

# NCIS – SABT “Mini-Manual”

*Extracts from the Manual for Courts-Martial (2005)  
& other documents*

February 2007



This text was assembled by members of the FLETC Legal Division as a legal reference for NCIS-SABT students.

(Contributors: CAPT. Anthony Bell, and Senior Instructors T.K. Caldbeck, Jeffrey Fluck, Keith Hodges, Tim Miller, and Jennifer Solari)

# NCIS-SABT "Mini-Manual" Contents

<b>Part I. MCM Materials</b>	<b>Pages</b>
MCM Index – Complete	1-11
<i>Rules for Courts Martial ....</i>	
RCM 104: Unlawful Command Influence	12-13
RCM 202-204: Jurisdiction	14-17
RCMs 301 & 302: Apprehension Authority and Reporting of Offenses	18-20
RCM 701: Discovery	21-24
RCM 704: Immunity	25-26
RCM 707: Speedy Trial	27-28
RCM 914: Production of Statements	29
RCM 916: Defenses	30-34
<i>Military Rules of Evidence ....</i>	
MRE 301: Self-Incrimination	35-36
MRE 304: Confessions and Admissions	36-38
MRE 305: Rights Warnings	38-40
MRE 311: Evidence Obtained from Unlawful Searches and Seizures	40-42
MRE 312: Body Views and Intrusions	43-44
MRE 313: Inspections and Inventories	44
RCM 314: Searches not Requiring Probable Cause	44-46
MRE 315: Probable Cause Searches	46-48
MRE 316: Seizures	48
MRE 317: Interception of Wire and Oral Communications	48-49
MRE 321: Eyewitness Identification	49-50
MREs 412-414: Sexual Assault and Molestation offenses - Special Evidentiary Rules	51-54
MREs 503: Clergy Privilege	55
MRE 504: Husband-Wife Privilege	55-56
MRE 507: Identity of Informant Privilege	57-58
MRE 513: Psychotherapist Privilege	59-60
MREs 901 – 902: Authentication and Self-Authentication	61-63
<i>Items from the MCM Appendix ....</i>	
Article 31, UCMJ (Compulsory Incrimination)	64
Article 43, UCMJ (Statute of Limitations)	65-66
Maximum Punishment Chart by Offense (MCM Appendix)	67-72
Sample Charge Sheet	73-74
<b>Part II. Non-MCM Items</b>	
Command Options Chart	75
Arrest Authority of NCIS Agents (10 U.S.C. Sec 7480 & 1585a plus NCIS guidelines)	76-77
Search and Seizure in-class PE	78-79
Self-Incrimination in Class PE	80
9 <sup>th</sup> Circuit concerning Posse Comitatus and NCIS: <i>U.S. v. Chae Wan Chon</i> , 210 F.3d 990 (9th Cir.) cert. denied, 531 U.S. 910 (2000)	81-84
<b>Part III. Complete Part IV, MCM (Punitive Articles)</b> <b>(Pagination of this section follows MCM index.)</b>	IV-1 – IV-128

CONTENTS

Page

**PART I PREAMBLE**

**1. Sources of military jurisdiction** ..... I-1

**2. Exercise of military jurisdiction** ..... I-1

(a) Kinds ..... I-1

(b) Agencies ..... I-1

**3. Nature and purpose of military law** ..... I-1

**4. Structure and application of the Manual for Courts-Martial** ..... I-1

**PART II RULES FOR COURTS-MARTIAL**

**CHAPTER I. GENERAL PROVISIONS**

**Rule 101. Scope, title** ..... II-1

(a) In general ..... II-1

(b) Title ..... II-1

**Rule 102. Purpose and construction** ..... II-1

(a) Purpose ..... II-1

(b) Construction ..... II-1

**Rule 103. Definitions and rules of construction** ..... II-1

**Rule 104. Unlawful command influence** ..... II-4

(a) General prohibitions ..... II-4

(b) Prohibitions concerning evaluations ..... II-5

**Rule 105. Direct communications: convening authorities and staff judge advocates; among staff judge advocates** ..... II-5

(a) Convening authorities and staff judge advocates ..... II-5

(b) Among staff judge advocates and with the Judge Advocate General ..... II-5

**Rule 106. Delivery of military offenders to civilian authorities** ..... II-5

**Rule 107. Dismissed officer's right to request trial by court-martial** ..... II-6

**Rule 108. Rules of court** ..... II-6

**Rule 109. Professional supervision of military judges and counsel** ..... II-6

(a) In general ..... II-6

(b) Action after suspension or disbarment ..... II-6

(c) Investigation of judges ..... II-6

**CHAPTER II. JURISDICTION**

**Rule 201. Jurisdiction in general** ..... II-9

(a) Nature of courts-martial jurisdiction ..... II-9

(b) Requisites of court-martial jurisdiction ..... II-9

(c) Contempt ..... II-9

(d) Exclusive and nonexclusive jurisdiction ..... II-10

(e) Reciprocal jurisdiction ..... II-10

(f) Types of courts-martial ..... II-11

(g) Concurrent jurisdiction of other military tribunals ..... II-12

**Rule 202. Persons subject to the jurisdiction of courts-martial** ..... II-13

(a) In general ..... II-13

(b) Offenses under the law of war ..... II-14

(c) Attachment of jurisdiction over the person ..... II-14

**Rule 203. Jurisdiction over the offense** ..... II-15

**Rule 204. Jurisdiction over certain reserve component personnel** ..... II-15

(a) Service regulations ..... II-15

(b) Courts-Martial ..... II-15

(c) Applicability ..... II-16

(d) Changes in type of service ..... II-16

**CHAPTER III. INITIATION OF CHARGES; APPREHENSION; PRETRIAL RESTRAINT; RELATED MATTERS**

**Rule 301. Report of offense** ..... II-17

(a) Who may report ..... II-17

(b) To whom reports conveyed for disposition ..... II-17

**Rule 302. Apprehension** ..... II-17

(a) Definition and scope ..... II-17

(b) Who may apprehend ..... II-17

(c) Grounds for apprehension ..... II-18

(d) How an apprehension may be made ..... II-18

(e) Where an apprehension may be made ..... II-18

**Rule 303. Preliminary inquiry into reported offenses** ..... II-19

**Rule 304. Pretrial restraint** ..... II-19

(a) Types of pretrial restraint ..... II-19

(b) Who may order pretrial restraint ..... II-20

(c) When a person may be restrained ..... II-20

(d) Procedures for ordering pretrial restraint ..... II-20

(e) Notice of basis for restraint ..... II-21

(f) Punishment prohibited ..... II-21

(g) Release ..... II-21

(h) Administrative restraint ..... II-21

**Rule 305. Pretrial confinement** ..... II-21

(a) In general ..... II-21

(b) Who may be confined ..... II-21

(c) Who may order confinement ..... II-21

(d) When a person may be confined ..... II-21

(e) Advice to the accused upon confinement ..... II-22

(f) Military counsel ..... II-22

(g) Who may direct release from confinement ..... II-22

(h) Notification and action by commander ..... II-22

(i) Procedures for review of pretrial confinement ..... II-23

(j) Review by military judge ..... II-24

(k) Remedy ..... II-24

Page

(l) Confinement after release ..... II-24

(m) Exceptions ..... II-25

**Rule 306. Initial disposition** ..... II-25

(a) Who may dispose of offenses ..... II-25

(b) Policy ..... II-25

(c) How offenses may be disposed of ..... II-26

(d) National security matters ..... II-26

**Rule 307. Preferral of charges** ..... II-27

(a) Who may prefer charges ..... II-27

(b) How charges are preferred; oath ..... II-27

(c) How to allege offenses ..... II-27

(d) Harmless error in citation ..... II-30

**Rule 308. Notification to accused of charges** ..... II-30

(a) Immediate commander ..... II-30

(b) Commanders at higher echelons ..... II-30

(c) Remedy ..... II-30

**CHAPTER IV. FORWARDING AND DISPOSITION OF CHARGES**

**Rule 401. Forwarding and disposition of charges in general** ..... II-31

(a) Who may dispose of charges ..... II-31

(b) Prompt determination ..... II-31

(c) How charges may be disposed of ..... II-31

(d) National security matters ..... II-32

**Rule 402. Action by commander not authorized to convene courts-martial** ..... II-32

**Rule 403. Action by commander exercising summary court-martial jurisdiction** ..... II-32

(a) Recording receipt ..... II-32

(b) Disposition ..... II-33

**Rule 404. Action by commander exercising special court-martial jurisdiction** ..... II-33

**Rule 405. Pretrial investigation** ..... II-34

(a) In general ..... II-34

(b) Earlier investigation ..... II-34

(c) Who may direct investigation ..... II-34

(d) Personnel ..... II-34

(e) Scope of investigation ..... II-35

(f) Rights of the accused ..... II-35

(g) Production of witnesses and evidence; alternatives ..... II-35

(h) Procedure ..... II-38

(i) Military Rules of Evidence ..... II-39

(j) Report of investigation ..... II-39

(k) Waiver ..... II-39

**Rule 406. Pretrial advice** ..... II-40

(a) In general ..... II-40

(b) Contents ..... II-40

(c) Distribution ..... II-40

**Rule 407. Action by commander exercising general court-martial jurisdiction** ..... II-40

Page

(a) Disposition ..... II-40

(b) National security matters ..... II-41

**CHAPTER V. COURT-MARTIAL COMPOSITION AND PERSONNEL; CONVENING COURTS-MARTIAL**

**Rule 501. Composition and personnel of courts-martial** ..... II-42

(a) Composition of courts-martial ..... II-42

(b) Counsel in general and special courts-martial ..... II-42

(c) Other personnel ..... II-42

**Rule 502. Qualifications and duties of personnel of courts-martial** ..... II-42

(a) Members ..... II-42

(b) President ..... II-43

(c) Qualifications of military judge ..... II-43

(d) Counsel ..... II-43

(e) Interpreters, reporters, escorts, bailiffs, clerks, and guards ..... II-46

(f) Action upon discovery of disqualification or lack of qualifications ..... II-46

**Rule 503. Detailing members, military judge, and counsel** ..... II-46

(a) Members ..... II-46

(b) Military judge ..... II-47

(c) Counsel ..... II-47

**Rule 504. Convening courts-martial** ..... II-47

(a) In general ..... II-47

(b) Who may convene courts-martial ..... II-47

(c) Disqualification ..... II-48

(d) Convening orders ..... II-48

(e) Place ..... II-49

**Rule 505. Changes of members, military judge, and counsel** ..... II-49

(a) In general ..... II-49

(b) Procedure ..... II-49

(c) Changes of members ..... II-49

(d) Changes of detailed counsel ..... II-49

(e) Change of military judge ..... II-50

(f) Good cause ..... II-50

**Rule 506. Accused's rights to counsel** ..... II-50

(a) In general ..... II-50

(b) Individual military counsel ..... II-50

(c) Excusal or withdrawal ..... II-51

(d) Waiver ..... II-51

(e) Nonlawyer present ..... II-51

**CHAPTER VI. REFERRAL, SERVICE, AMENDMENT, AND WITHDRAWAL OF CHARGES**

**Rule 601. Referral** ..... II-52

(a) In general ..... II-52

(b) Who may refer ..... II-52

(c) Disqualification ..... II-52

Page

(d) When charges may be referred. . . . . II-52  
 (e) How charges shall be referred. . . . . II-52  
 (f) Superior convening authorities. . . . . II-53

**Rule 602. Service of charges** . . . . . II-53

**Rule 603. Changes to charges and specifications** . . . . . II-54  
 (a) Minor changes defined. . . . . II-54  
 (b) Minor changes before arraignment. . . . . II-54  
 (c) Minor changes after arraignment. . . . . II-54  
 (d) Major changes. . . . . II-54

**Rule 604. Withdrawal of charges** . . . . . II-54  
 (a) Withdrawal. . . . . II-54  
 (b) Referral of withdrawn charges. . . . . II-55

**CHAPTER VII. PRETRIAL MATTERS**

**Rule 701. Discovery** . . . . . II-56  
 (a) Disclosure by the trial counsel. . . . . II-56  
 (b) Disclosure by the defense. . . . . II-57  
 (c) Failure to call witness. . . . . II-58  
 (d) Continuing duty to disclose. . . . . II-58  
 (e) Access to witnesses and evidence. . . . . II-58  
 (f) Information not subject to disclosure. . . . . II-58  
 (g) Regulation of discovery. . . . . II-58  
 (h) Inspect. . . . . II-59

**Rule 702. Depositions** . . . . . II-59  
 (a) In general. . . . . II-59  
 (b) Who may order. . . . . II-59  
 (c) Request to take deposition. . . . . II-59  
 (d) Action when request is approved. . . . . II-60  
 (e) Notice. . . . . II-60  
 (f) Duties of the deposition officer. . . . . II-61  
 (g) Procedure. . . . . II-61  
 (h) Objections. . . . . II-61  
 (i) Deposition by agreement not precluded. . . . . II-62

**Rule 703. Production of witnesses and evidence** . . . . . II-62  
 (a) In general. . . . . II-62  
 (b) Right to witnesses. . . . . II-62  
 (c) Determining which witness will be produced. . . . . II-62  
 (d) Employment of expert witnesses. . . . . II-63  
 (e) Procedures for production of witnesses. . . . . II-63  
 (f) Right to evidence. . . . . II-65

**Rule 704. Immunity** . . . . . II-66  
 (a) Types of immunity. . . . . II-66  
 (b) Scope. . . . . II-66  
 (c) Authority to grant immunity. . . . . II-66  
 (d) Procedure. . . . . II-67

Page

(e) Decision to grant immunity. . . . . II-67

**Rule 705. Pretrial agreements** . . . . . II-67  
 (a) In general. . . . . II-67  
 (b) Nature of agreement. . . . . II-68  
 (c) Terms and conditions. . . . . II-68  
 (d) Procedure. . . . . II-68  
 (e) Nondisclosure of existence of agreement. . . . . II-69

**Rule 706. Inquiry into the mental capacity or mental responsibility of the accused** . . . . . II-69  
 (a) Initial action. . . . . II-69  
 (b) Ordering an inquiry. . . . . II-70  
 (c) Inquiry. . . . . II-70

**Rule 707. Speedy trial** . . . . . II-71  
 (a) In general. . . . . II-71  
 (b) Accountability. . . . . II-71  
 (c) Excludable delay. . . . . II-71  
 (d) Remedy. . . . . II-72  
 (e) Waiver. . . . . II-72

**CHAPTER VIII. TRIAL PROCEDURE GENERALLY**

**Rule 801. Military judge's responsibilities; other matters** . . . . . II-73  
 (a) Responsibilities of military judge. . . . . II-73  
 (b) Rules of court; contempt. . . . . II-73  
 (c) Obtaining evidence. . . . . II-73  
 (d) Uncharged offenses. . . . . II-73  
 (e) Interlocutory questions and questions of law. . . . . II-74  
 (f) Rulings on record. . . . . II-75  
 (g) Effect of failure to raise defenses or objections. . . . . II-75

**Rule 802. Conferences** . . . . . II-76  
 (a) In general. . . . . II-76  
 (b) Matters on record. . . . . II-76  
 (c) Rights of parties. . . . . II-76  
 (d) Accused's presence. . . . . II-76  
 (e) Admission. . . . . II-76  
 (f) Limitations. . . . . II-76

**Rule 803. Court-martial sessions without members under Article 39(a)** . . . . . II-76

**Rule 804. Presence of the accused at trial proceedings** . . . . . II-77  
 (a) Presence required. . . . . II-77  
 (b) Continued presence not required. . . . . II-77  
 (c) Voluntary absence for limited purpose of child testimony. . . . . II-77  
 (d) Appearance and security of accused. . . . . II-78

**Rule 805. Presence of military judge, members, and counsel** . . . . . II-78  
 (a) Military judge. . . . . II-78  
 (b) Members. . . . . II-78  
 (c) Counsel. . . . . II-78  
 (d) Effect of replacement of member or military judge. . . . . II-78

Page

**Rule 806. Public trial** . . . . . II-79  
 (a) In general. . . . . II-79  
 (b) Control of spectators and closure. . . . . II-79  
 (c) Photography and broadcasting prohibited. . . . . II-80  
 (d) Protective orders. . . . . II-80

**Rule 807. Oaths** . . . . . II-80  
 (a) Definition. . . . . II-80  
 (b) Oaths in courts-martial. . . . . II-80

**Rule 808. Record of trial** . . . . . II-81

**Rule 809. Contempt proceedings** . . . . . II-82  
 (a) In general. . . . . II-82  
 (b) Method of disposition. . . . . II-82  
 (c) Procedure. . . . . II-82  
 (d) Record; review. . . . . II-82  
 (e) Sentence. . . . . II-82  
 (f) Informing person held in contempt. . . . . II-83

**Rule 810. Procedures for rehearings, new trials, and other trials** . . . . . II-83  
 (a) In general. . . . . II-83  
 (b) Composition. . . . . II-83  
 (c) Examination of record of former proceedings. . . . . II-83  
 (d) Sentence limitations. . . . . II-84  
 (e) Definition. . . . . II-84

**Rule 811. Stipulations** . . . . . II-84  
 (a) In general. . . . . II-84  
 (b) Authority to reject. . . . . II-84  
 (c) Requirements. . . . . II-84  
 (d) Withdrawal. . . . . II-85  
 (e) Effect of stipulation. . . . . II-85  
 (f) Procedure. . . . . II-85

**Rule 812. Joint and common trials** . . . . . II-85

**Rule 813. Announcing personnel of the court-martial and accused** . . . . . II-85  
 (a) Opening sessions. . . . . II-85  
 (b) Later proceedings. . . . . II-86  
 (c) Additions, replacement, and absences of personnel. . . . . II-86

**CHAPTER IX. TRIAL PROCEDURES THROUGH FINDINGS**

**Rule 901. Opening session** . . . . . II-87  
 (a) Call to order. . . . . II-87  
 (b) Announcement of parties. . . . . II-87  
 (c) Swearing reporter and interpreter. . . . . II-87  
 (d) Counsel. . . . . II-87  
 (e) Presence of members. . . . . II-88

**Rule 902. Disqualification of military judge** . . . . . II-88  
 (a) In general. . . . . II-88  
 (b) Specific grounds. . . . . II-88

Page

(c) Definitions. . . . . II-88  
 (d) Procedure. . . . . II-89  
 (e) Waiver. . . . . II-89

**Rule 903. Accused's elections on composition of court-martial** . . . . . II-89  
 (a) Time of elections. . . . . II-89  
 (b) Form of election. . . . . II-89  
 (c) Action on election. . . . . II-89  
 (d) Right to withdraw request. . . . . II-90  
 (e) Untimely requests. . . . . II-90  
 (f) Scope. . . . . II-90

**Rule 904. Arraignment** . . . . . II-90

**Rule 905. Motions generally** . . . . . II-91  
 (a) Definitions and form. . . . . II-91  
 (b) Pretrial motions. . . . . II-91  
 (c) Burden of proof. . . . . II-91  
 (d) Ruling on motions. . . . . II-92  
 (e) Effect of failure to raise defenses or objections. . . . . II-92  
 (f) Reconsideration. . . . . II-92  
 (g) Effect of final determinations. . . . . II-92  
 (h) Written motions. . . . . II-93  
 (i) Service. . . . . II-93  
 (j) Application to convening authority. . . . . II-93  
 (k) Production of statements on motion to suppress. . . . . II-93

**Rule 906. Motions for appropriate relief** . . . . . II-93  
 (a) In general. . . . . II-93  
 (b) Grounds for appropriate relief. . . . . II-93

**Rule 907. Motions to dismiss** . . . . . II-95  
 (a) In general. . . . . II-95  
 (b) Grounds for dismissal. . . . . II-95

**Rule 908. Appeal by the United States** . . . . . II-97  
 (a) In general. . . . . II-97  
 (b) Procedure. . . . . II-97  
 (c) Appellate proceedings. . . . . II-98  
 (d) Military judge. . . . . II-98

**Rule 909. Capacity of the accused to stand trial by court-martial** . . . . . II-98  
 (a) In general. . . . . II-98  
 (b) Presumption of capacity. . . . . II-99  
 (c) Determination before referral. . . . . II-99  
 (d) Determination after referral. . . . . II-99  
 (e) Incompetence determination hearing. . . . . II-99  
 (f) Hospitalization of the accused. . . . . II-99  
 (g) Excludable delay. . . . . II-99

**Rule 910. Pleas** . . . . . II-99  
 (a) Alternatives. . . . . II-99  
 (b) Refusal to plead; irregular plea. . . . . II-100

	Page
(c) Advice to accused.	II-100
(d) Ensuring that the plea is voluntary.	II-100
(e) Determining accuracy of plea.	II-101
(f) Plea agreement inquiry.	II-101
(g) Findings.	II-101
(h) Later action.	II-101
(i) Record of proceedings.	II-102
(j) Waiver.	II-102
<b>Rule 911. Assembly of the court-martial</b>	II-102
<b>Rule 912. Challenge of selection of members; examination and challenges of members</b>	II-102
(a) Pretrial matters.	II-102
(b) Challenge of selection of members.	II-103
(c) Stating grounds for challenge.	II-103
(d) Examination of members.	II-103
(e) Evidence.	II-103
(f) Challenges and removal for cause.	II-103
(g) Peremptory challenges.	II-104
(h) Special courts-martial without a military judge.	II-105
(i) Definitions.	II-105
<b>Rule 913. Presentation of the case on the merits</b>	II-105
(a) Preliminary instructions.	II-105
(b) Opening statements.	II-106
(c) Presentation of evidence.	II-106
<b>Rule 914. Production of statements of witnesses</b>	II-107
(a) Motion for production.	II-107
(b) Production of entire statement.	II-107
(c) Production of excised statement.	II-107
(d) Recess for examination of the statement.	II-107
(e) Remedy for failure to produce statement.	II-107
(f) Definition.	II-107
<b>Rule 914A. Use of remote live testimony of a child</b>	II-107
(a) General procedures.	II-107
(b) Prohibitions.	II-108
<b>Rule 915. Mistrial</b>	II-108
(a) In general.	II-108
(b) Procedure.	II-108
(c) Effect of declaration of mistrial.	II-108
<b>Rule 916. Defenses</b>	II-108
(a) In general.	II-108
(b) Burden of proof.	II-108
(c) Justification.	II-109
(d) Obedience to orders.	II-109
(e) Self-defense.	II-109
(f) Accident.	II-110

