged offense is determined to be necessarily included in a charged offense, an accused is deemed on notice that he may be convicted of this uncharged offense.

Following the release of *Jones* and *Alston*, the CAAF seized several opportunities to apply the elements/statutory construction test to cases brought before it. Leading up to its 2013 Term of Court, the CAAF ruled: assault consummated by a battery (Article 128) is necessarily included in wrongful sexual contact (1 October 2007-27 June 2012 version of [Article 120](#)); [FN80] negligent homicide (Article 134) is *not* necessarily included in premeditated murder (Article 118), [FN81] nor is it necessarily included in involuntary manslaughter (Article 119); [FN82] and housebreaking (Article 130) is necessarily in-

cluded in burglary (Article 129). [FN83] During its 2013 Term of Court, the CAAF continued to develop this area of the law through two additional opinions.

In the first opinion, the CAAF addressed the issue of whether abusive sexual contact is a lesser included offense of aggravated sexual assault under the 2007 version of [Article 120](#). [FN84] The appellant in *United States v. Wilkins* [FN85] had been charged, inter alia, with committing aggravated sexual assault on a fellow sailor by “placing his fingers or another object in the anus of [victim]” [FN86] The military judge sua sponte found appellant not guilty of the charged offense, and instructed the members to determine whether the appellant was nonetheless guilty of the lesser included offense of abusive sexual contact. This instruction was given without defense objection.

In conducting its lesser included offense analysis, the court compared the statutory elements and definitions of the two offenses in question, noting the key distinction between the two offenses is that aggravated sexual assault requires the commission of a “sexual act,” whereas abusive sexual contact requires “sexual contact” to occur. The court then compared the definitions of these two terms.

Sexual Act Under Aggravated Sexual Assault

Sexual Contact Under Abusive Sexual Contact

contact between the penis and the vulva ...; or

the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or

the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

intentionally causing 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, or degrade any person or to arouse or gratify the sexual desire of any person.

***11** The CAAF noted that in some cases, abusive sexual contact could be a lesser included offense of aggravated sexual assault. This could include cases where an accused was charged with committing aggravated sexual assault by penetrating the genital opening of another. This penetration would necessarily include a touching of the genitalia, as required for a sexual contact. In the instant case, however, the problem lay in the plain language of the specification, which the court noted constituted a legal impossibility. [FN87]

The CAAF stated the appellant's act of digitally penetrating the anus of his fellow Soldier could not constitute a “sexual act” because a sexual act is limited to penetrations of genital openings. Since the charged offense was inherently defective, instructing the members to consider abusive sexual contact as a lesser included offense was also in error. Having found error, the court then tested for prejudice to the appellant.

The CAAF determined the appellant's due process right to notice was not violated since the defective specification provided him notice of all of the elements of abusive sexual contact he needed to defend against at trial, and he did in fact employ a defense strategy to defend against this charge. Finding no prejudice, the CAAF affirmed the decision of the lower appellate court.

The second opinion the court released addressing lesser included offenses also related to sexual offenses. In *United States v. Tunstall*, [FN88] the CAAF granted review to determine whether the offense of indecent acts was a lesser included offense of aggravated sexual assault under the 2007 version of [Article 120](#). [FN89] Among other charges, the appellant had been charged with aggravated sexual assault for digitally penetrating the vagina of a fellow airman while she was vomiting into a sink from excessive alcohol consumption. The appellant committed this act while in the presence of two other airmen. The government charged the appellant under the theory that his actions were criminal because the victim was “substantially incapable of declining participation.” [FN90]

At trial, the military judge sua sponte instructed the members that the offense of indecent acts was a lesser included offense of aggravated sexual assault. The military judge went on to inform the members that an act may be indecent when it is done in an “open and notorious” manner, that is, when the participants know that someone else is present or could be reasonably present. The military judge did not inform the members that indecent acts could include engaging in sexual activity with a person substantially incapable of declining participation. The defense did not object to this instruction.

In reaching its decision, the CAAF first compared the elements of the two offenses at issue.