(g) Entrapment.	II-110
(h) Coercion or duress.	II-110
(i) Inability.	II-111
(j) Ignorance or mistake of fact.	II-111
(k) Lack of mental responsibility.	II-111
(l) Not defenses generally.	II-112
<b>Rule 917. Motion for a finding of not guilty</b>	II-112
(a) In general.	II-112
(b) Form of motion.	II-112
(c) Procedure.	II-112
(d) Standard.	II-113
(e) Motion as to greater offense.	II-113
(f) Effect of ruling.	II-113
(g) Effect of denial on review.	II-113
<b>Rule 918. Findings</b>	II-113
(a) General findings.	II-113
(b) Special findings.	II-114
(c) Basis of findings.	II-114
<b>Rule 919. Argument by counsel on findings</b>	II-114
(a) In general.	II-114
(b) Contents.	II-114
(c) Waiver of objection to improper argument.	II-115
<b>Rule 920. Instructions on findings</b>	II-115
(a) In general.	II-115
(b) When given.	II-115
(c) Requests for instructions.	II-115
(d) How given.	II-115
(e) Required instructions.	II-115
(f) Waiver.	II-116
<b>Rule 921. Deliberations and voting on findings</b>	II-116
(a) In general.	II-116
(b) Deliberations.	II-116
(c) Voting.	II-116
(d) Action after findings are reached.	II-117
<b>Rule 922. Announcement of findings</b>	II-118
(a) In general.	II-118
(b) Findings by members.	II-118
(c) Findings by military judge.	II-118
(d) Erroneous announcement.	II-118
(e) Polling prohibited.	II-118
<b>Rule 923. Impeachment of findings</b>	II-118
<b>Rule 924. Reconsideration of findings</b>	II-118
(a) Time for reconsideration.	II-118
(b) Procedure.	II-118

	Page
(c) Military judge sitting alone.	II-119
<b>CHAPTER X. SENTENCING</b>	
<b>Rule 1001. Presentencing procedure</b>	II-120
(a) In general.	II-120
(b) Matter to be presented by the prosecution.	II-120
(c) Matter to be presented by the defense.	II-122
(d) Rebuttal and surrebuttal.	II-122
(e) Production of witnesses.	II-123
(f) Additional matters to be considered.	II-123
(g) Argument.	II-123
<b>Rule 1002. Sentence determination</b>	II-123
<b>Rule 1003. Punishments</b>	II-124
(a) In general.	II-124
(b) Authorized punishments.	II-124
(c) Limits on punishments.	II-126
(d) Circumstances permitting increased punishments.	II-127
<b>Rule 1004. Capital cases</b>	II-128
(a) In general.	II-128
(b) Procedure.	II-128
(c) Aggravating factors.	II-129
(d) Spying.	II-130
(e) Other penalties.	II-131
<b>Rule 1005. Instructions on sentence</b>	II-131
(a) In general.	II-131
(b) When given.	II-131
(c) Requests for instructions.	II-131
(d) How given.	II-131
(e) Required instructions.	II-131
(f) Waiver.	II-132
<b>Rule 1006. Deliberations and voting on sentence</b>	II-132
(a) In general.	II-132
(b) Deliberations.	II-132
(c) Proposal of sentences.	II-132
(d) Voting.	II-132
(e) Action after a sentence is reached.	II-133
<b>Rule 1007. Announcement of sentence</b>	II-133
(a) In general.	II-133
(b) Erroneous announcement.	II-133
(c) Polling prohibited.	II-133
<b>Rule 1008. Impeachment of sentence</b>	II-134
<b>Rule 1009. Reconsideration of sentence</b>	II-134
(a) Reconsideration.	II-134
(b) Exceptions.	II-134
(c) Clarification of sentence.	II-134

	Page
(d) Action by the convening authority.	II-134
(e) Reconsideration procedure.	II-134
<b>Rule 1010. Notice concerning post-trial and appellate rights</b>	II-135
<b>Rule 1011. Adjournment</b>	II-135
<b>CHAPTER XI. POST-TRIAL PROCEDURE</b>	
<b>Rule 1101. Report of result of trial; post-trial restraint; deferment of confinement, forfeitures and reduction in grade; waiver of Article 58b forfeitures</b>	II-136
(a) Report of the result of trial.	II-136
(b) Post-trial confinement.	II-136
(c) Deferment of confinement, forfeitures or reduction in grade.	II-136
(d) Waiving forfeitures resulting from a sentence to confinement to provide for dependent support.	II-137
<b>Rule 1102. Post-trial sessions</b>	II-138
(a) In general.	II-138
(b) Purpose.	II-138
(c) Matters not subject to post-trial sessions.	II-138
(d) When directed.	II-138
(e) Procedure.	II-138
<b>Rule 1102A. Post-trial hearing for person found not guilty only by reason of lack of mental responsibility</b>	II-139
(a) In general.	II-139
(b) Psychiatric or psychological examination and report.	II-139
(c) Post-trial hearing.	II-139
<b>Rule 1103. Preparation of record of trial</b>	II-139
(a) In general.	II-139
(b) General courts-martial.	II-139
(c) Special courts-martial.	II-140
(d) Summary courts-martial.	II-141
(e) Acquittal; courts-martial resulting in findings of not guilty only by reason of lack of mental responsibility; termination prior to findings.	II-141
(f) Loss of notes or recordings of the proceedings.	II-141
(g) Copies of the record of trial.	II-141
(h) Security classification.	II-141
(i) Examination and correction before authentication.	II-141
(j) Videotape and similar records.	II-142
<b>Rule 1104. Records of trial: Authentication; service; loss; correction; forwarding</b>	II-143
(a) Authentication.	II-143
(b) Service.	II-143
(c) Loss of record.	II-144
(d) Correction of record after authentication; certificate of correction.	II-144
(e) Forwarding.	II-145
<b>Rule 1105. Matters submitted by the accused</b>	II-145
(a) In general.	II-145
(b) Matters which may be submitted.	II-145
(c) Time periods.	II-145

Page

(d) Waiver..... II-146

**Rule 1106. Recommendation of the staff judge advocate or legal officer** ..... II-146

(a) In general. .... II-146

(b) Disqualification. .... II-146

(c) When the convening authority has no staff judge advocate. .... II-146

(d) Form and content of recommendation. .... II-146

(e) No findings of guilty; findings of not guilty only by reason of lack of mental responsibility. .... II-147

(f) Service of recommendation on defense counsel and accused; defense response. .... II-147

**Rule 1107. Action by convening authority** ..... II-148

(a) Who may take action. .... II-148

(b) General considerations. .... II-149

(c) Action on findings. .... II-150

(d) Action on the sentence. .... II-150

(e) Ordering rehearing or other trial. .... II-151

(f) Contents of action and related matters. .... II-152

(g) Incomplete, ambiguous, or erroneous action. .... II-154

(h) Service on accused. .... II-154

**Rule 1108. Suspension of execution of sentence; remission** ..... II-154

(a) In general. .... II-154

(b) Who may suspend and remit. .... II-154

(c) Conditions of suspension. .... II-154

(d) Limitations on suspension. .... II-155

(e) Termination of suspension by remission. .... II-155

**Rule 1109. Vacation of suspension of sentence** ..... II-155

(a) In general. .... II-155

(b) Timeliness. .... II-155

(c) Confinement of probationer pending vacation proceedings. .... II-155

(d) Vacation of suspended general court-martial sentence. .... II-156

(e) Vacation of a suspended special court-martial sentence wherein a bad-conduct discharge or confinement for one year was not adjudged. .... II-157

(f) Vacation of a suspended special court-martial sentence that includes a bad-conduct discharge or confinement for one year. .... II-157

(g) Vacation of a suspended summary court-martial sentence. .... II-158

**Rule 1110. Waiver or withdrawal of appellate review** ..... II-158

(a) In general. .... II-158

(b) Right to counsel. .... II-158

(c) Compulsion, coercion, inducement prohibited. .... II-159

(d) Form of waiver or withdrawal. .... II-159

(e) To whom submitted. .... II-159

(f) Time limit. .... II-159

(g) Effect of waiver or withdrawal; substantial compliance required. .... II-159

**Rule 1111. Disposition of the record of trial after action** ..... II-160

(a) General courts-martial. .... II-160

(b) Special courts-martial. .... II-160

(c) Summary courts-martial. .... II-160

Page

**Rule 1112. Review by a judge advocate** ..... II-160

(a) In general. .... II-160

(b) Exception. .... II-160

(c) Disqualification. .... II-160

(d) Form and content of review. .... II-160

(e) Forwarding to officer exercising general court-martial jurisdiction. .... II-161

(f) Action by officer exercising general court-martial jurisdiction. .... II-161

(g) Forwarding following review under this rule. .... II-161

**Rule 1113. Execution of sentences** ..... II-161

(a) In general. .... II-161

(b) Punishments which the convening authority may order executed in the initial action. .... II-162

(c) Punishments which the convening authority may not order executed in the initial action. .... II-162

(d) Other considerations concerning the execution of certain sentences. .... II-162

**Rule 1114. Promulgating orders** ..... II-164

(a) In general. .... II-164

(b) By whom issued. .... II-164

(c) Contents. .... II-164

(d) Orders containing classified information. .... II-164

(e) Authentication. .... II-164

(f) Distribution. .... II-164

**CHAPTER XII. APPEALS AND REVIEW**

**Rule 1201. Action by the Judge Advocate General** ..... II-165

(a) Cases required to be referred to a Court of Criminal Appeals. .... II-165

(b) Cases reviewed by the Judge Advocate General. .... II-165

(c) Remission and suspension. .... II-166

**Rule 1202. Appellate counsel** ..... II-166

(a) In general. .... II-166

(b) Duties. .... II-166

**Rule 1203. Review by a Court of Criminal Appeals** ..... II-167

(a) In general. .... II-167

(b) Cases reviewed by a Court of Criminal Appeals. .... II-167

(c) Action on cases reviewed by a Court of Criminal Appeals. .... II-167

(d) Notification to accused. .... II-168

(e) Cases not reviewed by the Court of Appeals for the Armed Forces. .... II-169

(f) Scope. .... II-169

**Rule 1204. Review by the Court of Appeals for the Armed Forces** ..... II-169

(a) Cases reviewed by the Court of Appeals for the Armed Forces. .... II-169

(b) Petition by the accused for review by the Court of Appeals for the Armed Forces. .... II-169

(c) Action on decision by the Court of Appeals for the Armed Forces. .... II-170

**Rule 1205. Review by the Supreme Court** ..... II-170

(a) Cases subject to review by the Supreme Court. .... II-170

(b) Action by the Supreme Court. .... II-171

**Rule 1206. Powers and responsibilities of the Secretary** ..... II-171

(a) Sentences requiring approval by the Secretary. .... II-171

Page

(b) Remission and suspension. .... II-171

**Rule 1207. Sentences requiring approval by the President** ..... II-171

**Rule 1208. Restoration** ..... II-171

(a) New trial. .... II-171

(b) Other cases. .... II-171

**Rule 1209. Finality of courts-martial** ..... II-172

(a) When a conviction is final. .... II-172

(b) Effect of finality. .... II-172

**Rule 1210. New trial** ..... II-172

(a) In general. .... II-172

(b) Who may petition. .... II-172

(c) Form of petition. .... II-172

(d) Effect of petition. .... II-173

(e) Who may act on petition. .... II-173

(f) Grounds for new trial. .... II-173

(g) Action on the petition. .... II-173

(h) Action when new trial is granted. .... II-174

**CHAPTER XIII. SUMMARY COURTS-MARTIAL**

**Rule 1301. Summary courts-martial generally** ..... II-175

(a) Composition. .... II-175

(b) Function. .... II-175

(c) Jurisdiction. .... II-175

(d) Punishments. .... II-175

(e) Counsel. .... II-175

(f) Power to obtain witnesses and evidence. .... II-176

(g) Secretarial limitations. .... II-176

**Rule 1302. Convening a summary court-martial** ..... II-176

(a) Who may convene summary courts-martial. .... II-176

(b) When convening authority is accuser. .... II-176

(c) Procedure. .... II-176

**Rule 1303. Right to object to trial by summary court-martial** ..... II-176

**Rule 1304. Trial procedure** ..... II-176

(a) Pretrial duties. .... II-176

(b) Summary court-martial procedure. .... II-177

**Rule 1305. Record of trial** ..... II-178

(a) In general. .... II-178

(b) Contents. .... II-178

(c) Authentication. .... II-179

(d) Forwarding copies of the record. .... II-179

**Rule 1306. Post-trial procedure** ..... II-179

(a) Matters submitted by the accused. .... II-179

(b) Convening authority's action. .... II-179

(c) Review by a judge advocate. .... II-179

Page

(d) Review by the Judge Advocate General. .... II-179

**PART III. MILITARY RULES OF EVIDENCE**

**SECTION I. GENERAL PROVISIONS**

**Rule 101. Scope** ..... III-1

(a) Applicability. .... III-1

(b) Secondary Sources. .... III-1

(c) Rule of construction. .... III-1

**Rule 102. Purpose and construction** ..... III-1

**Rule 103. Ruling on evidence** ..... III-1

(a) Effect of erroneous ruling. .... III-1

(b) Record of offer and ruling. .... III-1

(c) Hearing of members. .... III-1

(d) Plain error. .... III-1

**Rule 104. Preliminary questions** ..... III-1

(a) Questions of admissibility generally. .... III-1

(b) Relevancy conditioned on fact. .... III-1

(c) Hearing of members. .... III-2

(d) Testimony by accused. .... III-2

(e) Weight and credibility. .... III-2

**Rule 105. Limited admissibility** ..... III-2

**Rule 106. Remainder of or related writings or recorded statements** ..... III-2

**SECTION II. JUDICIAL NOTICE**

**Rule 201. Judicial notice of adjudicative facts** ..... III-2

(a) Scope of rule. .... III-2

(b) Kinds of facts. .... III-2

(c) When discretionary. .... III-2

(d) When mandatory. .... III-2

(e) Opportunity to be heard. .... III-2

(f) Time of taking notice. .... III-2

(g) Instructing members. .... III-2

**Rule 201A. Judicial notice of law** ..... III-2

(a) Domestic law. .... III-2

(b) Foreign law. .... III-2

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

**Rule 301. Privilege concerning compulsory self-incrimination** ..... III-3

(a) General rule. .... III-3

(b) Standing. .... III-3

(c) Exercise of the privilege. .... III-3

(d) Waiver by a witness. .... III-3

(e) Waiver by the accused. .... III-3

Page

(f) Effect of claiming the privilege. . . . . III-3  
 (g) Instructions. . . . . III-4

**Rule 302. Privilege concerning mental examination of an accused** . . . . . III-4  
 (a) General rule. . . . . III-4  
 (b) Exceptions. . . . . III-4  
 (c) Release of evidence. . . . . III-4  
 (d) Noncompliance by the accused. . . . . III-4  
 (e) Procedure. . . . . III-4

**Rule 303. Degradng questions** . . . . . III-4

**Rule 304. Confessions and admissions** . . . . . III-4  
 (a) General rule. . . . . III-4  
 (b) Exceptions. . . . . III-4  
 (c) Definitions. . . . . III-5  
 (d) Procedure. . . . . III-5  
 (e) Burden of proof. . . . . III-5  
 (f) Defense evidence. . . . . III-6  
 (g) Corroboration. . . . . III-6  
 (h) Miscellaneous. . . . . III-6

**Rule 305. Warnings about rights** . . . . . III-6  
 (a) General rule. . . . . III-6  
 (b) Definitions. . . . . III-6  
 (c) Warnings concerning the accusation, right to remain silent, and use of statements. . . . . III-7  
 (d) Counsel rights and warnings. . . . . III-7  
 (e) Presence of Counsel. . . . . III-7  
 (f) Exercise of rights. . . . . III-7  
 (g) Waiver. . . . . III-7  
 (h) Nonmilitary interrogations. . . . . III-8

**Rule 306. Statements by one of several accused** . . . . . III-8

**Rule 311. Evidence obtained from unlawful searches and seizures** . . . . . III-8  
 (a) General rule. . . . . III-8  
 (b) Exceptions. . . . . III-8  
 (c) Nature of search or seizure. . . . . III-9  
 (d) Motions to suppress and objections. . . . . III-9  
 (e) Burden of proof. . . . . III-9  
 (f) Defense evidence. . . . . III-10  
 (g) Scope of motions and objections challenging probable cause. . . . . III-10  
 (h) Objections to evidence seized unlawfully. . . . . III-10  
 (i) Effect of guilty plea. . . . . III-10

**Rule 312. Body views and intrusions** . . . . . III-10  
 (a) General rule. . . . . III-11  
 (b) Visual examination of the body. . . . . III-11  
 (c) Intrusion into body cavities. . . . . III-11  
 (d) Extraction of body fluids. . . . . III-11  
 (e) Other intrusive searches. . . . . III-11  
 (f) Intrusions for valid medical purposes. . . . . III-11

Page

(g) Medical qualifications. . . . . III-11

**Rule 313. Inspections and inventories in the armed forces** . . . . . III-12  
 (a) General rule. . . . . III-12  
 (b) Inspections. . . . . III-12  
 (c) Inventories. . . . . III-12

**Rule 314. Searches not requiring probable cause** . . . . . III-12  
 (a) General rule. . . . . III-12  
 (b) Border searches. . . . . III-12  
 (c) Searches upon entry to or exit from United States installations, aircraft, and vessels abroad. . . . . III-12  
 (d) Searches of government property. . . . . III-12  
 (e) Consent searches. . . . . III-13  
 (f) Searches incident to a lawful stop. . . . . III-13  
 (g) Searches incident to a lawful apprehension. . . . . III-13  
 (h) Searches within jails, confinement facilities, or similar facilities. . . . . III-13  
 (i) Emergency searches to save life or for related purposes. . . . . III-14  
 (j) Searches of open fields or woodlands. . . . . III-14  
 (k) Other searches. . . . . III-14

**Rule 315. Probable cause searches** . . . . . III-14  
 (a) General rule. . . . . III-14  
 (b) Definitions. . . . . III-14  
 (c) Scope of authorization. . . . . III-14  
 (d) Power to authorize. . . . . III-14  
 (e) Power to search. . . . . III-15  
 (f) Basis for Search authorizations. . . . . III-15  
 (g) Exigencies. . . . . III-15  
 (h) Execution. . . . . III-15

**Rule 316. Seizures** . . . . . III-16  
 (a) General rule. . . . . III-16  
 (b) Seizure of property. . . . . III-16  
 (c) Apprehension. . . . . III-16  
 (d) Seizure of property or evidence. . . . . III-16  
 (e) Power to seize. . . . . III-16  
 (f) Other seizures. . . . . III-16

**Rule 317. Interception of wire and oral communications** . . . . . III-16  
 (a) General rule. . . . . III-16  
 (b) Authorization for judicial applications in the United States. . . . . III-16  
 (c) Regulations. . . . . III-16

**Rule 321. Eyewitness identification** . . . . . III-17  
 (a) General rule. . . . . III-17  
 (b) Definition of "unlawful". . . . . III-17  
 (c) Motions to suppress and objections. . . . . III-17  
 (d) Burden of proof. . . . . III-18  
 (e) Defense evidence. . . . . III-18  
 (f) Rulings. . . . . III-18

Page

(g) Effect of guilty pleas. . . . . III-18

**SECTION IV RELEVANCY AND ITS LIMITS** . . . . .

**Rule 401. Definition of "relevant evidence"** . . . . . III-18

**Rule 402. Relevant evidence general admissible; irrelevant evidence inadmissible** . . . . . III-19

**Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time** . . . . . III-19

**Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes** . . . . . III-19  
 (a) Character evidence generally. . . . . III-19  
 (b) Other crimes, wrongs, or acts. . . . . III-19

**Rule 405. Methods of proving character** . . . . . III-19  
 (a) Reputation or opinion. . . . . III-19  
 (b) Specific instances of conduct. . . . . III-19  
 (c) Affidavits. . . . . III-19  
 (d) Definitions. . . . . III-19

**Rule 406. Habit; routine practice** . . . . . III-19

**Rule 407. Subsequent remedial measures** . . . . . III-20

**Rule 408. Compromise and offer to compromise** . . . . . III-20

**Rule 409. Payment of medical and similar expenses** . . . . . III-20

**Rule 410. Inadmissibility of pleas, plea discussions, and related statements** . . . . . III-20  
 (a) In general. . . . . III-20  
 (b) Definitions. . . . . III-20

**Rule 411. Liability insurance** . . . . . III-20

**Rule 412. Nonconsensual sexual offenses; relevance of victim's behavior or sexual predisposition** . . . . . III-20  
 (a) Evidence generally inadmissible. . . . . III-20  
 (b) Exceptions. . . . . III-21  
 (c) Procedure to determine admissibility. . . . . III-21

**Rule 413. Evidence of similar crimes in sexual assault cases** . . . . . III-21

**Rule 414. Evidence of similar crimes in child molestation cases** . . . . . III-22

**SECTION V PRIVILEGES** . . . . .

**Rule 501. General rule** . . . . . III-23

**Rule 502. Lawyer-client privilege** . . . . . III-23  
 (a) General rule of privilege. . . . . III-23  
 (b) Definitions. . . . . III-23  
 (c) Who may claim the privilege. . . . . III-24  
 (d) Exceptions. . . . . III-24

**Rule 503. Communications to clergy** . . . . . III-24  
 (a) General rule of privilege. . . . . III-24  
 (b) Definitions. . . . . III-24

Page

(c) Who may claim the privilege. . . . . III-24

**Rule 504. Husband-wife privilege** . . . . . III-24  
 (a) Spousal incapacity. . . . . III-24  
 (b) Confidential communication made during marriage. . . . . III-24  
 (c) Exceptions. . . . . III-25

**Rule 505. Classified information** . . . . . III-25  
 (a) General rule of privilege. . . . . III-25  
 (b) Definitions. . . . . III-25  
 (c) Who may claim the privilege. . . . . III-25  
 (d) Action prior to referral of charges. . . . . III-25  
 (e) Pretrial session. . . . . III-26  
 (f) Action after referral of charges. . . . . III-26  
 (g) Disclosure of classified information to the accused. . . . . III-26  
 (h) Notice of the accused's intention to disclose classified information. . . . . III-27  
 (i) In camera proceedings for cases involving classified information. . . . . III-27  
 (j) Introduction of classified information. . . . . III-28  
 (k) Security procedures to safeguard against compromise of classified information disclosed to courts-martial. . . . . III-29

**Rule 506. Government information other than classified information** . . . . . III-29  
 (a) General rule of privilege. . . . . III-29  
 (b) Scope. . . . . III-29  
 (c) Who may claim the privilege. . . . . III-29  
 (d) Action prior to referral of charges. . . . . III-29  
 (e) Pretrial session. . . . . III-29  
 (f) Action after motion for disclosure of information. . . . . III-29  
 (g) Disclosure of government information to the accused. . . . . III-30  
 (h) Prohibition against disclosure. . . . . III-30  
 (i) In camera proceedings. . . . . III-30  
 (j) Appeals of orders and rulings. . . . . III-31  
 (k) Introduction of government information subject to a claim of privilege. . . . . III-31  
 (l) Procedures to safeguard against compromise of government information disclosed to courts-martial. . . . . III-31

**Rule 507. Identity of informant** . . . . . III-31  
 (a) Rule of privilege. . . . . III-31  
 (b) Who may claim the privilege. . . . . III-32  
 (c) Exceptions. . . . . III-32  
 (d) Procedures. . . . . III-32

**Rule 508. Political vote** . . . . . III-32

**Rule 509. Deliberations of courts and juries** . . . . . III-32

**Rule 510. Waiver of privilege by voluntary disclosure** . . . . . III-32

**Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege** . . . . . III-33

**Rule 512. Comment upon or inference from claim of privilege; instruction** . . . . . III-33  
 (a) Comment or inference not permitted. . . . . III-33  
 (b) Claiming privilege without knowledge of members. . . . . III-33

	Page
(c) Instruction. ....	III-33
<b>Rule 513. Psychotherapist-patient privilege</b> .....	III-33
(a) General rule of privilege. ....	III-33
(b) Definitions. ....	III-33
(c) Who may claim the privilege. ....	III-33
(d) Exceptions. ....	III-34
(e) Procedure to determine admissibility of patient records or communications. ....	III-34
<b>SECTION VI WITNESSES</b>	
<b>Rule 601. General rule of competency</b> .....	III-34
<b>Rule 602. Lack of personal knowledge</b> .....	III-34
<b>Rule 603. Oath or affirmation</b> .....	III-35
<b>Rule 604. Interpreters</b> .....	III-35
<b>Rule 605. Competency of military judge as witness</b> .....	III-35
<b>Rule 606. Competency of court member as witness</b> .....	III-35
(a) At the court-martial. ....	III-35
(b) Inquiry into validity of findings or sentence. ....	III-35
<b>Rule 607. Who may impeach</b> .....	III-35
<b>Rule 608. Evidence of character, conduct, and bias of witness</b> .....	III-35
(a) Opinion and reputation evidence of character. ....	III-35
(b) Specific instances of conduct. ....	III-35
(c) Evidence of bias. ....	III-35
<b>Rule 609. Impeachment by evidence of conviction of crime</b> .....	III-36
(a) General rule. ....	III-36
(b) Time limit. ....	III-36
(c) Effect of pardon, annulment, or certificate of rehabilitation. ....	III-36
(d) Juvenile adjudications. ....	III-36
(e) Pendency of appeal. ....	III-36
(f) Definition. ....	III-36
<b>Rule 610. Religious beliefs or opinions</b> .....	III-36
<b>Rule 611. Mode and order of interrogation and presentation</b> .....	III-36
(a) Control by the military judge. ....	III-36
(b) Scope of cross-examination. ....	III-36
(c) Leading questions. ....	III-36
(d) Remote live testimony of a child. ....	III-37
<b>Rule 612. Writing used to refresh memory</b> .....	III-37
<b>Rule 613. Prior statements of witnesses</b> .....	III-37
(a) Examining witness concerning prior statement. ....	III-37
(b) Extrinsic evidence of prior inconsistent statement of witness. ....	III-37
<b>Rule 614. Calling and interrogation of witnesses by the court-martial</b> .....	III-38
(a) Calling by the court-martial. ....	III-38
(b) Interrogation by the court-martial. ....	III-38
(c) Objections. ....	III-38

<b>Rule 615. Exclusion of witnesses</b> .....	III-38
<b>SECTION VII OPINIONS AND EXPERT TESTIMONY</b>	
<b>Rule 701. Opinion testimony by lay witnesses</b> .....	III-38
<b>Rule 702. Testimony by experts</b> .....	III-38
<b>Rule 703. Bases of opinion testimony by experts</b> .....	III-38
<b>Rule 704. Opinion on ultimate issue</b> .....	III-38
<b>Rule 705. Disclosure of facts or data underlying expert opinion</b> .....	III-39
<b>Rule 706. Court appointed experts</b> .....	III-39
(a) Appointment and compensation. ....	III-39
(b) Disclosure of employment. ....	III-39
(c) Accused's experts of own selection. ....	III-39
<b>Rule 707. Polygraph Examinations</b> .....	III-39
<b>SECTION VIII HEARSAY</b>	
<b>Rule 801. Definitions</b> .....	III-39
(a) Statement. ....	III-39
(b) Declarant. ....	III-39
(c) Hearsay. ....	III-39
(d) Statements which are not hearsay. ....	III-39
<b>Rule 802. Hearsay rule</b> .....	III-39
<b>Rule 803. Hearsay exceptions; availability of declarant immaterial</b> .....	III-39
(1) Present sense impression. ....	III-40
(2) Excited utterance. ....	III-40
(3) Then existing mental, emotional, or physical condition. ....	III-40
(4) Statements for purposes of medical diagnosis or treatment. ....	III-40
(5) Recorded recollection. ....	III-40
(6) Records of regularly conducted activity. ....	III-40
(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). ....	III-40
(8) Public records and reports. ....	III-40
(9) Records of vital statistics. ....	III-41
(10) Absence of public record or entry. ....	III-41
(11) Records of religious organizations. ....	III-41
(12) Marriage, baptismal, and similar certificates. ....	III-41
(13) Family records. ....	III-41
(14) Records of documents affecting an interest in property. ....	III-41
(15) Statements in documents affecting an interest in property. ....	III-41
(16) Statements in ancient documents. ....	III-41
(17) Market reports, commercial publications. ....	III-41
(18) Learned treatises. ....	III-41
(19) Reputation concerning personal or family history. ....	III-41
(20) Reputation concerning boundaries or general history. ....	III-41
(21) Reputation as to character. ....	III-41
(22) Judgment of previous conviction. ....	III-41
(23) Judgment as to personal, family or general history, or boundaries. ....	III-42

	Page
(24) Other exceptions. ....	III-42
<b>Rule 804. Hearsay exceptions; declarant unavailable</b> .....	III-42
(a) Definitions of unavailability. ....	III-42
(b) Hearsay exceptions. ....	III-42
<b>Rule 805. Hearsay within hearsay</b> .....	III-43
<b>Rule 806. Attacking and supporting credibility of declarant</b> .....	III-43
<b>Rule 807. Residual exception.</b> .....	III-43
<b>SECTION IX AUTHENTICATION AND IDENTIFICATION</b>	
<b>Rule 901. Requirement of authentication or identification</b> .....	III-43
(a) General provision. ....	III-43
(b) Illustrations. ....	III-43
<b>Rule 902. Self-authentication</b> .....	III-44
(1) Domestic public documents under seal. ....	III-44
(2) Domestic public documents not under seal. ....	III-44
(3) Foreign public documents. ....	III-44
(4) Certified copies of public records. ....	III-44
(4a) Documents or records of the United States accompanied by attesting certificates. ....	III-44
(5) Official publications. ....	III-44
(6) Newspapers and periodicals. ....	III-44
(7) Trade inscriptions and the like. ....	III-44
(8) Acknowledged documents. ....	III-44
(9) Commercial paper and related documents. ....	III-45
(10) Presumptions under Acts of Congress and regulations. ....	III-45
(11) Certified domestic records of regularly conducted activity. ....	III-45
<b>Rule 903. Subscribing witness' testimony unnecessary</b> .....	III-45
<b>SECTION X CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS</b>	
<b>Rule 1001. Definitions</b> .....	III-45
(1) Writings and recordings. ....	III-45
(2) Photographs. ....	III-45
(3) Original. ....	III-45
(4) Duplicate. ....	III-45
<b>Rule 1002. Requirement of an original</b> .....	III-45
<b>Rule 1003. Admissibility of duplicates</b> .....	III-45
<b>Rule 1004. Admissibility of other evidence of contents</b> .....	III-45
(1) Originals lost or destroyed. ....	III-45
(2) Original not obtainable. ....	III-45
(3) Original in possession of opponent. ....	III-45
(4) Collateral matters. ....	III-46
<b>Rule 1005. Public records</b> .....	III-46
<b>Rule 1006. Summaries</b> .....	III-46
<b>Rule 1007. Testimony or written admission of party</b> .....	III-46

<b>Rule 1008. Functions of military judge and members</b> .....	III-46
<b>SECTION XI MISCELLANEOUS RULES</b>	
<b>Rule 1101. Applicability of rules</b> .....	III-46
(a) Rules applicable. ....	III-46
(b) Rules of privilege. ....	III-46
(c) Rules relaxed. ....	III-46
(d) Rules inapplicable. ....	III-46
<b>Rule 1102. Amendments.</b> .....	III-46
<b>Rule 1103. Title</b> .....	III-47
<b>PART IV PUNITIVE ARTICLES</b>	
<b>1. Article 77—Principals</b> .....	IV-1
a. Text. ....	IV-1
b. Explanation. ....	IV-1
<b>2. Article 78—Accessory after the fact</b> .....	IV-2
a. Text. ....	IV-2
b. Elements. ....	IV-2
c. Explanation. ....	IV-2
d. Lesser included offense. ....	IV-3
e. Maximum punishment. ....	IV-3
f. Sample specification. ....	IV-3
<b>3. Article 79—Conviction of lesser included offenses</b> .....	IV-3
a. Text. ....	IV-3
b. Explanation. ....	IV-3
<b>4. Article 80—Attempts</b> .....	IV-4
a. Text. ....	IV-4
b. Elements. ....	IV-4
c. Explanation. ....	IV-4
d. Lesser included offenses. ....	IV-5
e. Maximum punishment. ....	IV-5
f. Sample specification. ....	IV-5
<b>5. Article 81—Conspiracy</b> .....	IV-5
a. Text. ....	IV-5
b. Elements. ....	IV-5
c. Explanation. ....	IV-5
d. Lesser included offense. ....	IV-6
e. Maximum punishment. ....	IV-6
f. Sample specification. ....	IV-6
<b>6. Article 82—Solicitation</b> .....	IV-7
a. Text. ....	IV-7
b. Elements. ....	IV-7
c. Explanation. ....	IV-7
d. Lesser included offense. ....	IV-7
e. Maximum punishment. ....	IV-7

	Page
f. Sample specifications.	IV-7
<b>7. Article 83—Fraudulent enlistment, appointment, or separation</b>	IV-8
a. Text.	IV-8
b. Elements.	IV-8
c. Explanation.	IV-8
d. Lesser included offense.	IV-9
e. Maximum punishment.	IV-9
f. Sample specifications.	IV-9
<b>8. Article 84—Effecting unlawful enlistment, appointment, or separation</b>	IV-9
a. Text.	IV-9
b. Elements.	IV-9
c. Explanation.	IV-9
d. Lesser included offense.	IV-9
e. Maximum punishment.	IV-9
f. Sample specification.	IV-9
<b>9. Article 85—Desertion</b>	IV-9
a. Text.	IV-9
b. Elements.	IV-10
c. Explanation.	IV-10
d. Lesser included offense.	IV-12
e. Maximum punishment.	IV-12
f. Sample specifications.	IV-12
<b>10. Article 86—Absence without leave</b>	IV-12
a. Text.	IV-12
b. Elements.	IV-12
c. Explanation.	IV-13
d. Lesser included offense.	IV-15
e. Maximum punishment.	IV-15
f. Sample specifications.	IV-15
<b>11. Article 87—Missing movement</b>	IV-15
a. Text.	IV-15
b. Elements.	IV-15
c. Explanation.	IV-15
d. Lesser included offenses.	IV-16
e. Maximum punishment.	IV-16
f. Sample specification.	IV-16
<b>12. Article 88—Contempt toward officials</b>	IV-16
a. Text.	IV-16
b. Elements.	IV-16
c. Explanation.	IV-17
d. Lesser included offense.	IV-17
e. Maximum punishment.	IV-17
f. Sample specification.	IV-17
<b>13. Article 89—Disrespect toward a superior commissioned officer</b>	IV-17
a. Text.	IV-17

xxv

b. Elements.	IV-17
c. Explanation.	IV-17
d. Lesser included offenses.	IV-18
e. Maximum punishment.	IV-18
f. Sample specification.	IV-18
<b>14. Article 90—Assaulting or willfully disobeying superior commissioned officer</b>	IV-18
a. Text.	IV-18
b. Elements.	IV-18
c. Explanation.	IV-19
d. Lesser included offenses.	IV-20
e. Maximum punishment.	IV-20
f. Sample specifications.	IV-20
<b>15. Article 91—Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer</b>	IV-21
a. Text.	IV-21
b. Elements.	IV-21
c. Explanation.	IV-22
d. Lesser included offenses.	IV-22
e. Maximum punishment.	IV-22
f. Sample specifications.	IV-23
<b>16. Article 92—Failure to obey order or regulation</b>	IV-23
a. Text.	IV-23
b. Elements.	IV-23
c. Explanation.	IV-23
d. Lesser included offense.	IV-24
e. Maximum punishment.	IV-24
f. Sample specifications.	IV-25
<b>17. Article 93—Cruelty and maltreatment</b>	IV-25
a. Text.	IV-25
b. Elements.	IV-25
c. Explanation.	IV-25
d. Lesser included offense.	IV-26
e. Maximum punishment.	IV-26
f. Sample specification.	IV-26
<b>18. Article 94—Mutiny and sedition</b>	IV-26
a. Text.	IV-26
b. Elements.	IV-26
c. Explanation.	IV-26
d. Lesser included offenses.	IV-27
e. Maximum punishment.	IV-27
f. Sample specifications.	IV-27
<b>19. Article 95—Resistance, flight, breach of arrest, and escape</b>	IV-28
a. Text.	IV-28
b. Elements.	IV-28
c. Explanation.	IV-29
d. Lesser included offenses.	IV-30

xxvi

	Page
e. Maximum punishment.	IV-30
f. Sample specifications.	IV-30
<b>20. Article 96—Releasing prisoner without proper authority</b>	IV-30
a. Text.	IV-31
b. Elements.	IV-31
c. Explanation.	IV-31
d. Lesser included offenses.	IV-31
e. Maximum punishment.	IV-31
f. Sample specifications.	IV-31
<b>21. Article 97—Unlawful detention</b>	IV-32
a. Text.	IV-32
b. Elements.	IV-32
c. Explanation.	IV-32
d. Lesser included offense.	IV-32
e. Maximum punishment.	IV-32
f. Sample specification.	IV-32
<b>22. Article 98—Noncompliance with procedural rules</b>	IV-32
a. Text.	IV-32
b. Elements.	IV-32
c. Explanation.	IV-32
d. Lesser included offense.	IV-33
e. Maximum punishment.	IV-33
f. Sample specifications.	IV-33
<b>23. Article 99—Misbehavior before the enemy</b>	IV-33
a. Text.	IV-33
b. Elements.	IV-33
c. Explanation.	IV-34
d. Lesser included offenses.	IV-35
e. Maximum punishment.	IV-36
f. Sample specifications.	IV-36
<b>24. Article 100—Subordinate compelling surrender</b>	IV-36
a. Text.	IV-36
b. Elements.	IV-37
c. Explanation.	IV-37
d. Lesser included offense.	IV-37
e. Maximum punishment.	IV-37
f. Sample specifications.	IV-37
<b>25. Article 101—Improper use of countersign</b>	IV-38
a. Text.	IV-38
b. Elements.	IV-38
c. Explanation.	IV-38
d. Lesser included offense.	IV-38
e. Maximum punishment.	IV-38
f. Sample specifications.	IV-38
<b>26. Article 102—Forcing a safeguard</b>	IV-38

xxvii

	Page
a. Text.	IV-39
b. Elements.	IV-39
c. Explanation.	IV-39
d. Lesser included offense.	IV-39
e. Maximum punishment.	IV-39
f. Sample specification.	IV-39
<b>27. Article 103—Captured or abandoned property</b>	IV-39
a. Text.	IV-39
b. Elements.	IV-39
c. Explanation.	IV-40
d. Lesser included offense.	IV-40
e. Maximum punishment.	IV-40
f. Sample specifications.	IV-40
<b>28. Article 104—Aiding the enemy</b>	IV-41
a. Text.	IV-41
b. Elements.	IV-41
c. Explanation.	IV-41
d. Lesser included offense.	IV-42
e. Maximum punishment.	IV-42
f. Sample specifications.	IV-42
<b>29. Article 105—Misconduct as a prisoner</b>	IV-42
a. Text.	IV-42
b. Elements.	IV-42
c. Explanation.	IV-43
d. Lesser included offense.	IV-43
e. Maximum punishment.	IV-43
f. Sample specifications.	IV-43
<b>30. Article 106—Spies</b>	IV-43
a. Text.	IV-43
b. Elements.	IV-44
c. Explanation.	IV-44
d. Lesser included offenses.	IV-44
e. Mandatory punishment.	IV-44
f. Sample specification.	IV-44
<b>30a. Article 106a—Espionage</b>	IV-44
a. Text.	IV-44
b. Elements.	IV-45
c. Explanation.	IV-46
d. Lesser included offense.	IV-46
e. Maximum punishment.	IV-46
f. Sample specification.	IV-46
<b>31. Article 107—False official statements</b>	IV-46
a. Text.	IV-46
b. Elements.	IV-46
c. Explanation.	IV-46
d. Lesser included offense.	IV-47

xxviii

	Page
e. Maximum punishment.	IV-47
f. Sample specification.	IV-47
<b>32. Article 108—Military property of the United States—sale, loss, damage, destruction, or wrongful disposition</b>	IV-47
a. Text.	IV-47
b. Elements.	IV-47
c. Explanation.	IV-47
d. Lesser included offenses.	IV-48
e. Maximum punishment.	IV-48
f. Sample specifications.	IV-49
<b>33. Article 109—Property other than military property of the United States—waste, spoilage, or destruction</b>	IV-49
a. Text.	IV-49
b. Elements.	IV-49
c. Explanation.	IV-49
d. Lesser included offense.	IV-50
e. Maximum punishment.	IV-50
f. Sample specification.	IV-50
<b>34. Article 110—Improper hazarding of vessel</b>	IV-50
a. Text.	IV-50
b. Elements.	IV-50
c. Explanation.	IV-50
d. Lesser included offenses.	IV-51
e. Maximum punishment.	IV-51
f. Sample specifications.	IV-51
<b>35. Article 111—Drunken or reckless operation of vehicle, aircraft, or vessel</b>	IV-52
a. Text.	IV-52
b. Elements.	IV-52
c. Explanation.	IV-52
d. Lesser included offense.	IV-53
e. Maximum punishment.	IV-54
f. Sample specification.	IV-54
<b>36. Article 112—Drunk on duty</b>	IV-54
a. Text.	IV-54
b. Elements.	IV-54
c. Explanation.	IV-54
d. Lesser included offense.	IV-54
e. Maximum punishment.	IV-54
f. Sample specification.	IV-54
<b>37. Article 112a—Wrongful use, possession, etc., of controlled substances</b>	IV-55
a. Text.	IV-55
b. Elements.	IV-55
c. Explanation.	IV-55
d. Lesser included offenses.	IV-57
e. Maximum punishments.	IV-57

xxix

	Page
f. Sample specifications.	IV-57
<b>38. Article 113—Misbehavior of sentinel or lookout</b>	IV-58
a. Text.	IV-58
b. Elements.	IV-58
c. Explanation.	IV-58
d. Lesser included offenses.	IV-59
e. Maximum punishment.	IV-59
f. Sample specification.	IV-59
<b>39. Article 114—Dueling</b>	IV-59
a. Text.	IV-59
b. Elements.	IV-59
c. Explanation.	IV-59
d. Lesser included offense.	IV-59
e. Maximum punishment.	IV-59
f. Sample specifications.	IV-60
<b>40. Article 115—Malingering</b>	IV-60
a. Text.	IV-60
b. Elements.	IV-60
c. Explanation.	IV-60
d. Lesser included offenses.	IV-60
e. Maximum punishment.	IV-60
f. Sample specification.	IV-61
<b>41. Article 116—Riot or breach of peace</b>	IV-61
a. Text.	IV-61
b. Elements.	IV-61
c. Explanation.	IV-61
d. Lesser included offenses.	IV-61
e. Maximum punishment.	IV-62
f. Sample specifications.	IV-62
<b>42. Article 117—Provoking speeches or gestures</b>	IV-62
a. Text.	IV-62
b. Elements.	IV-62
c. Explanation.	IV-62
d. Lesser included offenses.	IV-62
e. Maximum punishment.	IV-62
f. Sample specification.	IV-62
<b>43. Article 118—Murder</b>	IV-62
a. Text.	IV-62
b. Elements.	IV-62
c. Explanation.	IV-63
d. Lesser included offenses.	IV-64
e. Maximum punishment.	IV-64
f. Sample specification.	IV-64
<b>44. Article 119—Manslaughter</b>	IV-64
a. Text.	IV-64

xxx

	Page
b. Elements.	IV-65
c. Explanation.	IV-65
d. Lesser included offenses.	IV-65
e. Maximum punishment.	IV-66
f. Sample specifications.	IV-66
<b>44a. Article 119a—Death or injury of an unborn child</b>	IV-66
a. Text.	IV-66
<b>45. Article 120—Rape and carnal knowledge</b>	IV-66
a. Text.	IV-66
b. Elements.	IV-67
c. Explanation.	IV-67
d. Lesser included offenses.	IV-67
e. Maximum punishment.	IV-68
f. Sample specifications.	IV-68
<b>46. Article 121—Larceny and wrongful appropriation</b>	IV-68
a. Text.	IV-68
b. Elements.	IV-68
c. Explanation.	IV-68
d. Lesser included offenses.	IV-72
e. Maximum punishment.	IV-72
f. Sample specifications.	IV-72
<b>47. Article 122—Robbery</b>	IV-72
a. Text.	IV-72
b. Elements.	IV-72
c. Explanation.	IV-73
d. Lesser included offenses.	IV-73
e. Maximum punishment.	IV-73
f. Sample specifications.	IV-74
<b>48. Article 123—Forgery</b>	IV-74
a. Text.	IV-74
b. Elements.	IV-74
c. Explanation.	IV-74
d. Lesser included offense.	IV-75
e. Maximum punishment.	IV-75
f. Sample specifications.	IV-75
<b>49. Article 123a—Making, drawing, or uttering check, draft, or order without sufficient funds</b>	IV-76
a. Text.	IV-76
b. Elements.	IV-76
c. Explanation.	IV-76
d. Lesser included offenses.	IV-78
e. Maximum punishment.	IV-78
f. Sample specifications.	IV-78
<b>50. Article 124—Maiming</b>	IV-78
a. Text.	IV-78