Elements of Aggravated Sexual Assault by Substantial

Elements of Indecent Acts

Incapacitation

(1) The accused engaged in a sexual act with another person

(1) The accused engaged in certain conduct

(2) The other person was substantially incapable of declining participation in the sexual act

(2) The conduct was indecent

As charged in this case, the court determined the first element of both offenses rested on the same facts. That is, both the “sexual act” and the “certain conduct” refer to the digital penetration of the victim's vagina. The court noted the second element of both offenses also relied on the same set of facts. The fact that the victim was substantially incapable of declining participation not only meets the plain language of the second element of aggravated sexual assault, it is also what makes the

conduct indecent, as required by the second element of indecent acts.

The court concluded the relationship between the two offenses at issue was not one of greater/lesser, but rather one of alternative offenses aimed at criminalizing the same conduct. This is because there is no “additional fact that the members would need to find in order to convict for the offense of aggravated sexual assault which would be unnecessary to convict for the offense of indecent acts. Neither requires a factual finding that the other does not.” [FN91] In addition to finding the military judge committed plain error when he gave the lesser included offense instruction, the CAAF concluded the judge compounded his first error with his instruction regarding what constituted an indecent act.

*12 The government had charged the appellant under the theory that his conduct was wrongful because it was done with a person who was substantially incapable of declining participation. However, the military judge informed the members the conduct at issue could be indecent only if it was done in an “open and notorious” manner. This was the first mention at trial of the “open and notorious” theory of criminality. By doing this, the military judge ““essentially took the ‘substantially incapable of declining participation’ theory for the offense of indecent acts off the table” [FN92] Having found error, the court turned its attention to the issue of prejudice.

The CAAF started by recognizing the notice requirement mandates that an accused know not only of what offense, but also under what legal theory he can be convicted. [FN93] In the present case, the appellant was neither charged with, nor ever put on notice until the judge’s instructions, that he could be found guilty of committing indecent acts under an “open and notorious” theory of criminal liability. As such, the court determined the appellant’s due process right to fair notice was violated. Accordingly, the CAAF set aside the finding of guilty of an indecent act.

Although not dealing with instructions to the members, both the CAAF and the Army Court of Criminal Appeals decided cases involving lesser included offenses of which practitioners should be aware. The CAAF ruled that assault consummated by battery is a lesser included offense of indecent assault, [FN94] and the Army court decided indecent exposure was a lesser included offense of indecent liberties, given the facts of the particular case. [FN95]

IV. Evidence

A. Demonstrative Evidence

In *United States v. Pope*, [FN96] the CAAF considered whether it was error for the military judge to fail to give a limiting instruction on the use of demonstrative evidence.

As a result of a random urinalysis, Airman First Class (A1C) Pope’s urine tested positive for the metabolite of cocaine. [FN97] At trial, her former roommate testified that A1C Pope admitted that she sometimes got “messed up” and that her brother provided her with a “green drink” to “clean out [her] system” when “she would get messed up.” [FN98] The roommate also testified that she had seen bottles of the green drink in their shared refrigerator. [FN99] In conjunction with the roommate’s testimony, the trial counsel introduced a representative sample of a green detoxifying drink (purchased by a government investigator) as a demonstrative exhibit, which the roommate testified looked substantially like the green drinks she had seen in the refrigerator. [FN100] Despite the trial counsel’s representation at an Article 39(a) hearing that the panel would be instructed that the drink was being admitted solely as an illustration, the military judge gave no such instruction to the panel. [FN101]

Demonstrative evidence is admitted at the discretion of the military judge when it “illustrates or clarifies the testimony of a witness.” [FN102] As previously recognized by the Navy-Marine Court of Criminal Appeals, as well as other federal jurisdictions, demonstrative evidence requires “limited handling,” to include instructions to the panel about the use of the evidence. [FN103] In *Pope*, the CAAF affirmed this proposition by requiring the military judge to “properly instruct the members that the evidence is for illustrative purposes only.” [FN104] Despite this requirement, the CAAF determined that the error was harmless, as there was sufficient testimony from the government investigator who purchased the drink to make it clear to the panel members that the green drink was not substantive evidence and was intended solely as demonstrative evidence. [FN105]

The direction provided by the CAAF in *Pope* concerning demonstrative evidence is clear: when such evidence is admitted, the military judge must give a proper limiting instruction.