xxxii

	Page
b. Elements.	IV-79
c. Explanation.	IV-79
d. Lesser included offenses.	IV-79
e. Maximum punishment.	IV-79
f. Sample specification.	IV-79
<b>51. Article 125—Sodomy</b>	IV-79
a. Text.	IV-79
b. Elements.	IV-79
c. Explanation.	IV-79
d. Lesser included offenses.	IV-79
e. Maximum punishment.	IV-80
f. Sample specification.	IV-80
<b>52. Article 126—Arson</b>	IV-80
a. Text.	IV-80
b. Elements.	IV-80
c. Explanation.	IV-80
d. Lesser included offenses.	IV-81
e. Maximum punishment.	IV-81
f. Sample specifications.	IV-81
<b>53. Article 127—Extortion</b>	IV-81
a. Text.	IV-81
b. Elements.	IV-81
c. Explanation.	IV-81
d. Lesser included offenses.	IV-82
e. Maximum punishment.	IV-82
f. Sample specification.	IV-82
<b>54. Article 128—Assault</b>	IV-82
a. Text.	IV-82
b. Elements.	IV-82
c. Explanation.	IV-83
d. Lesser included offenses.	IV-85
e. Maximum punishment.	IV-85
f. Sample specifications.	IV-86
<b>55. Article 129—Burglary</b>	IV-87
a. Text.	IV-87
b. Elements.	IV-87
c. Explanation.	IV-87
d. Lesser included offenses.	IV-88
e. Maximum punishment.	IV-88
f. Sample specification.	IV-88
<b>56. Article 130—Housebreaking</b>	IV-88
a. Text.	IV-88
b. Elements.	IV-88
c. Explanation.	IV-88
d. Lesser included offenses.	IV-89
e. Maximum punishment.	IV-89

xxxiii

	Page
f. Sample specification.....	IV-89
<b>57. Article 131—Perjury</b> .....	IV-89
a. Text.....	IV-89
b. Elements.....	IV-89
c. Explanation.....	IV-89
d. Lesser included offense.....	IV-90
e. Maximum punishment.....	IV-90
f. Sample specifications.....	IV-90
<b>58. Article 132—Frauds against the United States</b> .....	IV-90
a. Text.....	IV-90
b. Elements.....	IV-91
c. Explanation.....	IV-92
d. Lesser included offense.....	IV-93
e. Maximum punishment.....	IV-93
f. Sample specifications.....	IV-93
<b>59. Article 133—Conduct unbecoming an officer and gentleman</b> .....	IV-94
a. Text.....	IV-94
b. Elements.....	IV-94
c. Explanation.....	IV-94
d. Lesser included offense.....	IV-95
e. Maximum punishment.....	IV-95
f. Sample specifications.....	IV-95
<b>60. Article 134—General article</b> .....	IV-95
a. Text.....	IV-95
b. Elements.....	IV-95
c. Explanation.....	IV-95
<b>61. Article 134—(Abusing public animal)</b> .....	IV-97
a. Text.....	IV-97
b. Elements.....	IV-97
c. Explanation.....	IV-97
d. Lesser included offenses.....	IV-97
e. Maximum punishment.....	IV-97
f. Sample specification.....	IV-97
<b>62. Article 134—(Adultery)</b> .....	IV-97
a. Text.....	IV-97
b. Elements.....	IV-97
c. Explanation.....	IV-97
d. Lesser included offense.....	IV-98
e. Maximum punishment.....	IV-98
f. Sample specification.....	IV-98
<b>63. Article 134—(Assault—indecent)</b> .....	IV-98
a. Text.....	IV-98
b. Elements.....	IV-98
c. Explanation.....	IV-98
d. Lesser included offenses.....	IV-99

e. Maximum punishment.....	IV-99
f. Sample specification.....	IV-99
<b>64. Article 134—(Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking)</b> .....	IV-99
a. Text.....	IV-99
b. Elements.....	IV-99
c. Explanation.....	IV-99
d. Lesser included offenses.....	IV-99
e. Maximum punishment.....	IV-100
f. Sample specification.....	IV-100
<b>65. Article 134—(Bigamy)</b> .....	IV-100
a. Text.....	IV-100
b. Elements.....	IV-100
c. Explanation.....	IV-100
d. Lesser included offense.....	IV-100
e. Maximum punishment.....	IV-100
f. Sample specification.....	IV-100
<b>66. Article 134—(Bribery and graft)</b> .....	IV-100
a. Text.....	IV-100
b. Elements.....	IV-100
c. Explanation.....	IV-101
d. Lesser included offenses.....	IV-101
e. Maximum punishment.....	IV-101
f. Sample specifications.....	IV-101
<b>67. Article 134—(Burning with intent to defraud)</b> .....	IV-101
a. Text.....	IV-101
b. Elements.....	IV-101
c. Explanation.....	IV-102
d. Lesser included offense.....	IV-102
e. Maximum punishment.....	IV-102
f. Sample specification.....	IV-102
<b>68. Article 134—(Check, worthless, making and uttering—by dishonorably failing to maintain funds)</b> .....	IV-102
a. Text.....	IV-102
b. Elements.....	IV-102
c. Explanation.....	IV-102
d. Lesser included offenses.....	IV-102
e. Maximum punishment.....	IV-102
f. Sample specification.....	IV-102
<b>69. Article 134—(Cohabitation, wrongful)</b> .....	IV-102
a. Text.....	IV-102
b. Elements.....	IV-102
c. Explanation.....	IV-102
d. Lesser included offense.....	IV-102
e. Maximum punishment.....	IV-102

	Page
f. Sample specification.....	IV-102
<b>70. Article 134—(Correctional custody—offenses against)</b> .....	IV-103
a. Text.....	IV-103
b. Elements.....	IV-103
c. Explanation.....	IV-103
d. Lesser included offense.....	IV-103
e. Maximum punishment.....	IV-103
f. Sample specifications.....	IV-103
<b>71. Article 134—(Debt, dishonorably failing to pay)</b> .....	IV-103
a. Text.....	IV-103
b. Elements.....	IV-103
c. Explanation.....	IV-104
d. Lesser included offenses.....	IV-104
e. Maximum punishment.....	IV-104
f. Sample specification.....	IV-104
<b>72. Article 134—(Disloyal statements)</b> .....	IV-104
a. Text.....	IV-104
b. Elements.....	IV-104
c. Explanation.....	IV-104
d. Lesser included offense.....	IV-104
e. Maximum punishment.....	IV-104
f. Sample specification.....	IV-104
<b>73. Article 134—(Disorderly conduct, drunkenness)</b> .....	IV-104
a. Text.....	IV-104
b. Elements.....	IV-104
c. Explanation.....	IV-105
d. Lesser included offense.....	IV-105
e. Maximum punishment.....	IV-105
f. Sample specification.....	IV-105
<b>74. Article 134—(Drinking liquor with prisoner)</b> .....	IV-105
a. Text.....	IV-105
b. Elements.....	IV-105
c. Explanation.....	IV-105
d. Lesser included offense.....	IV-105
e. Maximum punishment.....	IV-105
f. Sample specification.....	IV-105
<b>75. Article 134—(Drunk prisoner)</b> .....	IV-106
a. Text.....	IV-106
b. Elements.....	IV-106
c. Explanation.....	IV-106
d. Lesser included offenses.....	IV-106
e. Maximum punishment.....	IV-106
f. Sample specification.....	IV-106
<b>76. Article 134—(Drunkenness—incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug)</b> .....	IV-106

a. Text.....	IV-106
b. Elements.....	IV-106
c. Explanation.....	IV-106
d. Lesser included offense.....	IV-106
e. Maximum punishment.....	IV-106
f. Sample specification.....	IV-106
<b>77. Article 134—(False or unauthorized pass offenses)</b> .....	IV-106
a. Text.....	IV-106
b. Elements.....	IV-106
c. Explanation.....	IV-107
d. Lesser included offenses.....	IV-107
e. Maximum punishment.....	IV-107
f. Sample specifications.....	IV-107
<b>78. Article 134—(False pretenses, obtaining services under)</b> .....	IV-108
a. Text.....	IV-108
b. Elements.....	IV-108
c. Explanation.....	IV-108
d. Lesser included offense.....	IV-108
e. Maximum punishment.....	IV-108
f. Sample specification.....	IV-108
<b>79. Article 134—(False swearing)</b> .....	IV-108
a. Text.....	IV-108
b. Elements.....	IV-108
c. Explanation.....	IV-108
d. Lesser included offense.....	IV-108
e. Maximum punishment.....	IV-108
f. Sample specification.....	IV-108
<b>80. Article 134—(Firearm, discharging—through negligence)</b> .....	IV-109
a. Text.....	IV-109
b. Elements.....	IV-109
c. Explanation.....	IV-109
d. Lesser included offenses.....	IV-109
e. Maximum punishment.....	IV-109
f. Sample specification.....	IV-109
<b>81. Article 134—(Firearm, discharging—willfully, under such circumstances as to endanger human life)</b> .....	IV-109
a. Text.....	IV-109
b. Elements.....	IV-109
c. Explanation.....	IV-109
d. Lesser included offenses.....	IV-109
e. Maximum punishment.....	IV-109
f. Sample specification.....	IV-109
<b>82. Article 134—(Fleeing scene of accident)</b> .....	IV-109
a. Text.....	IV-109
b. Elements.....	IV-109
c. Explanation.....	IV-110

	Page
d. Lesser included offense.....	IV-110
e. Maximum punishment.....	IV-110
f. Sample specification.....	IV-110
<b>83. Article 134—(Fraternalization)</b> .....	IV-110
a. Text.....	IV-110
b. Elements.....	IV-110
c. Explanation.....	IV-110
d. Lesser included offense.....	IV-110
e. Maximum punishment.....	IV-110
f. Sample specification.....	IV-110
<b>84. Article 134—(Gambling with subordinate)</b> .....	IV-111
a. Text.....	IV-111
b. Elements.....	IV-111
c. Explanation.....	IV-111
d. Lesser included offense.....	IV-111
e. Maximum punishment.....	IV-111
f. Sample specification.....	IV-111
<b>85. Article 134—(Homicide, negligent)</b> .....	IV-111
a. Text.....	IV-111
b. Elements.....	IV-111
c. Explanation.....	IV-111
d. Lesser included offenses.....	IV-111
e. Maximum punishment.....	IV-111
f. Sample specification.....	IV-111
<b>86. Article 134—(Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official)</b> .....	IV-112
a. Text.....	IV-112
b. Elements.....	IV-112
c. Explanation.....	IV-112
d. Lesser included offense.....	IV-112
e. Maximum punishment.....	IV-112
f. Sample specification.....	IV-112
<b>87. Article 134—(Indecent acts or liberties with a child)</b> .....	IV-112
a. Text.....	IV-112
b. Elements.....	IV-112
c. Explanation.....	IV-113
d. Lesser included offense.....	IV-113
e. Maximum punishment.....	IV-113
f. Sample specification.....	IV-113
<b>88. Article 134—(Indecent exposure)</b> .....	IV-113
a. Text.....	IV-113
b. Elements.....	IV-113
c. Explanation.....	IV-113
d. Lesser included offense.....	IV-113
e. Maximum punishment.....	IV-113

f. Sample specification.....	IV-113
<b>89. Article 134—(Indecent language)</b> .....	IV-113
a. Text.....	IV-113
b. Elements.....	IV-113
c. Explanation.....	IV-113
d. Lesser included offenses.....	IV-113
e. Maximum punishment.....	IV-114
f. Sample specification.....	IV-114
<b>90. Article 134—(Indecent acts with another)</b> .....	IV-114
a. Text.....	IV-114
b. Elements.....	IV-114
c. Explanation.....	IV-114
d. Lesser included offense.....	IV-114
e. Maximum punishment.....	IV-114
f. Sample specification.....	IV-114
<b>91. Article 134—(Jumping from vessel into the water)</b> .....	IV-114
a. Text.....	IV-114
b. Elements.....	IV-114
c. Explanation.....	IV-114
d. Lesser included offense.....	IV-114
e. Maximum punishment.....	IV-114
f. Sample specification.....	IV-114
<b>92. Article 134—(Kidnapping)</b> .....	IV-114
a. Text.....	IV-114
b. Elements.....	IV-114
c. Explanation.....	IV-114
d. Lesser included offense.....	IV-114
e. Maximum punishment.....	IV-115
f. Sample specification.....	IV-115
<b>93. Article 134—(Mail: taking, opening, secreting, destroying, or stealing)</b> .....	IV-115
a. Text.....	IV-115
b. Elements.....	IV-115
c. Explanation.....	IV-115
d. Lesser included offenses.....	IV-116
e. Maximum punishment.....	IV-116
f. Sample specifications.....	IV-116
<b>94. Article 134—(Mails: depositing or causing to be deposited obscene matters in)</b> .....	IV-116
a. Text.....	IV-116
b. Elements.....	IV-116
c. Explanation.....	IV-116
d. Lesser included offense.....	IV-116
e. Maximum punishment.....	IV-116
f. Sample specification.....	IV-116
<b>95. Article 134—(Misprision of serious offense)</b> .....	IV-116

	Page
a. Text.....	IV-116
b. Elements.....	IV-116
c. Explanation.....	IV-117
d. Lesser included offense.....	IV-117
e. Maximum punishment.....	IV-117
f. Sample specification.....	IV-117
<b>96. Article 134—(Obstructing justice)</b> .....	IV-117
a. Text.....	IV-117
b. Elements.....	IV-117
c. Explanation.....	IV-117
d. Lesser included offenses.....	IV-117
e. Maximum punishment.....	IV-117
f. Sample specification.....	IV-117
<b>96a. Art 134 (Wrongful interference with an adverse administrative proceeding)</b> .....	IV-118
a. Text.....	IV-118
b. Elements.....	IV-118
c. Explanation.....	IV-118
d. Lesser included offenses.....	IV-118
e. Maximum punishment.....	IV-118
f. Sample specification.....	IV-118
<b>97. Article 134—(Pandering and prostitution)</b> .....	IV-118
a. Text.....	IV-118
b. Elements.....	IV-118
c. Explanation.....	IV-119
d. Lesser included offense.....	IV-119
e. Maximum punishment.....	IV-119
f. Sample specifications.....	IV-119
<b>97a. Article 134—(Parole, Violation of)</b> .....	IV-119
a. Text.....	IV-119
b. Elements.....	IV-119
c. Explanation.....	IV-119
d. Lesser included offense.....	IV-120
e. Maximum punishment.....	IV-120
f. Sample specifications.....	IV-120
<b>98. Article 134—(Perjury: subornation of)</b> .....	IV-120
a. Text.....	IV-120
b. Elements.....	IV-120
c. Explanation.....	IV-120
d. Lesser included offense.....	IV-120
e. Maximum punishment.....	IV-120
f. Sample specification.....	IV-120
<b>99. Article 134—(Public record: altering, concealing, removing, mutilating, obliterating, or destroying)</b> .....	IV-120
a. Text.....	IV-120
b. Elements.....	IV-120
c. Explanation.....	IV-120

d. Lesser included offense.....	IV-121
e. Maximum punishment.....	IV-121
f. Sample specification.....	IV-121
<b>100. Article 134—(Quarantine: medical, breaking)</b> .....	IV-121
a. Text.....	IV-121
b. Elements.....	IV-121
c. Explanation.....	IV-121
d. Lesser included offenses.....	IV-121
e. Maximum punishment.....	IV-121
f. Sample specification.....	IV-121
<b>100a. Article 134—(Reckless endangerment)</b> .....	IV-121
a. Text.....	IV-121
b. Elements.....	IV-121
c. Explanation.....	IV-121
d. Lesser included offenses.....	IV-122
e. Maximum punishment.....	IV-122
f. Sample specification.....	IV-122
<b>101. Article 134—(Requesting commission of an offense)</b> .....	IV-122
<b>102. Article 134—(Restriction, breaking)</b> .....	IV-122
a. Text.....	IV-122
b. Elements.....	IV-122
c. Explanation.....	IV-122
d. Lesser included offenses.....	IV-122
e. Maximum punishment.....	IV-122
f. Sample specification.....	IV-122
<b>103. Article 134—(Seizure: destruction, removal, or disposal of property to prevent)</b> .....	IV-122
a. Text.....	IV-122
b. Elements.....	IV-122
c. Explanation.....	IV-122
d. Lesser included offense.....	IV-122
e. Maximum punishment.....	IV-122
f. Sample specification.....	IV-122
<b>103a. Article 134—(Self-injury without intent to avoid service)</b> .....	IV-123
a. Text.....	IV-123
b. Elements.....	IV-123
c. Explanation.....	IV-123
d. Lesser included offense.....	IV-123
e. Maximum punishment.....	IV-123
f. Sample specification.....	IV-123
<b>104. Article 134—(Sentinel or lookout: offenses against or by)</b> .....	IV-123
a. Text.....	IV-123
b. Elements.....	IV-123
c. Explanation.....	IV-123
d. Lesser included offenses.....	IV-124

e. Maximum punishment. . . . . IV-124  
f. Sample specifications. . . . . IV-124  
**105. Article 134—(Soliciting another to commit an offense)** . . . . . IV-124  
a. Text. . . . . IV-124  
b. Elements. . . . . IV-124  
c. Explanation. . . . . IV-124  
d. Lesser included offenses. . . . . IV-124  
e. Maximum punishment. . . . . IV-124  
f. Sample specification. . . . . IV-124  
**106. Article 134—(Stolen property: knowingly receiving, buying, concealing)** . . . . . IV-124  
a. Text. . . . . IV-125  
b. Elements. . . . . IV-125  
c. Explanation. . . . . IV-125  
d. Lesser included offense. . . . . IV-125  
e. Maximum punishment. . . . . IV-125  
f. Sample specification. . . . . IV-125  
**107. Article 134—(Stragglng)** . . . . . IV-125  
a. Text. . . . . IV-125  
b. Elements. . . . . IV-125  
c. Explanation. . . . . IV-125  
d. Lesser included offense. . . . . IV-125  
e. Maximum punishment. . . . . IV-125  
f. Sample specification. . . . . IV-125  
**108. Article 134—(Testify: wrongful refusal)** . . . . . IV-125  
a. Text. . . . . IV-125  
b. Elements. . . . . IV-125  
c. Explanation. . . . . IV-126  
d. Lesser included offenses. . . . . IV-126  
e. Maximum punishment. . . . . IV-126  
f. Sample specification. . . . . IV-126  
**109. Article 134—(Threat or hoax: bomb)** . . . . . IV-126  
a. Text. . . . . IV-126  
b. Elements. . . . . IV-126  
c. Explanation. . . . . IV-126  
d. Lesser included offenses. . . . . IV-126  
e. Maximum punishment. . . . . IV-126  
f. Sample specifications. . . . . IV-126  
**110. Article 134—(Threat, communicating)** . . . . . IV-127  
a. Text. . . . . IV-127  
b. Elements. . . . . IV-127  
c. Explanation. . . . . IV-127  
d. Lesser included offenses. . . . . IV-127  
e. Maximum punishment. . . . . IV-127  
f. Sample specification. . . . . IV-127  
**111. Article 134—(Unlawful entry)** . . . . . IV-127

a. Text. . . . . IV-127  
b. Elements. . . . . IV-127  
c. Explanation. . . . . IV-127  
d. Lesser included offense. . . . . IV-127  
e. Maximum punishment. . . . . IV-127  
f. Sample specification. . . . . IV-127  
**112. Article 134—(Weapon: concealed, carrying)** . . . . . IV-127  
a. Text. . . . . IV-127  
b. Elements. . . . . IV-128  
c. Explanation. . . . . IV-128  
d. Lesser included offense. . . . . IV-128  
e. Maximum punishment. . . . . IV-128  
f. Sample specification. . . . . IV-128  
**113. Article 134—(Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button)** . . . . . IV-128  
a. Text. . . . . IV-128  
b. Elements. . . . . IV-128  
c. Explanation. . . . . IV-128  
d. Lesser included offense. . . . . IV-128  
e. Maximum punishment. . . . . IV-128  
f. Sample specification. . . . . IV-128

**PART V NONJUDICIAL PUNISHMENT PROCEDURE**

**1. General** . . . . . V-1  
a. Authority. . . . . V-1  
b. Nature. . . . . V-1  
c. Purpose. . . . . V-1  
d. Policy. . . . . V-1  
e. Minor offenses. . . . . V-1  
f. Limitations on nonjudicial punishment. . . . . V-1  
g. Relationship of nonjudicial punishment to administrative corrective measures. . . . . V-2  
h. Effect of errors. . . . . V-2  
**2. Who may impose nonjudicial punishment** . . . . . V-2  
a. Commander. . . . . V-2  
b. Officer in charge. . . . . V-2  
c. Principal assistant. . . . . V-2  
**3. Right to demand trial** . . . . . V-2  
**4. Procedure** . . . . . V-2  
a. Notice. . . . . V-2  
b. Decision by servicemember. . . . . V-3  
c. Nonjudicial punishment accepted. . . . . V-3  
d. Nonjudicial punishment based on record of court of inquiry or other investigative body. . . . . V-4  
**5. Punishments** . . . . . V-4  
a. General limitations. . . . . V-4  
b. Authorized maximum punishments. . . . . V-4  
c. Nature of punishment. . . . . V-5

d. Limitations on combination of punishments. . . . . V-6  
e. Punishments imposed on reserve component personnel while on inactive-duty training. . . . . V-6  
f. Punishments imposed on reserve component personnel when ordered to active duty for disciplinary purposes. . . . . V-7  
g. Effective date and execution of punishments. . . . . V-7  
**6. Suspension, mitigation, remission, and setting aside** . . . . . V-7  
a. Suspension. . . . . V-7  
b. Mitigation. . . . . V-7  
c. Remission. . . . . V-8  
d. Setting aside. . . . . V-8  
**7. Appeals** . . . . . V-8  
a. In general. . . . . V-8  
b. Who may act on appeal. . . . . V-8  
c. Format of appeal. . . . . V-8  
d. Time limit. . . . . V-8  
e. Legal review. . . . . V-8  
f. Action by superior authority. . . . . V-8  
**8. Records of nonjudicial punishment** . . . . . V-9

**Appendices**

**1.** Constitution of the United States—1787  
**2.** Uniform Code of Military Justice  
**3.** DoD Directive 5525.7  
**3.1** Memorandum of Understanding Between the Departments of Justice and Transportation (Coast Guard) Relating to the Investigations and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction  
**4.** Charge Sheet (DD FORM 458)  
**5.** Investigating Officer Report (DD FORM 457)  
**6.** Forms for Orders Convening Courts-Martial  
**7.** Subpoena (DD FORM 453)  
**8.** Guide for General and Special Courts-Martial  
**9.** Guide for Summary Courts-Martial  
**10.** Forms of Findings  
**11.** Forms of Sentences  
**12.** Maximum Punishment Chart  
**13.** Guide for Preparation of Record of Trial by General Court-Martial and by Special Court-Martial When a Verbatim Record is Not Required  
**14.** Guide for Preparation of Record of Trial by General Court-Martial and by Special Court-Martial When a Verbatim Record is Required  
**15.** Record of Trial by Summary Court-Martial (DD Form 2329)

**16.** Forms for Action  
**17.** Forms for Court-Martial Orders  
**18.** Report of Proceedings to Vacate Suspension of a General Court-Martial or of a Special Court-Martial Sentence Including a Bad-Conduct Discharge or Confinement for One Year Under Article 72, UCMJ, and R.C.M. 1109 (DD Form 455)  
**19.** Waiver/Withdrawal of Appellate Rights in General and Special Courts-Martial Subject to Review by a Court of Military Review (DD Form 2330)  
**20.** Waiver/Withdrawal of Appellate Rights in General Courts-Martial Subject to Examination in the Office of the Judge Advocate General (DD Form 2331)  
**21.** Analysis of Rules for Courts-Martial  
**22.** Analysis of the Military Rules of Evidence  
**23.** Analysis of Punitive Articles  
**24.** Analysis of Nonjudicial Punishment Procedure  
**25.** Historical Executive Orders  
**26.** The Joint Service Committee on Military Justice (JSC)

**R.C.M. 103(20)**

“no person may . . .” mean that no person is required, authorized, or permitted to do the act prescribed.