B. Expert Testimony

In *United States v. Lusk*, [FN106] the CAAF reiterated its previous position concerning the use of limiting instructions when an expert witness relies on inadmissible evidence as a basis for his expert opinion.

*13 As a result of a urinalysis pursuant to a unit inspection, Staff Sergeant (SSgt) Lusk's urine tested positive for the metabolite of cocaine. [FN107] Two different laboratories--the Air Force Drug Testing Laboratory (AFDTL) and the Armed Force Institute of Pathology (AFIP)--tested SSgt Lusk's urine sample, with the same results. [FN108] At trial, the military judge admitted the AFDTL report of results without defense objection. [FN109] Upon defense motion, the military judge excluded the AFIP report as testimonial hearsay which would deny the defense the right of confrontation guaranteed by the Sixth Amendment. [FN110]

The government called an expert witness who testified as to the reliability of the AFDTL report. [FN111] During extensive cross-examination, the defense attacked the reliability of the AFDTL report. [FN112] In response, the government asked permission to question the expert about whether he used the results from AFIP when forming his opinion as to the reliability of the AFDTL report. [FN113] The military judge granted the request, indicating that he would then “need to craft an instruction that [the panel members] are not to consider that for the truth of the matter asserted but rather for the manner in which the expert witness went about reaching his conclusion which he is allowed to do under [the] Military Rules [of] Evidence.” [FN114] Following the trial counsel's redirect examination, which included questions about whether the expert considered the AFIP results and what those results were, the defense counsel again conducted extensive cross-examination, this time attacking the expert's reliance on the AFIP by questioning him about the specific numerical results of the AFIP test. [FN115]

When the military judge discussed instructions with counsel, he stated that although he had previously intended to give a limiting instruction concerning the AFIP results, he believed that the evidence was already before the members through the redirect and extensive cross-examinations, and that there would be no benefit in giving an instruction. [FN116] The defense counsel objected, but the military judge gave no limiting instruction concerning the AFIP results. [FN117]

Military Rule of Evidence (MRE) 703 permits facts or data that are otherwise inadmissible to be presented at trial if the “military judge determines that their probative value in assisting the members to evaluate the expert's opinion substantially outweighs their prejudicial effect.” [FN118] When this type of testimony is permitted by the military judge, **MRE 105** requires

him to restrict the evidence to its proper scope and instruct the members accordingly. [FN119] In *United States v. Neeley*, [FN120] the CAAF had previously made clear that MRE 105 applies to otherwise inadmissible evidence relied upon by expert witnesses when forming their opinions and that the military judge should give a limiting instruction concerning this type of evidence. [FN121] In *Lusk*, the CAAF reiterated its holding in *Neeley* and emphasized the importance of limiting instructions.

United States v. Lusk serves as a reminder to military judges that limiting instructions must not be overlooked. In the cases in which an expert refers to matters that would otherwise be inadmissible, the *Benchbook* provides recommendations for drafting an appropriate instruction. [FN122] Whether following these drafting recommendations or not, military judges should always craft a limiting instruction to ensure the panel members understand the permissible use of the evidence and ensure that the evidence is not inadvertently relied upon as substantive evidence. [FN123]

V. Sentencing

The one instructions case the CAAF released relating to sentencing dealt not with actual sentencing evidence, but rather with the procedures for reconsideration of a sentence by the members. In *United States v. Garner*, [FN124] the military judge provided the members, prior to their deliberations, with the standard instructions on sentencing and also a sentencing worksheet to aid them in putting their sentence in a proper form. When the members returned from their deliberation, the military judge reviewed the worksheet and noted the members recorded the sentence to confinement as both 35 years and confinement for life without eligibility for parole. [FN125]

After discussing the issue with counsel during an Article 39(a) session, the military judge recalled the members and *14 informed them the sentencing worksheet was ambiguous, in that it could not include both a term of years and confinement for life without eligibility for parole. She then repeated the instructions she had previously provided them regarding confinement options, provided them a clean sentencing worksheet and once again placed them in deliberations. She did not provide any instructions on the procedures for reconsidering a sentence found in Rule for Courts-Martial (RCM) 1009(e). [FN126] When the members completed their second deliberation, they returned with a sentence of confinement for life. [FN127] This new sentence was different from both the 35 years and the confinement for life without the possibility of parole the members had previously returned.

In addressing this issue, the CAAF determined the sentence to confinement as recorded on the first worksheet was clearly ambiguous, and as such, the military judge acted properly in returning the members to clarify their sentence. However, once the members returned with a new sentence that differed completely from those reflected in the first sentencing worksheet, it was clear they had reconsidered their initial sentence. In discussing the proper procedures for handling such a situation, the CAAF noted the requirement that a military judge “shall” instruct the members on the procedure for reconsideration “[w]hen a sentence has been reached by members and reconsideration has been initiated.” [FN128] In this case, the judge erred when she accepted the new sentence instead of providing the members the instruction on reconsideration and returning them to deliberate once more.

The CAAF went on to say that although there was error, they were not convinced it was plain or obvious. They were, however, convinced there was no prejudice to the appellant in this case. The court reached this conclusion by examining the reconsideration procedures in RCM 1009(e)(3). They noted the rule stated “[the] members may reconsider a sentence with a view of increasing it only if at least a majority vote for reconsideration.” [FN129] Of significance, the military judge had in-

formed the members in her initial instructions that a sentence to confinement for life required the concurrence of at least three-fourths--in this case, six members. Since the “new” sentence returned by the members was for confinement for life, they could have only reached this decision if at least six members concurred. This required concurrence of three-fourths (six of seven) exceeded the simple majority required for reconsideration (four of seven); [FN130] therefore, there was no prejudice to the appellant.

VI. Conclusion

The past year yielded many new developments in the law. As discussed above, many of these developments had significant impact on the instructions judges provide to members. Some of these developments, such as the enactment of a new sex offense statute in 2012 and the CAAF's new approach to lesser included offenses, will take time to become fully developed. However, one principle remains constant: the importance of the *Benchbook*. Many of the developments discussed in this article have already been addressed by appropriate changes in the *Benchbook*. Judges and counsel who follow these changes and keep abreast of new developments in statutory and case law should be able to successfully navigate the ever-changing landscape of instructions to members.

[FN1]. Judge Advocate, U.S. Army. Currently serving as the outgoing Chief Circuit Judge, 5th Judicial Circuit, U.S. Army Trial Judiciary, Kaiserslautern, Germany.

[FNaa1]. Judge Advocate, U.S. Army. Currently serving as the incoming Chief Circuit Judge, 5th Judicial Circuit, U.S. Army Trial Judiciary, Kaiserslautern, Germany.

[FNaaa1]. Judge Advocate, U.S. Army. Currently serving as Circuit Judge, 4th Judicial Circuit, U.S. Army Trial Judiciary, Yongsan, Republic of Korea.

[FN1]. The *Manual for Courts-Martial (MCM)* requires the military judge to instruct members (jurors) on questions of law and procedure, findings, and sentencing. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 801(a)(5), 920 and 1005 (2012) [hereinafter MCM].

[FN2]. The 2013 term began on 1 September 2012 and ended on 31 August 2013.

[FN3]. The most recent article of this nature was published in May 2011. Lieutenant Colonel Christopher T. Fredrikson, Lieutenant Colonel Wendy P. Daknis, and Lieutenant Colonel James L. Varley, *Annual Review of Developments in Instructions*, ARMY LAW., May 2011, at 25. The authors of this article relied a great deal on materials prepared in 2012 by Lieutenant Colonel Varley and Colonel Fredrikson and are extremely grateful for their contributions.

[FN4]. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 Jan. 2010) [hereinafter BENCHBOOK].

[FN5]. UCMJ art. 120 (2012).

[FN6]. 68 M.J. 465 (C.A.A.F. 2010).

[FN7]. See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (codified in UCMJ art. 120 (2008)).

[FN8]. For example, the crimes of indecent acts or liberties with a child, indecent exposure, indecent acts with another, contained as enumerated offenses defined by the President under Article 134, Uniform Code of Military Justice (UCMJ), were moved to Article 120 of the UCMJ. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶ 87, 88, 90 (2005); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 120 (2008).

[FN9]. The elements of rape under the Article 120, UCMJ, effective before October 1, 2007, were that the accused committed the act of sexual intercourse and that the act of sexual intercourse was done by force and without consent. UCMJ art. 120 (2005).

[FN10]. See UCMJ art. 120 (2008).