(30) “Includes” means “includes but is not limited to.”

(31) “Inactive-duty training” means—

(A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and

(B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

It includes those duties when performed by Reserves in their status as members of the National Guard.

(32) “Spouse” means husband or wife, as the case may be.

(33) “Regular”, with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office in a regular component of an armed force.

(34) “Reserve”, with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office held as a Reserve of an armed force.

(35) “Original”, with respect to the appointment of a member of the armed forces in a regular or reserve component, refers to his most recent appointment in the component that is neither a promotion nor a demotion.

(36) Repealed.

(37) “Active-duty list” means a single list for the Army, Navy, Air Force or Marine Corps (required to be maintained under section 620 of this title) which contains the names of all officers of that armed force, other than officers described in section 641 of this title, who are serving on active duty.

(38) “Medical officer” means an officer of the Medical Corps of the Army, an officer of the Medical Corps of the Navy, or an officer in the Air Force designated as a medical officer.

(39) “Dental officer” means an officer of the Dental Corps of the Army, an officer of the Dental Corps of the Navy, or an officer of the Air Force designated as a dental officer.

(40) “General officer” means an officer of the Army, Air Force, or Marine Corps serving in or having the grade of general, lieutenant general, major general, or brigadier general.

(41) “Flag officer” means an officer of the Navy or Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or commodore.

10 U.S.C. § 801. *Article 1. Definitions* In this chapter:

(1) “Judge Advocate General” means, severally, the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation.

(2) The Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy, shall be considered as one armed force.

(3) “Commanding officer” includes only commissioned officers.

(4) “Officer in charge” means a member of the Navy, the Marine Corps, or the Coast Guard designated as such by appropriate authority.

(5) “Superior commissioned officer” means a commissioned officer superior in rank or command.

(6) “Cadet” means a cadet of the United States Military

Academy, the United States Air Force Academy, or the United States Coast Guard Academy.

(7) “Midshipman” means a midshipman of the United States Naval Academy and any other midshipman on active duty in the naval service.

(8) “Military” refers to any or all of the armed forces.

(9) “Accuser” means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

(10) “Military judge” means an official of a general or special court-martial detailed in accordance with section 826 of this title (article 26). [*See also* R.C.M. 103(15).]

(11) “Law specialist” means a commissioned officer of the Coast Guard designated for special duty (law).

(12) “Legal officer” means any commissioned officer of the Navy, Marine Corps, or Coast Guard designated to perform legal duties for a command.

(13) “Judge Advocate” means—

(A) an officer of the Judge Advocate General’s Corps of the Army or Navy;

(B) an officer of the Air Force or the Marine Corps who is designated as a judge advocate; or

(C) an officer of the Coast Guard who is designated as a law specialist.

(14) “Classified information” (A) means any information or material that has been determined by an official of the United States pursuant to law, an Executive Order, or regulation to require protection against unauthorized disclosure for reasons of national security, and (B) any restricted data, as defined in section 2014(y) of title 42, United States Code.

(15) “National security” means the national defense and foreign relations of the United States.

---

**Rule 104. Unlawful command influence**

(a) *General prohibitions.*

(1) *Convening authorities and commanders.* No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

(2) *All persons subject to the code.* No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority’s judicial acts.

(3) *Exceptions.*

(A) *Instructions.* Subsections (a)(1) and (2) of the rule do not prohibit general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing personnel of a command in the substantive and procedural aspects of courts-martial.

(B) *Court-martial statements.* Subsections (a)(1) and (2) of this rule do not prohibit statements and instructions given in open session by the military judge or counsel.

(C) *Professional supervision.* Subsections (a)(1) and (2) of this rule do not prohibit action by the Judge Advocate General concerned under R.C.M. 109.

(D) *Offense.* Subsection (a)(1) and (2) of this rule do not prohibit appropriate action against a person for an offense committed while detailed as a military judge, counsel, or member of a court-martial, or while serving as individual counsel.

(b) *Prohibitions concerning evaluations.*

(1) *Evaluation of member or defense counsel.* In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the code may:

(A) Consider or evaluate the performance of duty of any such person as a member of a court-martial; or

(B) Give a less favorable rating or evaluation of any defense counsel because of the zeal with which such counsel represented any accused.

(2) *Evaluation of military judge.*

(A) *General courts-martial.* Unless the general court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of the convening authority's staff may prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge detailed to a general court-martial, which relates to the performance of duty as a military judge.

(B) *Special courts-martial.* The convening authority may not prepare or review any report con-

cerning the effectiveness, fitness, or efficiency of a military judge detailed to a special court-martial which relates to the performance of duty as a military judge. When the military judge is normally rated or the military judge's report is reviewed by the convening authority, the manner in which such military judge will be rated or evaluated upon the performance of duty as a military judge may be as prescribed in regulations of the Secretary concerned which shall ensure the absence of any command influence in the rating or evaluation of the military judge's judicial performance.

**Discussion**

See paragraph 22 of Part IV concerning prosecuting violations of Article 37 under Article 98.

**Rule 105. Direct communications: convening authorities and staff judge advocates; among staff judge advocates**

(a) *Convening authorities and staff judge advocates.* Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice.

(b) *Among staff judge advocates and with the Judge Advocate General.* The staff judge advocate of any command is entitled to communicate directly with the staff judge advocate of a superior or subordinate command, or with the Judge Advocate General.

**Discussion**

See R.C.M. 103(17) for a definition of staff judge advocate.

**Rule 106. Delivery of military offenders to civilian authorities**

Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civilian authority may be delivered, upon request, to the civilian authority for trial. A member may be placed in restraint by military authorities for this purpose only upon receipt of a duly issued warrant for the apprehension of the member or upon receipt of information establishing probable cause that the member committed an offense, and upon reasonable belief that such restraint is necessary. Such restraint may continue only for

## Discussion

See Articles 104 and 106 for some instances of concurrent jurisdiction.

### Rule 202. Persons subject to the jurisdiction of courts-martial

(a) *In general.* Courts-martial may try any person when authorized to do so under the code.

## Discussion

(1) *Authority under the code.* Article 2 lists classes of persons who are subject to the code. These include active duty personnel (Article 2(a)(1)); cadets, aviation cadets, and midshipmen (Article 2(a)(2)); certain retired personnel (Article 2(a)(4) and (5)); members of Reserve components not on active duty under some circumstances (Article 2(a)(3) and (6)); persons in the custody of the armed forces serving a sentence imposed by court-martial (Article 2(a)(7)); and, under some circumstances, specified categories of civilians (Article 2(a)(8), (9), (10), (11), and (12); see subsection (3) and (4) of this discussion). In addition, certain persons whose status as members of the armed forces or as persons otherwise subject to the code apparently has ended may, nevertheless, be amendable to trial by court-martial. See Article 3, 4, and 73. A person need not be subject to the code to be subject to trial by court-martial under Articles 83, 104, or 106. See also Article 48 and R.C.M. 809 concerning who may be subject to the contempt powers of a court-martial.

(2) *Active duty personnel.* Court-martial jurisdiction is most commonly exercised over active duty personnel. In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the armed forces, acceptance of a commission, or entry onto active duty pursuant to orders. Court-martial jurisdiction over active duty personnel ordinarily ends on delivery of a discharge certificate or its equivalent to the person concerned issued pursuant to competent orders. Orders transferring a person to the inactive reserve are the equivalent of a discharge certificate for purposes of jurisdiction.

These are several important qualifications and exceptions to these general guidelines.

(A) *Inception of court-martial jurisdiction over active duty personnel.*

(i) *Enlistment.* “The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under [Article 2(a)] and a change of status from civilian to member of the armed forces shall be effective upon taking the oath of enlistment.” Article 2(b). A person who is, at the time of enlistment, insane, intoxicated, or under the age of 17 does not have the capacity to enlist by law. No court-martial jurisdiction over such a person may exist as long as the incapacity continues. If the incapacity ceases to exist, a “constructive enlistment” may result under Article 2(c). See discussion of “constructive enlistment” below. Similarly, if the enlistment was involuntary, court-martial jurisdiction will exist only when the coercion is removed and a “constructive enlistment” under Article 2(c) is established.

Persons age 17 (but not yet 18) may not enlist without

parental consent. A parent or guardian may, within 90 days of its inception, terminate the enlistment of a 17-year-old who enlisted without parental consent, if the person has not yet reached the age of 18. 10 U.S.C. § 1170. See also DOD Directive 1332.14 and service regulations for specific rules on separation of persons 17 years of age on the basis of a parental request. Absent effective action by a parent or guardian to terminate such an enlistment, court-martial jurisdiction exists over the person. An application by a parent for release does not deprive a court-martial of jurisdiction to try a person for offenses committed before action is completed on such an application.

Even if a person lacked capacity to understand the effect of enlistment or did not enlist voluntarily, a “constructive enlistment” may be established under Article 2(c), which provides:

Notwithstanding any other provision of law, a person serving with an armed force who—

- (1) submitted voluntarily to military authority;
- (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority [that is, not insane, intoxicated, or under the age of 17]
- (3) received military pay or allowances; and
- (4) performed military duties;

is subject to [the code] until such person’s active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

Even if a person never underwent an enlistment or induction proceeding of any kind, court-martial jurisdiction could be established under this provision.

(ii) *Induction.* Court-martial jurisdiction does not extend to a draftee until: the draftee has completed an induction ceremony which was in substantial compliance with the requirements prescribed by statute and regulations; the draftee by conduct after an apparent induction, has waived objection to substantive defects in it; or a “constructive enlistment” under Article 2(c) exists.

The fact that a person was improperly inducted (for example, because of incorrect classification or erroneous denial of exemption) does not of itself negate court-martial jurisdiction. When a person has made timely and persistent efforts to correct such an error, court-martial jurisdiction may be defeated if improper induction is found, depending on all the circumstances of the case.

(iii) *Call to active duty.* A member of a reserve component may be called or ordered to active duty for a variety of reasons, including training, service in time of war or national emergency, discipline, or as a result of failure to participate satisfactorily in unit activities.

When a person is ordered to active duty for failure to satisfactorily participate in unit activities, the order must substantially comply with procedures prescribed by regulations, to the extent due process requires, for court-martial jurisdiction to exist. Generally, the person must be given notice of the activation and the reasons therefor, and an opportunity to object to the activation. A person waives the right to contest involuntary activation by failure to exercise this right within a reasonable time after notice of the right to do so.

(B) *Termination of jurisdiction over active duty personnel.* As indicated above, the delivery of a valid discharge certificate or its equivalent ordinarily serves to terminate court-martial jurisdiction.

**R.C.M. 202(a)**

(i) *Effect of completion of term of service.* Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction. An original term of enlistment may be adjusted for a variety of reasons, such as making up time lost for unauthorized absence. Even after such adjustments are considered, court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention.

As indicated in subsection (c) of this rule, servicemembers may be retained past their scheduled time of separation, over protest, by action with a view to trial while they are still subject to the code. Thus, if action with a view to trial is initiated before discharge or the effective terminal date of self-executing orders, a person may be retained beyond the date that the period of service would otherwise have expired or the terminal date of such orders.

(ii) *Effect of discharge and reenlistment.* For offenses occurring on or after 23 October 1992, under the 1992 Amendment to Article 3(a), a person who reenlists following a discharge may be tried for offenses committed during the earlier term of service. For offenses occurring prior to 23 October 1992, a person who reenlists following a discharge may be tried for offenses committed during the earlier term of service only if the offense was punishable by confinement for five (5) years or more and could not be tried in the courts of the United States or of a State, a Territory, or the District of Columbia. However, see (iii)(a) below.

(iii) *Exceptions.* There are several exceptions to the general principle that court-martial jurisdiction terminates on discharge or its equivalent.

(a) A person who was subject to the code at the time an offense was committed may be tried by court-martial for that offense despite a later discharge or other termination of that status if:

(1) For offenses occurring on or after 23 October 1992, the person is, at the time of the court-martial, subject to the code, by reentry into the armed forces or otherwise. See Article 3(a) as amended by the National Defense Authorization Act for Fiscal Year 1993, Pub.L. No. 102-484, 106 Stat. 2315, 2505 (1992);

(2) For offenses occurring before 23 October 1992,

(A) The offense is one for which a court-martial may adjudge confinement for five (5) or more years;

(B) The person cannot be tried in the courts of the United States or of a State, Territory, or the District of Columbia; and

(C) The person is, at the time of the court-martial, subject to the code, by reentry into the armed forces or otherwise. See Article 3(a) prior to the 1992 amendment.

(b) A person who was subject to the code at the time the offense was committed is subject to trial by court-martial despite a later discharge if—

(1) The discharge was issued before the end of the accused's term of enlistment for the purpose of reenlisting;

(2) The person remains, at the time of the court-martial, subject to the code; and

(3) The reenlistment occurred after 26 July 1982.

**II-14**

(c) Persons in the custody of the armed forces serving a sentence imposed by a court-martial remain subject to the code and court-martial jurisdiction. A prisoner who has received a discharge and who remains in the custody of an armed force may be tried for an offense committed while a member of the armed forces and before the execution of the discharge as well as for offenses committed after it.

(d) A person discharged from the armed forces who is later charged with having fraudulently obtained that discharge is, subject to the statute of limitations, subject to trial by court-martial on that charge, and is after apprehension subject to the code while in the custody of the armed forces for trial. Upon conviction of that charge such a person is subject to trial by court-martial for any offenses under the code committed before the fraudulent discharge.

(e) No person who has deserted from the armed forces is relieved from court-martial jurisdiction by a separation from any later period of service.

(f) When a person's discharge or other separation does not interrupt the status as a person belonging to the general category of persons subject to the code, court-martial jurisdiction over that person does not end. For example, when an officer holding a commission in a Reserve component of an armed force is discharged from that commission while on active duty because of acceptance of a commission in a Regular component of that armed force, without an interval between the periods of service under the two commissions, that officer's military status does not end. There is merely a change in personnel status from temporary to permanent officer, and court-martial jurisdiction over an offense committed before the discharge is not affected.

(3) *Public Health Service and National Oceanic and Atmospheric Administration.* Members of the Public Health Service and the National Oceanic and Atmospheric Administration become subject to the code when assigned to and serving with the armed forces.

(4) *Limitations on jurisdiction over civilians.* Court-martial jurisdiction over civilians under the code is limited by judicial decisions. The exercise of jurisdiction under Article 2(a)(11) in peacetime has been held unconstitutional by the Supreme Court of the United States. Article 2(a)(10) has also been limited. Before initiating court-martial proceedings against a civilian, relevant statutes and decisions should be carefully examined.

(5) *Members of a Reserve Component.* Members of a reserve component in federal service on active duty, as well as those in federal service on inactive-duty training, are subject to the code. Moreover, members of a reserve component are amenable to the jurisdiction of courts-martial notwithstanding the termination of a period of such duty. See R.C.M. 204.

(b) *Offenses under the law of war.* Nothing in this rule limits the power of general courts-martial to try persons under the law of war. See R.C.M. 201(f)(1)(B).

(c) *Attachment of jurisdiction over the person.*

(1) *In general.* Court-martial jurisdiction attaches over a person when action with a view to trial of

that person is taken. Once court-martial jurisdiction over a person attaches, such jurisdiction shall continue for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service or other period in which that person was subject to the code or trial by court-martial. When jurisdiction attaches over a servicemember on active duty, the servicemember may be held on active duty over objection pending disposition of any offense for which held and shall remain subject to the code during the entire period.

### Discussion

Court-martial jurisdiction exists to try a person as long as that person occupies a status as a person subject to the code. *See also* Article 104 and 106. Thus, a servicemember is subject to court-martial jurisdiction until lawfully discharged or, when the servicemember's term of service has expired, the government fails to act within a reasonable time on objection by the servicemember to continued retention.

Court-martial jurisdiction attaches over a person upon action with a view to trial. Once court-martial jurisdiction attaches, it continues throughout the trial and appellate process, and for purposes of punishment.

If jurisdiction has attached before the effective terminal date of self-executing orders, the person may be held for trial by court-martial beyond the effective terminal date.

---

(2) *Procedure*. Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges.

### Rule 203. Jurisdiction over the offense

To the extent permitted by the Constitution, courts-martial may try any offense under the code and, in the case of general courts-martial, the law of war.

### Discussion

(a) *In general*. Courts-martial have power to try any offense under the code except when prohibited from so doing by the Constitution. The rule enunciated in *Solorio v. United States*, 483 U.S. 435 (1987) is that jurisdiction of courts-martial depends solely on the accused's status as a person subject to the Uniform Code of Military Justice, and not on the "service-connection" of the offense charged.

(b) *Pleading and proof*. Normally, the inclusion of the accused's rank or grade will be sufficient to plead the service status of the accused. Ordinarily, no allegation of the accused's armed

force or unit is necessary for military members on active duty. *See* R.C.M. 307 regarding required specificity of pleadings.

---

### Rule 204. Jurisdiction over certain reserve component personnel

(a) *Service regulations*. The Secretary concerned shall prescribe regulations setting forth rules and procedures for the exercise of court-martial jurisdiction and nonjudicial punishment authority over reserve component personnel under Article 2(a)(3) and 2(d), subject to the limitations of this Manual and the UCMJ.

### Discussion

Such regulations should describe procedures for ordering a reservist to active duty for disciplinary action, for the preferral, investigation, forwarding, and referral of charges, designation of convening authorities and commanders authorized to conduct nonjudicial punishment proceedings, and for other appropriate purposes.

*See* definitions in R.C.M. 103 (Discussion). *See* paragraph 5e and f, Part V, concerning limitations on nonjudicial punishments imposed on reservists while on inactive-duty training.

Members of the Army National Guard and the Air National Guard are subject to Federal court-martial jurisdiction only when the offense concerned is committed while the member is in Federal service.

---

### (b) Courts-Martial

(1) *General and special court-martial proceedings*. A member of a reserve component must be on active duty prior to arraignment at a general or special court-martial. A member ordered to active duty pursuant to Article 2(d) may be retained on active duty to serve any adjudged confinement or other restriction on liberty if the order to active duty was approved in accordance with Article 2(d)(5), but such member may not be retained on active duty pursuant to Article 2(d) after service of the confinement or other restriction on liberty. All punishments remaining unserved at the time the member is released from active duty may be carried over to subsequent periods of inactive-duty training or active duty.

### Discussion

An accused ordered to active duty pursuant to Article 2(d) may be retained on active duty after service of the punishment if permitted by other authority. For example, an accused who commits another offense while on active duty ordered pursuant to

**R.C.M. 204(b)(1)**

Article 2(d) may be retained on active duty pursuant to R.C.M. 202(c)(1).

---

(2) *Summary courts-martial.* A member of a reserve component may be tried by summary court-martial either while on active duty or inactive-duty training. A summary court-martial conducted during inactive-duty training may be in session only during normal periods of such training. The accused may not be held beyond such periods of training for trial or service or any punishment. All punishments remaining unserved at the end of a period of active duty or the end of any normal period of inactive-duty training may be carried over to subsequent periods of inactive-duty training or active duty.

**Discussion**

A "normal period" of inactive-duty training does not include periods which are scheduled solely for the purpose of conducting court-martial proceedings.

---

(c) *Applicability.* This subsection is not applicable

when a member is held on active duty pursuant to R.C.M. 202(c).

(d) *Changes in type of service.* A member of a reserve component at the time disciplinary action is initiated, who is alleged to have committed an offense while on active duty or inactive-duty training, is subject to court-martial jurisdiction without regard to any change between active and reserve service or within different categories of reserve service subsequent to commission of the offense. This subsection does not apply to a person whose military status was completely terminated after commission of an offense.

**Discussion**

A member of a regular or reserve component remains subject to court-martial jurisdiction after leaving active duty for offenses committed prior to such termination of active duty if the member retains military status in a reserve component without having been discharged from all obligations of military service.

See R.C.M. 202(a), Discussion, paragraph (2)(B)(ii) and (iii) regarding the jurisdictional effect of a discharge from military service. A "complete termination" of military status refers to a discharge relieving the servicemember of any further military service. It does not include a discharge conditioned upon acceptance of further military service.

---

## CHAPTER III. INITIATION OF CHARGES; APPREHENSION; PRETRIAL RESTRAINT; RELATED MATTERS

### Rule 301. Report of offense

(a) *Who may report.* Any person may report an offense subject to trial by court-martial.

(b) *To whom reports conveyed for disposition.* Ordinarily, any military authority who receives a report of an offense shall forward as soon as practicable the report and any accompanying information to the immediate commander of the suspect. Competent authority superior to that commander may direct otherwise.

#### Discussion

Any military authority may receive a report of an offense. Typically such reports are made to law enforcement or investigative personnel, or to appropriate persons in the chain of command. A report may be made by any means, and no particular format is required. When a person who is not a law enforcement official receives a report of an offense, that person should forward the report to the immediate commander of the suspect unless that person believes it would be more appropriate to notify law enforcement or investigative authorities.

If the suspect is unidentified, the military authority who receives the report should refer it to a law enforcement or investigative agency.

Upon receipt of a report, the immediate commander of a suspect should refer to R.C.M. 306 (Initial disposition). *See also* R.C.M. 302 (Apprehension); R.C.M. 303 (Preliminary inquiry); R.C.M. 304, 305 (Pretrial restraint, confinement).

### Rule 302. Apprehension

(a) *Definition and scope.*

(1) *Definition.* Apprehension is the taking of a person into custody.

#### Discussion

Apprehension is the equivalent of "arrest" in civilian terminology. (In military terminology, "arrest" is a form of restraint. *See* Article 9; R.C.M. 304.) *See* subsection (c) of this rule concerning the bases for apprehension. An apprehension is not required in every case; the fact that an accused was never apprehended does not affect the jurisdiction of a court-martial to try the accused. However, *see* R.C.M. 202(c) concerning attachment of jurisdiction.