[FN11]. For a detailed critique and analysis of these provisions, see Major Howard H. Hoege III, “Overshift” *The Unconstitutional Double Burden-Shifting on Affirmative Defenses in the New Article 120*, ARMY LAW., May 2007, at 2. See also James G. Clark, “A Camel is a Horse Designed by a Committee”: *Resolving Constitutional Defects in Uniform Code of Military Justice Article 120’s Consent and Mistake of Fact as to Consent Defenses*, ARMY LAW., July 2011, at 4.

[FN12]. The term “judicial band-aid” comes from Judge Margaret A. Ryan’s dissenting opinion in *United States v. Neal*, 68 M.J. 289, 305 (C.A.A.F. 2010). The CAAF implied that it may be appropriate to apply such judicial band-aids when it stated that “[T]he military judge has the authority to craft an appropriate instruction ensuring that the burden of proof remains with the government.” *Id.* at 304.

[FN13]. Article 120 provides the specific elements of the offenses of rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. UCMJ art. 120 (2008).

[FN14]. BENCHBOOK, *supra* note 4, para. 3-45-3 n.10. This explanation and the accompanying instructions were subsequently modified. See *infra* note 22 and accompanying text.

[FN15]. This was the approach followed by the trial judge in *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011).

[FN16]. This was the approach followed by the trial judge in *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010).

[FN17]. This was the approach used by the trial judge in *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011).

[FN18]. 68 M.J. 289 (C.A.A.F. 2010).

[FN19]. *Id.* at 299.

[FN20]. *Id.* at 303.

[FN21]. This term was used in Judge Ryan's dissent. *Id.* at 305.

[FN22]. *Id.* at 299.

[FN23]. U.S. ARMY TRIAL JUDICIARY, MILITARY JUDGES' BENCHBOOK, APPROVED INTERIM CHANGE 10-01 VERSION 2, effective 16 Jul. 2010, para. 3-45-3 n.11.1, available at <https://www.jagcnet2.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=DE67163596F12C3F85257B48006915EA>.

[FN24]. U.S. ARMY TRIAL JUDICIARY, MILITARY JUDGES' BENCHBOOK, APPROVED INTERIM CHANGE 10-04, effective 24 May 2010, para. 3-45-3, n. 11.1, available at <https://www.jagcnet2.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=DE67163596F12C3F85257B48006915EA>.

[FN25]. *Id.*

[FN26]. 69 M.J. 338 (C.A.A.F. 2011).

[FN27]. 69 M.J. 462 (C.A.A.F. 2011).

[FN28]. 69 M.J. at 342-43.

[FN29]. *Id.* at 340.

[FN30]. *Id.*

[FN31]. *Id.* at 345.

[FN32]. *Id.*

[FN33]. *United States v. Medina*, 69 M.J. 462, 464 (C.A.A.F. 2011).

[FN34]. *Id.* at 466. The CAAF found that “[t]he instruction that was given was clear and correctly conveyed to the members the Government's burden.” *Id.* at 465.

[FN35]. *Id.*

[FN36]. *Id.*

[FN37]. U.S. ARMY TRIAL JUDICIARY, MILITARY JUDGES' BENCHBOOK, APPROVED INTERIM CHANGE 11-02A, paras. 3-45-3, 3-45-4, 3-45-5, 3-45-6, 3-45-7, 3-45-8, 3-45-11 n.1.1 (28 Apr. 2011), *available at* <https://www.jagcnet2.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=DE67163596F12C3F85257B48006915EA>.

[FN38]. For one proposed alternative approach, see Clark, *supra* note 11, at 3. Mr. Clark proposed that military judges should “sever the provisions of [Article 120](#) that create consent as an affirmative defense.” *Id.* at 15. This proposal was based on an analysis of congressional intent. However, this proposal would sever clear language that is beneficial to the accused.

[FN39]. *See* National Defense Authorization Act for Fiscal Year 2012, [Pub. L. No. 112-81, § 541, 125 Stat. 1298](#) (codified in UCMJ arts. 120, 120b and 120c (2012)).

[FN40]. UCMJ art. 120 (2012).

[FN41]. *Id.* art. 120b. Article 120a had already been designated for the new offense of stalking. UCMJ art. 120a (2006).

[FN42]. UCMJ art. 120c (2012).

[FN43]. 68 M.J. 289 (C.A.A.F. 2010).

[FN44]. U.S. ARMY TRIAL JUDICIARY, MILITARY JUDGES' BENCHBOOK, APPROVED INTERIM CHANGE 11-11, paras. 3-45-13 n.8 (21 June 2012) [hereinafter 21 JUNE 2012 BENCHBOOK], *available at* <https://www.jagcnet2.army.mil/Portals/USArmyTJ.nsf/6065c91f137aff3685256cbf0079f732/91971c8c7def592e852572b30063512c?OpenDocument>. There is currently a debate on whether this instruction is necessary.

[FN45]. 69 M.J. 338 (C.A.A.F. 2011).

[FN46]. 69 M.J. 462 (C.A.A.F. 2011).

[FN47]. 21 JUNE 2012 BENCHBOOK, *supra* note 44, para. 3-45-13 n.8. There is currently a debate on whether this instruction is necessary.

[FN48]. UCMJ art. 120a(5) (2012).

[FN49]. 21 JUNE 2012 BENCHBOOK, *supra* note 44, para. 3-45-13 n.9.

[FN50]. UCMJ art. 120b(1)(B).

[FN51]. *Id.*

[FN52]. *Id.* art. 120(d) (emphasis added).

[FN53]. 21 JUNE 2012 BENCHBOOK, *supra* note 44, para. 3-45-13 n.10.

[FN54]. *Id.* The U.S. Army Trial Judiciary (USATJ) is currently considering changes to the [Article 120](#) instructions. Practitioners are advised to consult the USATJ link on JAGCNeT for the most current approved changes to the *Benchbook*, available at <https://www.jagcnet2.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=DE67163596F12C3F85257B48006915EA> (follow JAGCNet; USALSA; Trial Judiciary; Resources; then DA Pam 27-9 and Approved Interim Updates).

[FN55]. 72 M.J. 217 (C.A.A.F. 2013).

[FN56]. UCMJ art. 125 (2012).

[FN57]. 539 U.S. 558 (2003).

[FN58]. U.S. CONST. amend. V.

[FN59]. 60 M.J. 198 (C.A.A.F. 2004).

[FN60]. *Id.* at 207.

[FN61]. *United States v. Castellano*, 72 M.J. 217, 219 (C.A.A.F. 2013).

[FN62]. U.S. ARMY TRIAL JUDICIARY, MILITARY JUDGES' BENCHBOOK, APPROVED INTERIM CHANGE 13-06, para. 3-51-1 n.3 (7 Aug. 2013), available at <https://www.jagcnet2.army.mil/Portals/USArmyTJ.nsf/60655c91f137aff3685256cbf0079f732/91971c8c7def592e852572b30063512c?OpenDocument>. The Fiscal Year 2014 National Defense Authorization Act (NDAA), as agreed upon by the House and Senate Armed Services Committees, contains a provision that would repeal the offense of consensual sodomy under the Uniform Code of Military Justice if the defense bill is approved. For additional information on how the NDAA could affect military justice, see Zachary D. Spillman, *Military Justice Reforms in the FY14 Compromise NDAA*, NATIONAL INSTITUTE OF MILITARY JUSTICE BLOG -- CAAFLOG (Dec. 12, 2013), <http://www.caaflog.com/2013/12/12/military-justice-reforms-in-the-fy14-compromise-ndaa/>.

[FN63]. 72 M.J. 319 (C.A.A.F. 2013).

[FN64]. The examination was conducted pursuant to [Rule for Courts-Martial 706](#). MCM, *supra* note 1, R.C.M. 706.

[FN65]. BENCHBOOK, *supra* note 4, paras. 6-3, 6-4, 6-6 and 6-7.

[FN66]. *Mott*, 72 M.J. at 323.

[FN67]. UCMJ art. 50a (2012).

[FN68]. 18 U.S.C. § 17 (2012). This law was enacted in response to the use of the insanity defense in the acquittal of John Hinkley, who attempted to assassinate President Reagan. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, sec. 402 § 20, 1937, 2057.

[FN69]. 8 Eng. Rep. 718 (H.L.) (1843).