An apprehension is different from detention of a person for investigative purposes, although each involves the exercise of government control over the freedom of movement of a person. An apprehension must be based on probable cause, and the custody initiated in an apprehension may continue until proper authority is notified and acts under R.C.M. 304 or 305. An investigative detention may be made on less than probable cause (*see* Mil. R. Evid. 314(f)), and normally involves a relatively

short period of custody. Furthermore, an extensive search of the person is not authorized incident to an investigative detention, as it is with an apprehension. *See* Mil. R. Evid. 314(f) and (g). This rule does not affect any seizure of the person less severe than apprehension.

Evidence obtained as the result of an apprehension which is in violation of this rule may be challenged under Mil. R. Evid. 311(c)(1). Evidence obtained as the result of an unlawful civilian arrest may be challenged under Mil. R. Evid. 311(c)(1), (2).

(2) *Scope.* This rule applies only to apprehensions made by persons authorized to do so under subsection (b) of this rule with respect to offenses subject to trial by court-martial. Nothing in this rule limits the authority of federal law enforcement officials to apprehend persons, whether or not subject to trial by court-martial, to the extent permitted by applicable enabling statutes and other law.

#### Discussion

R.C.M. 302 does not affect the authority of any official to detain, arrest, or apprehend persons not subject to trial under the code. The rule does not apply to actions taken by any person in a private capacity.

Several federal agencies have broad powers to apprehend persons for violations of federal laws, including the Uniform Code of Military Justice. For example, agents of the Federal Bureau of Investigation, United States Marshals, and agents of the Secret Service may apprehend persons for any offenses committed in their presence and for felonies. 18 U.S.C. §§ 3052, 3053, 3056. Other agencies have apprehension powers include the General Services Administration, 40 U.S.C. § 318 and the Veterans Administration, 38 U.S.C. § 218. The extent to which such agencies become involved in the apprehension of persons subject to trial by courts-martial may depend on the statutory authority of the agency and the agency's formal or informal relationships with the Department of Defense.

(b) *Who may apprehend.* The following officials may apprehend any person subject to trial by court-martial:

(1) *Military law enforcement officials.* Security police, military police, master at arms personnel, members of the shore patrol, and persons designated by proper authorities to perform military criminal investigative, guard, or police duties, whether subject to the code or not, when in each of the foregoing instances, the official making the apprehension is in the execution of law enforcement duties;

**Discussion**

Whenever enlisted persons, including police and guards, and civilian police and guards apprehend any commissioned or warrant officer, such persons should make an immediate report to the commissioned officer to whom the apprehending person is responsible.

The phrase "persons designated by proper authority to perform military criminal investigative, guard or police duties" includes special agents of the Defense Criminal Investigative Service.

---

(2) *Commissioned, warrant, petty, and noncommissioned officers.* All commissioned, warrant, petty, and noncommissioned officers on active duty or inactive duty training;

**Discussion**

Noncommissioned and petty officers not otherwise performing law enforcement duties should not apprehend a commissioned officer unless directed to do so by a commissioned officer or in order to prevent disgrace to the service or the escape of one who has committed a serious offense.

---

(3) *Civilians authorized to apprehend deserters.* Under Article 8, any civilian officer having authority to apprehend offenders under laws of the United States or of a State, Territory, Commonwealth, or possession, or the District of Columbia, when the apprehension is of a deserter from the armed forces.

**Discussion**

The code specifically provides that any civil officer, whether of a State, Territory, district, or of the United States may apprehend any deserter. However, this authority does not permit state and local law enforcement officers to apprehend persons for other violations of the code. See Article 8.

---

(c) *Grounds for apprehension.* A person subject to the code or trial thereunder may be apprehended for an offense triable by court-martial upon probable cause to apprehend. Probable cause to apprehend exists when there are reasonable grounds to believe that an offense has been or is being committed and the person to be apprehended committed or is committing it. Persons authorized to apprehend under subsection (b)(2) of this rule may also apprehend persons subject to the code who take part in quarrels, frays, or disorders, wherever they occur.

**Discussion**

"Reasonable grounds" means that there must be the kind of reliable information that a reasonable, prudent person would rely on which makes it more likely than not that something is true. A mere suspicion is not enough but proof which would support a conviction is not necessary. A person who determines probable cause may rely on the reports of others.

---

(d) *How an apprehension may be made.*

(1) *In general.* An apprehension is made by clearly notifying the person to be apprehended that person is in custody. This notice should be given orally or in writing, but it may be implied by the circumstances.

(2) *Warrants.* Neither warrants nor any other authorization shall be required for an apprehension under these rules except as required in subsection (e)(2) of this rule.

(3) *Use of force.* Any person authorized under these rules to make an apprehension may use such force and means as reasonably necessary under the circumstances to effect the apprehension.

**Discussion**

In addition to any other action required by law or regulation or proper military officials, any person making an apprehension under these rules should: maintain custody of the person apprehended; and inform as promptly as possible the immediate commander of the person apprehended, or any official higher in the chain of command of the person apprehended if it is impractical to inform the immediate commander.

---

(e) *Where an apprehension may be made.*

(1) *In general.* An apprehension may be made at any place, except as provided in subsection (e)(2) of this rule.

(2) *Private dwellings.* A private dwelling includes dwellings, on or off a military installation, such as single family houses, duplexes, and apartments. The quarters may be owned, leased, or rented by the residents, or assigned, and may be occupied on a temporary or permanent basis. "Private dwelling" does not include the following, whether or not subdivided into individual units: living areas in military barracks, vessels, aircraft, vehicles, tents, bunkers, field encampments, and similar places. No person may enter a private dwelling for the purpose of making an apprehension under these rules unless:

(A) Pursuant to consent under Mil. R. Evid. 314(e) of 316(d)(2);

(B) Under exigent circumstances described in Mil. R. Evid. 315(g) or 316(d)(4)(B);

(C) In the case of a private dwelling which is military property or under military control, or non-military property in a foreign country.

(i) if the person to be apprehended is a resident of the private dwelling, there exists, at the time of the entry, reason to believe that the person to be apprehended is present in the dwelling, and the apprehension has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause to apprehend the person exists; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the entry has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause exists to apprehend the person and to believe that the person to be apprehended is or will be present at the time of the entry;

(D) In the case of a private dwelling not included in subsection (e)(2)(C) of this rule,

(i) if the person to be apprehended is a resident of the private dwelling, there exists at the time of the entry, reason to believe that the person to be apprehended is present and the apprehension is authorized by an arrest warrant issued by competent civilian authority; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority.

A person who is not a resident of the private dwelling entered may not challenge the legality of an apprehension of that person on the basis of failure to secure a warrant or authorization to enter that dwelling, or on the basis of the sufficiency of such a warrant or authorization. Nothing in this subsection ((e)(2)) affects the legality of an apprehension which is incident to otherwise lawful presence in a private dwelling.

### Discussion

For example, if law enforcement officials enter a private dwelling pursuant to a valid search warrant or search authorization, they may apprehend persons therein if grounds for an apprehension exist. This subsection is not intended to be an independent grant of authority to execute civilian arrest or search warrants. The

authority must derive from an appropriate Federal or state procedure. *See e.g.* Fed. R. Crim. P. 41 and 28 C.F.R. 60.1.

---

### Rule 303. Preliminary inquiry into reported offenses

Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.

### Discussion

The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation. The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation.

The Military Rules of Evidence should be consulted when conducting interrogations (*see* Mil. R. Evid. 301-306), searches (*see* Mil. R. Evid. 311-317), and eyewitness identifications (*see* Mil. R. Evid. 321).

If the offense is one for which the Department of Justice has investigative responsibilities, appropriate coordination should be made under the Memorandum of Understanding, *see* Appendix 3, and any implementing regulations.

If it appears that any witness may not be available for later proceedings in the case, this should be brought to the attention of appropriate authorities. *See also* R.C.M. 702 (depositions).

A person who is an accuser (*see* Article 1(9)) is disqualified from convening a general or special court-martial in that case. R.C.M. 504(c)(1). Therefore, when the immediate commander is a general or special court-martial convening authority, the preliminary inquiry should be conducted by another officer of the command. That officer may be informed that charges may be preferred if the officer determines that prefferal is warranted.

---

### Rule 304. Pretrial restraint

(a) *Types of pretrial restraint.* Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.

(1) *Conditions on liberty.* Conditions on liberty are imposed by orders directing a person to do or

## CHAPTER VII. PRETRIAL MATTERS

### Rule 701. Discovery

(a) *Disclosure by the trial counsel.* Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following information or matters to the defense—

(1) *Papers accompanying charges; convening orders; statements.* As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

(A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders; and

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

(2) *Documents, tangible objects, reports.* After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

(B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

#### Discussion

For specific rules concerning certain mental examinations of the accused or third party patients, *see* R.C.M. 701(f), R.C.M. 706, Mil. R. Evid. 302 and Mil. R. Evid. 513.

(3) *Witnesses.* Before the beginning of trial on the merits the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b)(1) or (2) of this rule.

#### Discussion

Such notice should be in writing except when impracticable.

(4) *Prior convictions of accused offered on the merits.* Before arraignment the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in the trial counsel's possession.

(5) *Information to be offered at sentencing.* Upon request of the defense the trial counsel shall:

(A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and

(B) Notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) *Evidence favorable to the defense.* The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

(C) Reduce the punishment.

#### Discussion

In addition to the matters required to be disclosed under subsection (a) of this rule, the Government is required to notify the defense of or provide to the defense certain information under other rules. Mil. R. Evid. 506 covers the disclosure of unclassified

information which is under the control of the Government. Mil. R. Evid. 505 covers disclosure of classified information.

Other R.C.M. and Mil. R. Evid. concern disclosure of other specific matters. *See* R.C.M. 308 (identification of accuser), 405 (report of Article 32 investigation), 706(c)(3)(B) (mental examination of accused), 914 (production of certain statements), and 1004(b)(1) (aggravating circumstances in capital cases); Mil. R. Evid. 301(c)(2) (notice of immunity or leniency to witnesses), 302 (mental examination of accused), 304(d)(1) (statements by accused), 311(d)(1) (evidence seized from accused), 321(c)(1) (evidence based on lineups), 507 (identity of informants), 612 (memoranda used to refresh recollection), and 613(a) (prior inconsistent statements).

Requirements for notice of intent to use certain evidence are found in: Mil. R. Evid. 201A(b) (judicial notice of foreign law), 301(c)(2) (immunized witnesses), 304(d)(2) (notice of intent to use undisclosed confessions), 304(f) (testimony of accused for limited purpose on confession), 311(d)(2)(B) (notice of intent to use undisclosed evidence seized), 311(f) (testimony of accused for limited purpose on seizures), 321(c)(2)(B) (notice of intent to use undisclosed line-up evidence), 321(e) (testimony of accused for limited purpose of line-ups), 412(c)(1) and (2) (intent of defense to use evidence of sexual misconduct by a victim); 505(h) (intent to disclose classified information), 506(h) (intent to disclose privilege government information), and 609(b) (intent to impeach with conviction over 10 years old).

(b) *Disclosure by the defense.* Except as otherwise provided in subsections (f) and (g)(2) of this rule, the defense shall provide the following information to the trial counsel—

(1) *Names of witnesses and statements.*

(A) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also

(i) Provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(ii) Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

### Discussion

Such notice shall be in writing except when impracticable. *See*

R.C.M. 701(f) for statements that would not be subject to disclosure.

(2) *Notice of certain defenses.* The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

### Discussion

Such notice should be in writing except when impracticable. *See* R.C.M. 916(k) concerning the defense of lack of mental responsibility. *See* R.C.M. 706 concerning inquiries into the mental responsibility of the accused. *See* Mil. R. Evid. 302 concerning statements by the accused during such inquiries. If the defense needs more detail as to the time, date, or place of the offense to comply with this rule, it should request a bill of particulars. *See* R.C.M. 906(b)(6).

(3) *Documents and tangible objects.* If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) *Reports of examination and tests.* If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall (except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil. R. Evid. 513) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the

**R.C.M. 701(b)(4)**

possession, custody, or control of the defense that the defense intends to introduce as evidence in the defense case-in-chief at trial or that were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

(5) *Inadmissibility of withdrawn defense.* If an intention to rely upon a defense under subsection (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention.

**Discussion**

In addition to the matters covered in subsection (b) of this rule, defense counsel is required to give notice or disclose evidence under certain Military Rules of Evidence: Mil. R. Evid. 201A(b) (judicial notice of foreign law), 304(f) (testimony by the accused for a limited purpose in relation to a confession), 311(b) (same, search), 321(e) (same, lineup), 412(c)(1) and (2) (intent to offer evidence of sexual misconduct by a victim), 505(h) (intent to disclose classified information), 506(h) (intent to disclose privileged government information), 609(b) (intent to impeach a witness with a conviction older than 10 years), 612(2) (writing used to refresh recollection), and 613(a) (prior inconsistent statements).

(c) *Failure to call witness.* The fact that a witness' name is on a list of expected or intended witnesses provided to an opposing party, whether required by this rule or not, shall not be ground for comment upon a failure to call the witness.

(d) *Continuing duty to disclose.* If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material.

(e) *Access to witnesses and evidence.* Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.

**Discussion**

Convening authorities, commanders and members of their immediate staffs should make no statement, oral or written, and take no action which could reasonably be understood to discourage or

prevent witnesses from testifying truthfully before a court-martial, or as a threat of retribution for such testimony.

(f) *Information not subject to disclosure.* Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives.

(g) *Regulation of discovery.*

(1) *Time, place, and manner.* The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.

(2) *Protective and modifying orders.* Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(3) *Failure to comply.* If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(A) Order the party to permit discovery;

(B) Grant a continuance;

(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and

(D) Enter such other order as is just under the circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

**Discussion**

Factors to be considered in determining whether to grant an exception to exclusion under subsection (3)(C) include: the extent of disadvantage that resulted from a failure to disclose; the reason for the failure to disclose; the extent to which later events miti-

gated the disadvantage caused by the failure to disclose; and any other relevant factors.

The sanction of excluding the testimony of a defense witness should be used only upon finding that the defense counsel's failure to comply with this rule was willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony. Moreover, the sanction of excluding the testimony of a defense witness should only be used if alternative sanctions could not have minimized the prejudice to the Government. Before imposing this sanction, the military judge must weigh the defendant's right to compulsory process against the countervailing public interests, including (1) the integrity of the adversary process; (2) the interest in the fair and efficient administration of military justice; and (3) the potential prejudice to the truth-determining function of the trial process.

Procedures governing refusal to disclose classified information are in Mil. R. Evid. 505. Procedures governing refusal to disclose other government information are in Mil. R. Evid. 506. Procedures governing refusal to disclose an informant's identity are in Mil. R. Evid. 507.

---

(h) *Inspect*. As used in this rule "inspect" includes the right to photograph and copy.

## Rule 702. Depositions

(a) *In general*. A deposition may be ordered whenever, after prefferal of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.

### Discussion

A deposition is the out-of-court testimony of a witness under oath in response to questions by the parties, which is reduced to writing or recorded on videotape or audiotape or similar material. A deposition taken on oral examination is an oral deposition, and a deposition taken on written interrogatories is a written deposition. Written interrogatories are questions, prepared by the prosecution, defense, or both, which are reduced to writing before submission to a witness whose testimony is to be taken by deposition. The answers, reduced to writing and properly sworn to, constitute the deposition testimony of the witness.

Note that under subsection (i) of this rule a deposition may be taken by agreement of the parties without necessity of an order.

A deposition may be taken to preserve the testimony of a witness who is likely to be unavailable at the investigation under Article 32 (see R.C.M. 405(g)) or at the time of trial (see R.C.M. 703(b)). Part of all of a deposition, so far as otherwise admissible under the Military Rules of Evidence, may be used on the merits or on an interlocutory question as substantive evidence if the witness is unavailable under Mil. R. Evid. 804(a) except that a deposition may be admitted in a capital case only upon offer by the defense. See Mil. R. Evid. 804(b)(1). In any case, a deposition may be used by any party for the purpose of contradicting or

impeaching the testimony of the deponent as a witness. See Mil. R. Evid. 613. If only a part of a deposition is offered in evidence by a party, an adverse party may require the proponent to offer all which is relevant to the part offered, and any party may offer other parts. See Mil. R. Evid. 106.

A deposition which is transcribed is ordinarily read to the court-martial by the party offering it. See also subsection (g)(3) of this rule. The transcript of a deposition may not be inspected by the members. Objections may be made to testimony in a written deposition in the same way that they would be if the testimony were offered through the personal appearance of a witness.

Part or all of a deposition so far as otherwise admissible under the Military Rules of Evidence may be used in presentencing proceedings as substantive evidence as provided in R.C.M. 1001.

DD Form 456 (Interrogatories and Deposition) may be used in conjunction with this rule.

---

(b) *Who may order*. A convening authority who has the charges for disposition or, after referral, the convening authority or the military judge may order that a deposition be taken on request of a party.

(c) *Request to take deposition*.

(1) *Submission of request*. At any time after charges have been preferred, any party may request in writing that a deposition be taken.

### Discussion

A copy of the request and any accompanying papers ordinarily should be served on the other parties when the request is submitted.

---

(2) *Contents of request*. A request for a deposition shall include:

(A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(B) A statement of the matters on which the person is to be examined;

(C) A statement of the reasons for taking the deposition; and

(D) Whether an oral or written deposition is requested.

(3) *Action on request*.

(A) *In general*. A request for a deposition may be denied only for good cause.

### Discussion

Good cause for denial includes: failure to state a proper ground for taking a deposition; failure to show the probable relevance of

*ment.* Evidence under the control of the Government may be obtained by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence.

(B) *Evidence not under the control of the Government.* Evidence not under the control of the Government may be obtained by subpoena issued in accordance with subsection (e)(2) of this rule.

(C) *Relief.* If the person having custody of evidence requests relief on grounds that compliance with the subpoena or order of production is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena or order of production be withdrawn or modified. Subject to Mil. R. Evid. 505 and 506, the military judge may direct that the evidence be submitted to the military judge for an in camera inspection in order to determine whether such relief should be granted.

#### **Rule 704. Immunity**

(a) *Types of immunity.* Two types of immunity may be granted under this rule.

(1) *Transactional immunity.* A person may be granted transactional immunity from trial by court-martial for one or more offenses under the code.

(2) *Testimonial immunity.* A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.

#### **Discussion**

“Testimonial” immunity is also called “use” immunity.

Immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the needs of good order and discipline, and when the person has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.

Testimonial immunity is preferred because it does not bar prosecution of the person for the offenses about which testimony or information is given under the grant of immunity.

In any trial of a person granted testimonial immunity after the testimony or information is given, the Government must meet a heavy burden to show that it has not used in any way for the prosecution of that person the person’s statements, testimony, or information derived from them. In many cases this burden makes difficult a later prosecution of such a person for any offense that was the subject of that person’s testimony or statements. Therefore, if it is intended to prosecute a person to whom testimonial

immunity has been or will be granted for offenses about which that person may testify or make statements, it may be necessary to try that person before the testimony or statements are given.

---

(b) *Scope.* Nothing in this rule bars:

(1) A later court-martial for perjury, false swearing, making a false official statement, or failure to comply with an order to testify; or

(2) Use in a court-martial under subsection (b)(1) of this rule of testimony or statements derived from such testimony or statements.

(c) *Authority to grant immunity.* Only a general court-martial convening authority may grant immunity, and may do so only in accordance with this rule.

#### **Discussion**

Only general court-martial convening authorities are authorized to grant immunity. However, in some circumstances, when a person testifies or makes statements pursuant to a promise of immunity, or a similar promise, by a person with apparent authority to make it, such testimony or statements and evidence derived from them may be inadmissible in a later trial. Under some circumstances a promise of immunity by someone other than a general court-martial convening authority may bar prosecution altogether. Persons not authorized to grant immunity should exercise care when dealing with accused or suspects to avoid inadvertently causing statements to be inadmissible or prosecution to be barred.

A convening authority who grants immunity to a prosecution witness in a court-martial may be disqualified from taking post-trial action in the case under some circumstances.

---

(1) *Persons subject to the code.* A general court-martial convening authority may grant immunity to any person subject to the code. However, a general court-martial convening authority may grant immunity to a person subject to the code extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

#### **Discussion**

When testimony or a statement for which a person subject to the code may be granted immunity may relate to an offense for which that person could be prosecuted in a United States District Court, immunity should not be granted without prior coordination with the Department of Justice. Ordinarily coordination with the local United States Attorney is appropriate. Unless the Department of Justice indicates it has no interest in the case, authorization for the grant of immunity should be sought from the Attorney General. A request for such authorization should be forwarded through the office of the Judge Advocate General concerned. Service

regulations may provide additional guidance. Even if the Department of Justice expresses no interest in the case, authorization by the Attorney General for the grant of immunity may be necessary to compel the person to testify or make a statement if such testimony or statement would make the person liable for a Federal civilian offense.

---

(2) *Persons not subject to the code.* A general court-martial convening authority may grant immunity to persons not subject to the code only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

### Discussion

See the discussion under subsection (c)(1) of this rule concerning forwarding a request for authorization to grant immunity to the Attorney General.

---

(3) *Other limitations.* The authority to grant immunity under this rule may not be delegated. The authority to grant immunity may be limited by superior authority.

### Discussion

Department of Defense Directive 1355.1 (21 July 1981) provides: "A proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or the foreign relations of the United States, shall be forwarded to the General Counsel of the Department of Defense for the purpose of consultation with the Department of Justice. The General Counsel shall obtain the view of other appropriate elements of the Department of defense in furtherance of such consultation."

---

(d) *Procedure.* A grant of immunity shall be written and signed by the convening authority who issues it. The grant shall include a statement of the authority under which it is made and shall identify the matters to which it extends.

### Discussion

A person who has received a valid grant of immunity from a proper authority may be ordered to testify. In addition, a servicemember who has received a valid grant of immunity may be ordered to answer questions by investigators or counsel pursuant to that grant. See Mil. R. Evid. 301(c). A person who refuses to testify despite a valid grant of immunity may be prosecuted for such refusal. Persons subject to the code may be charged under Article 134. See paragraph 108, Part IV. A grant of immunity removes the right to refuse to testify or make a statement on self-incrimination grounds. It does not, however, remove other privi-

leges against disclosure of information. See Mil. R. Evid., Section V.

An immunity order or grant must not specify the contents of the testimony it is expected the witness will give.

When immunity is granted to a prosecution witness, the accused must be notified in accordance with Mil. R. Evid. 301(c)(2).

---

(e) *Decision to grant immunity.* Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

(1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; and

(2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.

## Rule 705. Pretrial agreements

(a) *In general.* Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule.

### Discussion

The authority of convening authorities to refer cases to trial and approve pretrial agreements extends only to trials by courts-martial. To ensure that such actions do not preclude appropriate action by Federal civilian authorities in cases likely to be prosecuted in the United States district courts, convening authorities shall ensure that appropriate consultation under the "Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction" has taken place prior to trial by court-martial or approval of a

trial counsel any statement made by the accused to the board or any evidence derived from such statement.