[FN70]. *Id.* at 722.

[FN71]. *Mott*, 72 M.J. at 325-26.

[FN72]. *Id.* at 326.

[FN73]. BENCHBOOK, *supra* note 4, para.6-4 n.2. “Lack of mental responsibility (insanity) at the time of the offense is an affirmative defense which must be instructed upon, sua sponte, when the military judge presents final instructions The following instruction is suggested” *Id.*

[FN74]. 68 M.J. 465 (C.A.A.F. 2010).

[FN75]. *Id.* at 468.

[FN76]. UCMJ art. 79 (2012) (“An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.”).

[FN77]. 69 M.J. 214 (C.A.A.F. 2010).

[FN78]. *Id.* at 216.

[FN79]. *Id.*

[FN80]. *United States v. Bonner*, 70 M.J. 1 (C.A.A.F. 2011).

[FN81]. *United States v. Girouard*, 70 M.J. 5 (C.A.A.F. 2011) (emphasis added).

[FN82]. *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011).

[FN83]. *United States v. Arriaga*, 70 M.J. 51 (C.A.A.F. 2011).

[FN84]. UCMJ art. 120 (2008).

[FN85]. 71 M.J. 410 (C.A.A.F. 2012).

[FN86]. *Id.* at 412.

[FN87]. *Id.* at 413.

[FN88]. 72 M.J. 191 (C.A.A.F. 2013).

[FN89]. UCMJ art. 120 (2008).

[FN90]. *Tunstall*, 72 M.J. at 193.

[FN91]. *Id.* at 195.

[FN92]. *Id.* at 196.

[FN93]. *Id.* at 192.

[FN94]. *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013).

[FN95]. *United States v. St. John*, 72 M.J. 685 (A. Ct. Crim. App. 2013).

[FN96]. 69 M.J. 328 (C.A.A.F. 2011).

[FN97]. *Id.* at 331.

[FN98]. *Id.*

[FN99]. *Id.*

[FN100]. *Id.*

[FN101]. *Id.*

[FN102]. *United States v. Heatherly*, 21 M.J. 113, 115 n.2 (C.M.A. 1985).

[FN103]. *United States v. Knox*, 46 M.J. 688, 694 (N-M. Ct. Crim. App. 1997).

See also United States v. Gonzalez, 933 F.2d 417, 427 (7th Cir. 1991); *Harvey By and Through Harvey v. Gen. Motors Corp.*, 873 F.2d 1343, 1356 (10th Cir. 1989); *Veliz v. Crown Lift Trucks*, 714 F. Supp. 49, 53 (E.D.N.Y. 1989).

[FN104]. *Pope*, 69 M.J. at 333.

[FN105]. *Id.* at 333-34.

[FN106]. 70 M.J. 278 (C.A.A.F. 2011).

[FN107]. *Id.* at 279.

[FN108]. *Id.*

[FN109]. *Id.*

[FN110]. *Id.*

[FN111]. *Id.*

[FN112]. *Id.*

[FN113]. *Id.*

[FN114]. *Id.* at 280.

[FN115]. *Id.*

[FN116]. *Id.* at 281.

[FN117]. *Id.*

[FN118]. MCM, *supra* note 1, MIL. R. EVID. 703.

[FN119]. *Id.* MIL. R. EVID. 105.

[FN120]. 25 M.J. 105 (C.M.A. 1987).

[FN121]. *Lusk*, 70 M.J. at 281 (citing *United States v. Neeley*, 25 M.J. 105, 107 (C.M.A. 1987)).

[FN122]. BENCHBOOK, *supra* note 4, para. 7-9-1.

[FN123]. *Lusk*, 70 M.J. at 282.

[FN124]. 71 M.J. 430 (C.A.A.F. 2013).

[FN125]. *Id* at 432.

[FN126]. “When a sentence has been reached by members and reconsideration has been initiated, the military judge shall instruct the members on the procedure for reconsideration.” MCM, *supra* note 1, R.C.M. 1009(e)(1). The rule dictates how votes should be taken and the number of votes required to reconsider a sentence. *Id*.

[FN127]. *Id*.

[FN128]. *Id*. at 433.

[FN129]. *Id*. at 434.

[FN130]. *Id*.

2013-DEC Army Law. 4

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