### Discussion

See Mil. R. Evid. 302.

### Rule 707. Speedy trial

(a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:

- (1) Preferral of charges;

### Discussion

Delay from the time of an offense to preferral of charges or the imposition of pretrial restraint is not considered for speedy trial purposes. See also Article 43 (statute of limitations). In some circumstances such delay may prejudice the accused and may result in dismissal of the charges or other relief. Offenses ordinarily should be disposed of promptly to serve the interests of good order and discipline. Priority shall be given to persons in arrest or confinement.

(2) The imposition of restraint under R.C.M. 304(a)(2)–(4); or

- (3) Entry on active duty under R.C.M. 204.

(b) *Accountability.*

(1) *In general.* The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304 (a)(2)–(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.

(2) *Multiple Charges.* When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.

- (3) *Events which affect time periods.*

(A) *Dismissal or mistrial.* If charges are dismissed, or if a mistrial is granted, a new 120-day time period under this rule shall begin on the date of dismissal or mistrial for cases in which there is no repreferal and cases in which the accused is in pretrial restraint. In all other cases, a new 120-day time period under the rule shall begin on the earlier of

(i) the date of repreferal;

(ii) the date of imposition of restraint under R.C.M. 304(a)(2)–(4).

(B) *Release from restraint.* If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of

(i) the date of preferral of charges;

(ii) the date on which restraint under R.C.M. 304(a) (2)–(4) is reimposed; or

(iii) the date of entry on active duty under R.C.M. 204.

(C) *Government appeals.* If notice of appeal under R.C.M. 908 is filed, a new 120-day time period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Criminal Appeals under R.C.M. 908, if there is a further appeal to the Court of Appeals for the Armed Forces or, subsequently, to the Supreme Court, a new 120-day time period under this rule shall begin on the date the parties are notified of the final decision of the Court of Appeals for the Armed Forces, or, if appropriate, the Supreme Court.

(D) *Rehearings.* If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.C.M. 803.

(E) *Commitment of the incompetent accused.* If the accused is committed to the custody of the Attorney General for hospitalization as provided in R.C.M. 909(f), all periods of such commitment shall be excluded when determining whether the period in subsection (a) of this rule has run. If, at the end of the period of commitment, the accused is returned to the custody of the general court-martial convening authority, a new 120-day time period under this rule shall begin on the date of such return to custody.

(c) *Excludable delay.* All periods of time during

**R.C.M. 707(c)**

which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.

(1) *Procedure.* Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

**Discussion**

The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge. This decision should be based on the facts and circumstances then and there existing. Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

Pretrial delays should not be granted ex parte, and when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.

Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer.

---

(2) *Motions.* Upon accused's timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made a part of the appellate record.

(d) *Remedy.* A failure to comply with this rule will result in dismissal of the affected charges, or, in a sentence-only rehearing, sentence relief as appropriate.

(1) *Dismissal.* Dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

(2) *Sentence relief.* In determining whether or how much sentence relief is appropriate, the military judge shall consider, among others, each of the following factors: the length of the delay, the reasons for the delay, the accused's demand for speedy trial, and any prejudice to the accused from the delay. Any sentence relief granted will be applied against the sentence approved by the convening authority.

**Discussion**

See subsection (c)(1) and the accompanying Discussion concerning reasons for delay and procedures for parties to request delay.

---

(e) *Waiver.* Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense.

**Discussion**

Speedy trial issues may also be waived by a failure to raise the issue at trial. See R.C.M. 905(e) and 907(b)(2).

objected to by a party except in extraordinary circumstances. Counsel should be permitted to try the case and present the evidence without unnecessary interference by the military judge. *See also* Mil. R. Evid. 103.

(5) *Reopening case.* The military judge may, as a matter of discretion, permit a party to reopen its case after it has rested.

#### **Rule 914. Production of statements of witnesses**

(a) *Motion for production.* After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement of the witness that relates to the subject matter concerning which the witness has testified, and that is:

(1) In the case of a witness called by the trial counsel, in the possession of the United States; or

(2) In the case of a witness called by the defense, in the possession of the accused or defense counsel.

#### **Discussion**

*See also* R.C.M. 701 (Discovery).

Counsel should anticipate legitimate demands for statements under this and similar rules and avoid delays in the proceedings by voluntary disclosure before arraignment.

This rule does not apply to investigations under Article 32.

As to procedures for certain government information as to which a privilege is asserted, *see* Mil. R. Evid. 505; 506.

(b) *Production of entire statement.* If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the military judge shall order that the statement be delivered to the moving party.

(c) *Production of excised statement.* If the party who called the witness claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the military judge shall order that it be delivered to the military judge. Upon inspection, the military judge shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of a statement that

is withheld from an accused over objection shall be preserved by the trial counsel, and, in the event of a conviction, shall be made available to the reviewing authorities for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) *Recess for examination of the statement.* Upon delivery of the statement to the moving party, the military judge may recess the trial for the examination of the statement and preparation for its use in the trial.

(e) *Remedy for failure to produce statement.* If the other party elects not to comply with an order to deliver a statement to the moving party, the military judge shall order that the testimony of the witness be disregarded by the trier of fact and that the trial proceed, or, if it is the trial counsel who elects not to comply, shall declare a mistrial if required in the interest of justice.

(f) *Definition.* As used in this rule, a "statement" of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a Federal grand jury.

#### **Rule 914A. Use of remote live testimony of a child**

(a) *General procedures.* A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied. The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. However, such testimony should normally be taken via a two-way closed circuit television system. At a minimum, the following procedures shall be observed:

(1) The witness shall testify from a remote location outside the courtroom;

(2) Attendance at the remote location shall be

II-107

**R.C.M. 914A(a)(2)**

limited to the child, counsel for each side (not including an accused pro se), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;

(3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter and the public;

(4) The voice of the military judge shall be transmitted into the remote location to allow control of the proceedings; and

(5) The accused shall be permitted private, contemporaneous communication with his counsel.

(b) *Prohibitions.* The procedures described above shall not be used where the accused elects to absent himself from the courtroom pursuant to R.C.M. 804(c).

**Rule 915. Mistrial**

(a) *In general.* The military judge may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. A mistrial may be declared as to some or all charges, and as to the entire proceedings or as to only the proceedings after findings.

**Discussion**

The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons. As examples, a mistrial may be appropriate when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members or when members engage in prejudicial misconduct. Also a mistrial is appropriate when the proceedings must be terminated because of a legal defect, such as a jurisdictional defect, which can be cured; for example, when the referral is jurisdictionally defective. See also R.C.M. 905(g) concerning the effect of rulings in one proceeding on later proceedings.

(b) *Procedure.* On motion for a mistrial or when it otherwise appears that grounds for a mistrial may exist, the military judge shall inquire into the views of the parties on the matter and then decide the matter as an interlocutory question.

**Discussion**

Except in a special court-martial without a military judge, the

hearing on a mistrial should be conducted out of the presence of the members.

(c) *Effect of declaration of mistrial.*

(1) *Withdrawal of charges.* A declaration of a mistrial shall have the effect of withdrawing the affected charges and specifications from the court-martial.

**Discussion**

Upon declaration of a mistrial, the affected charges are returned to the convening authority who may refer them anew or otherwise dispose of them. See R.C.M. 401-407.

(2) *Further proceedings.* A declaration of a mistrial shall not prevent trial by another court-martial on the affected charges and specifications except when the mistrial was declared after jeopardy attached and before findings, and the declaration was:

(A) An abuse of discretion and without the consent of the defense; or

(B) The direct result of intentional prosecutorial misconduct designed to necessitate a mistrial.

**Rule 916. Defenses**

(a) *In general.* As used in this rule, “defenses” includes 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.

**Discussion**

Special defenses are also called “affirmative defenses.”

“Alibi” and “good character” are not special defenses, as they operate to deny that the accused committed one or more of the acts constituting the offense. As to evidence of the accused’s good character, see Mil. R. Evid. 404(a)(1). See R.C.M. 701(b)(1) concerning notice of alibi.

(b) *Burden of proof.* Except for the defense of lack of mental responsibility and the defense of mistake of fact as to age as described in Part IV, para. 45c.(2) in a prosecution of carnal knowledge, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist. The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence, and has the burden of proving

mistake of fact as to age in a carnal knowledge prosecution by a preponderance of the evidence.

**Discussion**

A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial. For example, in a prosecution for assault, testimony by prosecution witnesses that the victim brandished a weapon toward the accused may raise a defense of self-defense. See subsection (e) below. More than one defense may be raised as to a particular offense. The defenses need not necessarily be consistent.

See R.C.M. 920(e)(3) concerning instructions on defenses.

---

(c) *Justification.* A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.

**Discussion**

The duty may be imposed by statute, regulation, or order. For example, the use of force by a law enforcement officer when reasonably necessary in the proper execution of a lawful apprehension is justified because the duty to apprehend is imposed by lawful authority. Also, killing an enemy combatant in battle is justified.

---

(d) *Obedience to orders.* It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

**Discussion**

Ordinarily the lawfulness of an order is finally decided by the military judge. See R.C.M. 801(e). An exception might exist when the sole issue is whether the person who gave the order in fact occupied a certain position at the time.

An act performed pursuant to a lawful order is justified. See subsection (c) of this rule. An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have known it to be unlawful.

---

(e) *Self-defense.*

(1) *Homicide or assault cases involving deadly force.* It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused:

(A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force the accused used

was necessary for protection against death or grievous bodily harm.

**Discussion**

The words “involving deadly force” described the factual circumstances of the case, not specific assault offenses. If the accused is charged with simple assault, battery or any form of aggravated assault, or if simple assault, battery or any form of aggravated assault is in issue as a lesser included offense, the accused may rely on this subsection if the test specified in subsections (A) and (B) is satisfied.

The test for the first element of self-defense is objective. Thus, the accused’s apprehension of death or grievous bodily harm must have been one which a reasonable, prudent person would have held under the circumstances. Because this test is objective, such matters as intoxication or emotional instability of the accused are irrelevant. On the other hand, such matters as the relative height, weight, and general build of the accused and the alleged victim, and the possibility of safe retreat are ordinarily among the circumstances which should be considered in determining the reasonableness of the apprehension of death or grievous bodily harm.

The test for the second element is entirely subjective. The accused is not objectively limited to the use of reasonable force. Accordingly, such matters as the accused’s emotional control, education, and intelligence are relevant in determining the accused’s actual belief as to the force necessary to repel the attack.

See also Mil. R. Evid. 404(a)(2) as to evidence concerning the character of the victim.

---

(2) *Certain aggravated assault cases.* It is a defense to assault with a dangerous weapon or means likely to produce death or grievous bodily harm that the accused:

(A) Apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) In order to deter the assailant, offered but did not actually apply or attempt to apply such means or force as would be likely to cause death or grievous bodily harm.

**Discussion**

The principles in the discussion of subsection (e)(1) of this rule concerning reasonableness of the apprehension of bodily harm apply here.

If, as a result of the accused’s offer of a means or force likely to produce grievous bodily harm, the victim was killed or injured unintentionally by the accused, this aspect of self-defense may operate in conjunction with the defense of accident (see subsection (f) of this rule) to excuse the accused’s acts. The death or injury must have been an unintended and unexpected result of the accused’s exercise of the right of self-defense.

**R.C.M. 916(e)(3)**

(3) *Other assaults.* It is a defense to any assault punishable under Article 90, 91, or 128 and not listed in subsections (e)(1) or (2) of this rule that the accused:

(A) Apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force that accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.

**Discussion**

The principles in the discussion under subsection (e)(1) apply here.

If, in using only such force as the accused was entitled to use under this aspect of self-defense, death or serious injury to the victim results, this aspect of self-defense may operate in conjunction with the defense of accident (*see* subsection (f) of this rule) to excuse the accused's acts. The death or serious injury must have been an unintended and unexpected result of the accused's proper exercise of the right of self-defense.

(4) *Loss of right to self-defense.* The right to self-defense is lost and the defenses described in subsections (e)(1), (2), and (3) of this rule shall not apply if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.

**Discussion**

A person does not become an aggressor or provocateur merely because that person approaches another to seek an interview, even if the approach is not made in a friendly manner. For example, one may approach another and demand an explanation of offensive words or redress of a complaint. If the approach is made in a nonviolent manner, the right to self-defense is not lost.

Failure to retreat, when retreat is possible, does not deprive the accused of the right to self-defense if the accused was lawfully present. The availability of avenues of retreat is one factor which may be considered in addressing the reasonableness of the accused's apprehension of bodily harm and the sincerity of the accused's belief that the force used was necessary for self-protection.

(5) *Defense of another.* The principles of self-defense under subsection (e)(1) through (4) of this rule apply to defense of another. It is a defense to homicide, attempted homicide, assault with intent to kill,

or any assault under Article 90, 91, or 128 that the accused acted in defense of another, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances.

**Discussion**

The accused acts at the accused's peril when defending another. Thus, if the accused goes to the aid of an apparent assault victim, the accused is guilty of any assault the accused commits on the apparent assailant if, unbeknownst to the accused, the apparent victim was in fact the aggressor and not entitled to use self-defense.

(f) *Accident.* A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable.

**Discussion**

The defense of accident is not available when the act which caused the death, injury, or event was a negligent act.

(g) *Entrapment.* It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense.

**Discussion**

The "Government" includes agents of the Government and persons cooperating with them (for example, informants). The fact that persons acting for the Government merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct is the product of the creative activity of law enforcement officials.

When the defense of entrapment is raised, evidence of uncharged misconduct by the accused of a nature similar to that charged is admissible to show predisposition. *See* Mil. R. Evid. 404(b).

(h) *Coercion or duress.* It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without sub-

jecting the accused or another innocent person to the harm threatened, this defense shall not apply.

### Discussion

The immediacy of the harm necessary may vary with the circumstances. For example, a threat to kill a person's wife the next day may be immediate if the person has no opportunity to contact law enforcement officials or otherwise protect the intended victim or avoid committing the offense before then.

---

(i) *Inability*. It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty.

### Discussion

The test of inability is objective in nature. The accused's opinion that a physical impairment prevented performance of the duty will not suffice unless the opinion is reasonable under all the circumstances.

If the physical or financial inability of the accused occurred through the accused's own fault or design, it is not a defense. For example, if the accused, having knowledge of an order to get a haircut, spends money on other nonessential items, the accused's inability to pay for the haircut would not be a defense.

---

(j) *Ignorance or mistake of fact*.

(1) *Generally*. Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

(2) *Carnal knowledge*. It is a defense to a prosecution for carnal knowledge that, at the time of the sexual intercourse, the person with whom the accused had sexual intercourse was at least 12 years of age, and the accused reasonably believed the person

was at least 16 years of age. The accused must prove this defense by a preponderance of the evidence.

### Discussion

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

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

Examples of offenses in which the accused's intent or knowledge is immaterial include: carnal knowledge (if the victim is under 12 years of age, knowledge or belief as to age is immaterial) and improper use of countersign (mistake as to authority of person to whom disclosed not a defense). However, such ignorance or mistake may be relevant in extenuation and mitigation.

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

---

(k) *Lack of mental responsibility*.

(1) *Lack of mental responsibility*. It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

### Discussion

*See* R.C.M. 706 concerning sanity inquiries; R.C.M. 909 concerning the capacity of the accused to stand trial; and R.C.M. 1102A concerning any post-trial hearing for an accused found not guilty only by reason of lack of mental responsibility.

---

(2) *Partial mental responsibility*. A mental condition not amounting to a lack of mental responsibility under subsection (k)(1) of this rule is not an affirmative defense.

### Discussion

Evidence of a mental condition not amounting to a lack of mental responsibility may be admissible as to whether the accused entertained a state of mind necessary to be proven as an element of the offense. The defense must notify the trial counsel before the

**R.C.M. 916(k)(2)**

beginning of trial on the merits if the defense intends to introduce expert testimony as to the accused's mental condition. *See* R.C.M. 701(b)(2).

---

(3) *Procedure.*

(A) *Presumption.* The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense.

**Discussion**

The accused is presumed to be mentally responsible, and this presumption continues throughout the proceedings unless the finder of fact determines that the accused has proven lack of mental responsibility by clear and convincing evidence. *See* subsection (b) of this rule.

---

(B) *Inquiry.* If a question is raised concerning the mental responsibility of the accused, the military judge shall rule finally whether to direct an inquiry under R.C.M. 706. In a special court-martial without a military judge, the president shall rule finally except to the extent that the question is one of fact, in which case the president rules subject to objection by any member.

**Discussion**

*See* R.C.M. 801(e)(3) for the procedures for voting on rulings of the president of a special court-martial without a military judge.

If an inquiry is directed, priority should be given to it.

---

(C) *Determination.* The issue of mental responsibility shall not be considered as an interlocutory question.

(1) *Not defenses generally.*

(1) *Ignorance or mistake of law.* Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense.

**Discussion**

For example, ignorance that it is a crime to possess marijuana is not a defense to wrongful possession of marijuana.

Ignorance or mistake of law may be a defense in some limited circumstances. If the accused, because of a mistake as to a separate nonpenal law, lacks the criminal intent or state of mind necessary to establish guilt, this may be a defense. For example, if the accused, under mistaken belief that the accused is entitled to take an item under property law, takes an item, this mistake of

law (as to the accused's legal right) would, if genuine, be a defense to larceny. On the other hand, if the accused disobeyed an order, under the actual but mistaken belief that the order was unlawful, this would not be a defense because the accused's mistake was as to the order itself, and not as to a separate nonpenal law. Also, mistake of law may be a defense when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency. For example, if an accused, acting on the advice of an official responsible for administering benefits that the accused is entitled to those benefits, applies for and receives those benefits, the accused may have a defense even though the accused was not legally eligible for the benefits. On the other hand, reliance on the advice of counsel that a certain course of conduct is legal is not, of itself, a defense.

---

(2) *Voluntary intoxication.* Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

**Discussion**

Intoxication may reduce premeditated murder to unpremeditated murder, but it will not reduce murder to manslaughter or any other lesser offense. *See* paragraph 43c(2)(c), Part IV.

Although voluntary intoxication is not a defense, evidence of voluntary intoxication may be admitted in extenuation.

---

**Rule 917. Motion for a finding of not guilty**

(a) *In general.* The military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected. If a motion for a finding of not guilty at the close of the prosecution's case is denied, the defense may offer evidence on that offense without having reserved the right to do so.

(b) *Form of motion.* The motion shall specifically indicate wherein the evidence is insufficient.

(c) *Procedure.* Before ruling on a motion for a finding of not guilty, whether made by counsel or *sua sponte*, the military judge shall give each party an opportunity to be heard on the matter.

### **Rule 301. Privilege concerning compulsory self-incrimination**

(a) *General rule.* The privileges against self-incrimination provided by the Fifth Amendment to the Constitution of the United States and Article 31 are applicable only to evidence of a testimonial or communicative nature. The privilege most beneficial to the individual asserting the privilege shall be applied.

(b) *Standing.*

(1) *In general.* The privilege of a witness to refuse to respond to a question the answer to which may tend to incriminate the witness is a personal one that the witness may exercise or waive at the discretion of the witness.

(2) *Judicial advice.* If a witness who is apparently uninformed of the privileges under this rule appears likely to incriminate himself or herself, the military judge should advise the witness of the right to decline to make any answer that might tend to incriminate the witness and that any self-incriminating answer the witness might make can later be used as evidence against the witness. Counsel for any party or for the witness may request the military judge to so advise a witness provided that such a request is made out of the hearing of the witness and, except in a special court-martial without a military judge, the members. Failure to so advise a witness does not make the testimony of the witness inadmissible.

(c) *Exercise of the privilege.* If a witness states that the answer to a question may tend to incriminate him or her, the witness may not be required to answer unless facts and circumstances are such that no answer the witness might make to the question could have the effect of tending to incriminate the witness or that the witness has, with respect to the question, waived the privilege against self-incrimination. A witness may not assert the privilege if the witness is not subject to criminal penalty as a result of an answer by reason of immunity, running of the statute of limitations, or similar reason.

(1) *Immunity generally.* The minimum grant of immunity adequate to overcome the privilege is that which under either R.C.M. 704 or other proper authority provides that neither the testimony of the witness nor any evidence obtained from that testimony may be used against the witness at any subsequent trial other than in a prosecution for perjury, false swearing, the making of a false official state-

ment, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

(2) *Notification of immunity or leniency.* When a prosecution witness before a court-martial has been granted immunity or leniency in exchange for testimony, the grant shall be reduced to writing and shall be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this rule, the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required.

(d) *Waiver by a witness.* A witness who answers a question without having asserted the privilege against self-incrimination and thereby admits a self-incriminating fact may be required to disclose all information relevant to that fact except when there is a real danger of further self-incrimination. This limited waiver of the privilege applies only at the trial in which the answer is given, does not extend to a rehearing or new or other trial, and is subject to Mil. R. Evid. 608(b).

(e) *Waiver by the accused.* When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified. This waiver is subject to Mil. R. Evid. 608(b).

(f) *Effect of claiming the privilege.*

(1) *Generally.* The fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government.

(2) *On cross-examination.* If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.

**M.R.E. 301(f)(3)**

(3) *Pretrial.* The fact that the accused during official questioning and in exercise of rights under the Fifth Amendment to the Constitution of the United States or Article 31, remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated is inadmissible against the accused.

(g) *Instructions.* When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice.

**Rule 302. Privilege concerning mental examination of an accused**

(a) *General rule.* The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M. 706 and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Mil. R. Evid. 305 at the examination.

(b) *Exceptions.*

(1) There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence.

(2) An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence, but such testimony may not extend to statements of the accused except as provided in (1).

(c) *Release of evidence.* If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.C.M. 706. If the defense offers statements made by the accused at

such examination, the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

(d) *Noncompliance by the accused.* The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under R.C.M. 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination.

(e) *Procedure.* The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil. R. Evid. 304 for an objection or a motion to suppress.

**Rule 303. Degrading questions**

No person may be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade that person.

**Rule 304. Confessions and admissions**

(a) *General rule.* Except as provided in subsection (b), an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.

(b) *Exceptions.*

(1) Where the statement is involuntary only in terms of noncompliance with the requirements of Mil. R. Evid. 305(c) or 305(f), or the requirements concerning counsel under Mil. R. Evid. 305(d), 305(e), and 305(g), this rule does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

(2) Evidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made.

(3) *Derivative evidence.* Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the

evidence would have been obtained even if the statement had not been made.

(c) *Definitions.* As used in these rules:

(1) *Confession.* A “confession” is an acknowledgment of guilt.

(2) *Admission.* An “admission” is a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory.

(3) *Involuntary.* A statement is “involuntary” if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

(d) *Procedure.*

(1) *Disclosure.* Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces.

(2) *Motions and objections.*

(A) Motions to suppress or objections under this rule or Mil. R. Evid. 302 or 305 to statements that have been disclosed shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

(B) If the prosecution intends to offer against the accused a statement made by the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interests of justice.

(C) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule or Mil. R. Evid. 302 or 305 shall be made in accordance with the procedure for challenging a statement under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

(3) *Specificity.* The military judge may require the defense to specify the grounds upon which the

defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement, the military judge may make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

(4) *Rulings.* A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at trial, but no such determination shall be deferred if a party’s right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

(5) *Effect of guilty plea.* Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this rule with respect to that offense regardless of whether raised prior to plea.

(e) *Burden of proof.* When an appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence. When a specific motion or objection has been required under subdivision (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

(1) *In general.* The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. When trial is by a special court-martial without a military judge, a determination by the president of the court that a statement was made voluntarily is subject to objection by any member of the court. When such objection is made, it shall be resolved pursuant to R.C.M. 801(e)(3)(C).

(2) *Weight of the evidence.* If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence with respect to the voluntariness of the statement and shall instruct the members to give such weight to the statement as it deserves under all the circumstances. When trial is by military judge without members, the military judge shall determine the appropriate weight to give the statement.

III-5

(3) *Derivative evidence.* Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

(f) *Defense evidence.* The defense may present evidence relevant to the admissibility of evidence as to which there has been an objection or motion to suppress under this rule. An accused may testify for the limited purpose of denying that the accused made the statement or that the statement was made voluntarily. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(g) *Corroboration.* An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

(1) *Quantum of evidence needed.* The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the ad-

mission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(2) *Procedure.* The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

(h) *Miscellaneous.*

(1) *Oral statements.* A voluntary oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for.

(2) *Completeness.* If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.

(3) *Certain admissions by silence.* A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation.

(4) *Refusal to obey order to submit body substance.* If an accused refuses a lawful order to submit for chemical analysis a sample of his or her blood, breath, urine or other body substance, evidence of such refusal may be admitted into evidence on:

(A) A charge of violating an order to submit such a sample; or

(B) Any other charge on which the results of the chemical analysis would have been admissible.

### **Rule 305. Warnings about rights**

(a) *General rule.* A statement obtained in violation of this rule is involuntary and shall be treated under Mil. R. Evid. 304.

(b) *Definitions.* As used in this rule:

(1) *Person subject to the code.* A "person subject to the code" includes a person acting as a knowing

agent of a military unit or of a person subject to the code.

(2) *Interrogation.* “Interrogation” includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.

(c) *Warnings concerning the accusation, right to remain silent, and use of statements.* A person subject to the code who is required to give warnings under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(1) informing the accused or suspect of the nature of the accusation;

(2) advising the accused or suspect that the accused or suspect has the right to remain silent; and

(3) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

(d) *Counsel rights and warnings.*

(1) *General rule.* When evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the Constitution of the United States either is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel as provided by paragraph (2) of this subdivision, to have such counsel present at the interrogation, and to be warned of these rights prior to the interrogation if—

(A) The interrogation is conducted by a person subject to the code who is required to give warnings under Article 31 and the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way; or

(B) The interrogation is conducted by a person subject to the code acting in a law enforcement capacity, or the agent of such a person, the interrogation is conducted subsequent to the preferral of charges, and the interrogation concerns the offenses or matters that were the subject of the preferral of the charges.

(2) *Counsel.* When a person entitled to counsel under this rule requests counsel, a judge advocate or an individual certified in accordance with Article 27(b) shall be provided by the United States at no expense to the person and without regard to the person’s indigency or lack thereof before the interro-

gation may proceed. In addition to counsel supplied by the United States, the person may retain civilian counsel at no expense to the United States. Unless otherwise provided by regulations of the Secretary concerned, an accused or suspect does not have a right under this rule to have military counsel of his or her own selection.

(e) *Presence of Counsel.*

(1) *Custodial interrogation.* Absent a valid waiver of counsel under subdivision (g)(2)(B), when an accused or person suspected of an offense is subjected to custodial interrogation under circumstances described under subdivision (d)(1)(A) of this rule, and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed.

(2) *Post-preferral interrogation.* Absent a valid waiver of counsel under subdivision (g)(2)(C), when an accused or person suspected of an offense is subjected to interrogation under circumstances described in subdivision (d)(1)(B) of this rule, and the accused or suspect either requests counsel or has an appointed or retained counsel, counsel must be present before any subsequent interrogation concerning that offense may proceed.

(f) *Exercise of rights.*

(1) *The privilege against self-incrimination.* If a person chooses to exercise the privilege against self-incrimination under this rule, questioning must cease immediately.

(2) *The right to counsel.* If a person subjected to interrogation under the circumstances described in subdivision (d)(1) of this rule chooses to exercise the right to counsel, questioning must cease until counsel is present.

(g) *Waiver.*

(1) *General rule.* After receiving applicable warnings under this rule, a person may waive the rights described therein and in Mil. R. Evid. 301 and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect must acknowledge affirmatively that he or she understands the rights involved, affirmatively decline the right to counsel and affirmatively consent to making a statement.

(2) *Counsel.*

(A) If the right to counsel in subdivision (d) is applicable and the accused or suspect does not decline affirmatively the right to counsel, the prosecu-

**M.R.E. 305(g)(2)(A)**

tion must demonstrate by a preponderance of the evidence that the individual waived the right to counsel.

(B) If an accused or suspect interrogated under circumstances described in subdivision (d)(1)(A) requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that—

(i) the accused or suspect initiated the communication leading to the waiver; or

(ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

(C) If an accused or suspect interrogated under circumstances described in subdivision (d)(1)(B) requests counsel, any subsequent waiver of the right to counsel obtained during an interrogation concerning the same offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that the accused or suspect initiated the communication leading to the waiver.

(h) *Nonmilitary interrogations.*

(1) *General rule.* When a person subject to the code is interrogated by an official or agent of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States, or any political subdivision of such a State, Commonwealth, or possession, and such official or agent is not required to give warning under subdivision (c), the person's entitlement to rights warnings and the validity of any waiver of applicable rights shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar interrogations.

(2) *Foreign interrogations.* Neither warnings under subdivisions (c) or (d), nor notice to counsel under subdivision (e) are required during an interrogation conducted abroad by officials of a foreign government or their agents unless such interrogation is conducted, instigated, or participated in by military personnel or their agents or by those officials or agents listed in subdivision (h)(1). A statement obtained during such an interrogation is involuntary within the meaning of Mil. R. Evid. 304(b)(3) if it is obtained through the use of coercion, unlawful influ-

ence, or unlawful inducement. An interrogation is not "participated in" by military personnel or their agents or by the officials or agents listed in subdivision (h)(1) merely because such a person was present at an interrogation conducted in a foreign nation by officials of a foreign government or their agents, or because such a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign interrogation.

**Rule 306. Statements by one of several accused**

When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accused may not be received in evidence unless all references inculpat- ing an accused against whom the statement is inad- missible are deleted effectively or the maker of the statement is subject to cross-examination.

**Rule 311. Evidence obtained from unlawful searches and seizures**

(a) *General rule.* Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) *Objection.* The accused makes a timely motion to suppress or an objection to the evidence under this rule; and

(2) *Adequate interest.* The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when chal- lenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

(b) *Exceptions.*

(1) Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

(2) Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

(3) Evidence that was obtained as a result of an unlawful search or seizure may be used if:

(A) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;

(B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

(c) *Nature of search or seizure.* A search or seizure is “unlawful” if it was conducted, instigated, or participated in by:

(1) *Military personnel.* Military personnel or their agents and was in violation of the Constitution of the United States as applied to members of the armed forces, an Act of Congress applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or Mil. R. Evid. 312–317;

(2) *Other officials.* Other officials or agents of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth, or possession and was in violation of the Constitution of the United States, or is unlawful under the principles of law generally applied in the trial of criminal cases in the United States district courts involving a similar search or seizure; or

(3) *Officials of a foreign government.* Officials of a foreign government or their agents and was obtained as a result of a foreign search or seizure which subjected the accused to gross and brutal maltreatment. A search or seizure is not “participated in” merely because a person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

(d) *Motions to suppress and objections.*

(1) *Disclosure.* Prior to arraignment, the prosecution shall disclose to the defense all evidence seized

from the person or property of the accused, or believed to be owned by the accused, that it intends to offer into evidence against the accused at trial.

(2) *Motion or objection.*

(A) When evidence has been disclosed under subdivision (d)(1), any motion to suppress or objection under this rule shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

(B) If the prosecution intends to offer evidence seized from the person or property of the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

(C) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule shall be made in accordance with the procedure for challenging evidence under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

(3) *Specificity.* The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

(4) *Rulings.* A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party’s right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

(e) *Burden of proof.*

**M.R.E. 311(e)(1)**

(1) *In general.* When an appropriate motion or objection has been made by the defense under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant.

(2) *Derivative evidence.* Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence ultimately would have been obtained by lawful means even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize or apprehend or a search warrant or an arrest warrant. Notwithstanding other provisions of this Rule, an apprehension made in a dwelling in a manner that violates R.C.M. 302 (d)(2) and (e) does not preclude the admission into evidence of a statement of an individual apprehended provided (1) that the apprehension was based on probable cause, (2) that the statement was made subsequent to the apprehension at a location outside the dwelling, and (3) that the statement was otherwise in compliance with these rules.

(3) *Specific motions or objections.* When a specific motion or objection has been required under subdivision (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

(f) *Defense evidence.* The defense may present evidence relevant to the admissibility of evidence as to which there has been an appropriate motion or objection under this rule. An accused may testify for the limited purpose of contesting the legality of the search or seizure giving rise to the challenged evidence. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing

said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(g) *Scope of motions and objections challenging probable cause.*

(1) *Generally.* If the defense challenges evidence seized pursuant to a search warrant or search authorization on the grounds that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer, except as provided in paragraph (2).

(2) *False statements.* If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion shall be granted unless the search is otherwise lawful under these rules.

(h) *Objections to evidence seized unlawfully.* If a defense motion or objection under this rule is sustained in whole or in part, the members may not be informed of that fact except insofar as the military judge must instruct the members to disregard evidence.

(i) *Effect of guilty plea.* Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under the Fourth Amendment to the Constitution of the United States and Mil. R. Evid. 311-317 with respect to the offense whether or not raised prior to plea.

**Rule 312. Body views and intrusions**

(a) *General rule.* Evidence obtained from body views and intrusions conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Visual examination of the body.*

(1) *Consensual.* Visual examination of the unclothed body may be made with the consent of the individual subject to the inspection in accordance with Mil. R. Evid. 314(e).

(2) *Involuntary.* An involuntary display of the unclothed body, including a visual examination of body cavities, may be required only if conducted in reasonable fashion and authorized under the following provisions of the Military Rules of Evidence: inspections and inventories under Mil. R. Evid. 313; searches under Mil. R. Evid. 314(b) and 314(c) if there is a reasonable suspicion that weapons, contraband, or evidence of crime is concealed on the body of the person to be searched; searches within jails and similar facilities under Mil. R. Evid. 314(h) if reasonably necessary to maintain the security of the institution or its personnel; searches incident to lawful apprehension under Mil. R. Evid. 314(g); emergency searches under Mil. R. Evid. 314(i); and probable cause searches under Mil. R. Evid. 315. An examination of the unclothed body under this rule should be conducted whenever practicable by a person of the same sex as that of the person being examined; provided, however, that failure to comply with this requirement does not make an examination an unlawful search within the meaning of Mil. R. Evid. 311.

(c) *Intrusion into body cavities.* A reasonable non-consensual physical intrusion into the mouth, nose, and ears may be made when a visual examination of the body under subdivision (b) is permissible. Non-consensual intrusions into other body cavities may be made:

(1) *For purposes of seizure.* When there is a clear indication that weapons, contraband, or other evidence or crime is present, to remove weapons, contraband, or evidence of crime discovered under subdivisions (b) and (c)(2) of this rule or under Mil. R. Evid. 316(d)(4)(C) if such intrusion is made in a reasonable fashion by a person with appropriate medical qualifications; or

(2) *For purposes of search.* To search for weapons, contraband, or evidence of crime if authorized

by a search warrant or search authorization under Mil. R. Evid. 315 and conducted by a person with appropriate medical qualifications.

Notwithstanding this rule, a search under Mil. R. Evid. 314(h) may be made without a search warrant or authorization if such search is based on a reasonable suspicion that the individual is concealing weapons, contraband, or evidence of crime.

(d) *Extraction of body fluids.* Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a search authorization under Mil. R. Evid. 315. Nonconsensual extraction of body fluids may be made without such warrant or authorization, notwithstanding Mil. R. Evid. 315(g), only when there is clear indication that evidence of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of the evidence. Involuntary extraction of body fluids under this rule must be done in a reasonable fashion by a person with appropriate medical qualifications.

(e) *Other intrusive searches.* Nonconsensual intrusive searches of the body made to locate or obtain weapons, contraband, or evidence of crime and not within the scope of subdivisions (b) or (c) may be made only upon search warrant or search authorization under Mil. R. Evid. 315 and only if such search is conducted in a reasonable fashion by a person with appropriate medical qualifications and does not endanger the health of the person to be searched. Compelling a person to ingest substances for the purposes of locating the property described above or to compel the bodily elimination of such property is a search within the meaning of this section. Notwithstanding this rule, a person who is neither a suspect nor an accused may not be compelled to submit to an intrusive search of the body for the sole purpose of obtaining evidence of crime.

(f) *Intrusions for valid medical purposes.* Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

(g) *Medical qualifications.* The Secretary concerned may prescribe appropriate medical qualifications for

persons who conduct searches and seizures under this rule.

**Rule 313. Inspections and inventories in the armed forces**

(a) *General rule.* Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Inspections.* An “inspection” is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or

other evidence of crime located during an inspection may be seized.

(c) *Inventories.* Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

**Rule 314. Searches not requiring probable cause**

(a) *General rule.* Evidence obtained from reasonable searches not requiring probable cause conducted pursuant to this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Border searches.* Border searches for customs or immigration purposes may be conducted when authorized by Act of Congress.

(c) *Searches upon entry to or exit from United States installations, aircraft, and vessels abroad.* In addition to the authority to conduct inspections under Mil. R. Evid. 313(b), a commander of a United States military installation, enclave, or aircraft on foreign soil, or in foreign or international airspace, or a United States vessel in foreign or international waters, may authorize appropriate personnel to search persons or the property of such persons upon entry to or exit from the installation, enclave, aircraft, or vessel to ensure the security, military fitness, or good order and discipline of the command. Such searches may not be conducted at a time or in a manner contrary to an express provision of a treaty or agreement to which the United States is a party. Failure to comply with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311. A search made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceeding is not authorized by this subdivision.

(d) *Searches of government property.* Government property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at

the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use; but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.

(e) *Consent searches.*

(1) *General rule.* Searches may be conducted of any person or property with lawful consent.

(2) *Who may consent.* A person may consent to a search of his or her person or property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.

(3) *Scope of consent.* Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time.

(4) *Voluntariness.* To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.

(5) *Burden of proof.* Consent must be shown by clear and convincing evidence. The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of consent, but it does not affect the burden of proof.

(f) *Searches incident to a lawful stop.*

(1) *Stops.* A person authorized to apprehend under R.C.M. 302(b) and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

(2) *Frisks.* When a lawful stop is performed, the person stopped may be frisked for weapons when that person is reasonably believed to be armed and presently dangerous. Contraband or evidence located in the process of a lawful frisk may be seized.

(3) *Motor vehicles.* When a person lawfully stopped is the driver or a passenger in a motor vehicle, the passenger compartment of the vehicle may be searched for weapons if the official who made the stop has a reasonable belief that the person stopped is dangerous and that the person stopped may gain immediate control of a weapon.

(g) *Searches incident to a lawful apprehension.*

(1) *General rule.* A person who has been lawfully apprehended may be searched.

(2) *Search for weapons and destructible evidence.* A search may be conducted for weapons or destructible evidence, in the area within the immediate control of a person who has been apprehended. The area within the person's "immediate control" is the area within the individual searching could reasonably believe that the person apprehended could reach with a sudden movement to obtain such property; provided, that the passenger compartment of an automobile, and containers within the passenger compartment may be searched as a contemporaneous incident of the apprehension of an occupant of the automobile, regardless whether the person apprehended has been removed from the vehicle.

(3) *Examination for other persons.*

(A) When an apprehension takes place at a location in which other persons might be present who might endanger those conducting the apprehension and others in the area of the apprehension, a reasonable examination may be made of the general area in which such other persons might be located. A reasonable examination under this rule is permitted if the apprehending officials have a reasonable suspicion based on specific and articulable facts that the area to be examined harbors an individual posing a danger to those in the area of the apprehension.

(B) Apprehending officials may, incident to apprehension, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of apprehension from which an attack could be immediately launched.

(h) *Searches within jails, confinement facilities, or similar facilities.* Searches within jails, confinement

**M.R.E. 314(h)**

facilities, or similar facilities may be authorized by persons with authority over the institution.

(i) *Emergency searches to save life or for related purposes.* In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury.

(j) *Searches of open fields or woodlands.* A search of open fields or woodlands is not an unlawful search within the meaning of Mil. R. Evid. 311.

(k) *Other searches.* A search of a type not otherwise included in this rule and not requiring probable cause under Mil. R. Evid. 315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces.

**Rule 315. Probable cause searches**

(a) *General rule.* Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Definitions.* As used in these rules:

(1) *Authorization to search.* An “authorization to search” is an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(2) *Search warrant.* A “search warrant” is an express permission to search and seize issued by competent civilian authority.

(c) *Scope of authorization.* A search authorization may be issued under this rule for a search of:

(1) *Persons.* The person of anyone subject to military law or the law of war wherever found;

(2) *Military property.* Military property of the United States or of nonappropriated fund activities of an armed force of the United States wherever located;

(3) *Persons and property within military control.* Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or

any other location under military control, wherever located; or

(4) *Nonmilitary property within a foreign country.*

(A) Property owned, used, occupied by, or in the possession of an agency of the United States other than the Department of Defense when situated in a foreign country. A search of such property may not be conducted without the concurrence of an appropriate representative of the agency concerned. Failure to obtain such concurrence, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311.

(B) Other property situated in a foreign country. If the United States is a party to a treaty or agreement that governs a search in a foreign country, the search shall be conducted in accordance with the treaty or agreement. If there is no treaty or agreement, concurrence should be obtained from an appropriate representative of the foreign country with respect to a search under paragraph (4)(B) of this subdivision. Failure to obtain such concurrence or noncompliance with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311.

(d) *Power to authorize.* Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

(1) *Commander.* A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war; or

(2) *Military judge.* A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned. An otherwise impartial authorizing official does not lose the character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(e) *Power to search.* Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision (g).

(f) *Basis for Search authorizations.*

(1) *Probable cause requirement.* A search authorization issued under this rule must be based upon probable cause.

(2) *Probable cause determination.* Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule shall be based upon any or all of the following:

(A) Written statements communicated to the authorizing officer;

(B) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

(C) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion. The Secretary of Defense or the Secretary concerned may prescribe additional requirements.

(g) *Exigencies.* A search warrant or search authorization is not required under this rule for a search based on probable cause when:

(1) *Insufficient time.* There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(2) *Lack of communications.* There is a reasonable military operational necessity that is reasonably believed to prohibit or prevent communication with a person empowered to grant a search warrant or authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruc-

tion, or concealment of the property or evidence sought;

(3) *Search of operable vehicle.* An operable vehicle is to be searched, except in the circumstances where a search warrant or authorization is required by the Constitution of the United States, this Manual, or these rules; or

(4) *Not required by the Constitution.* A search warrant or authorization is not otherwise required by the Constitution of the United States as applied to members of the armed forces. For purpose of this rule, a vehicle is "operable" unless a reasonable person would have known at the time of search that the vehicle was not functional for purposes of transportation.

(h) *Execution.*

(1) *Notice.* If the person whose property is to be searched is present during a search conducted pursuant to a search authorization granted under this rule, the person conducting the search should when possible notify him or her of the act of authorization and the general substance of the authorization. Such notice may be made prior to or contemporaneously with the search. Failure to provide such notice does not make a search unlawful within the meaning of Mil. R. Evid. 311.

(2) *Inventory.* Under regulations prescribed by the Secretary concerned, and with such exceptions as may be authorized by the Secretary, an inventory of the property seized shall be made at the time of a seizure under this rule or as soon as practicable thereafter. At an appropriate time, a copy of the inventory shall be given to a person from whose possession or premises the property was taken. Failure to make an inventory, furnish a copy thereof, or otherwise comply with this paragraph does not render a search or seizure unlawful within the meaning of Mil. R. Evid. 311.

(3) *Foreign searches.* Execution of a search authorization outside the United States and within the jurisdiction of a foreign nation should be in conformity with existing agreements between the United States and the foreign nation. Noncompliance with such an agreement does not make an otherwise lawful search unlawful.

(4) *Search warrants.* Any civilian or military criminal investigator authorized to request search warrants pursuant to applicable law or regulation is authorized to serve and execute search warrants. The

**M.R.E. 315(h)(4)**

execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or an applicable Act of Congress.

**Rule 316. Seizures**

(a) *General rule.* Evidence obtained from seizures conducted in accordance with this rule is admissible at trial if the evidence was not obtained as a result of an unlawful search and if the evidence is relevant and not otherwise inadmissible under these rules.

(b) *Seizure of property.* Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape.

(c) *Apprehension.* Apprehension is governed by R.C.M. 302.

(d) *Seizure of property or evidence.*

(1) *Abandoned property.* Abandoned property may be seized without probable cause and without a search warrant or search authorization. Such seizure may be made by any person.

(2) *Consent.* Property or evidence may be seized with consent consistent with the requirements applicable to consensual searches under Mil. R. Evid. 314.

(3) *Government property.* Government property may be seized without probable cause and without a search warrant or search authorization by any person listed in subdivision (e), unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein, as provided in Mil. R. Evid. 314(d), at the time of the seizure.

(4) *Other property.* Property or evidence not included in paragraph (1)-(3) may be seized for use in evidence by any person listed in subdivision (e) if:

(A) *Authorization.* The person is authorized to seize the property or evidence by a search warrant or a search authorization under Mil. R. Evid. 315;

(B) *Exigent circumstances.* The person has probable cause to seize the property or evidence and under Mil. R. Evid. 315(g) a search warrant or search authorization is not required; or

(C) *Plain view.* The person while in the course of otherwise lawful activity observes in a reasonable fashion property or evidence that the person has probable cause to seize.

(5) *Temporary detention.* Nothing in this rule shall prohibit temporary detention of property on less than probable cause when authorized under the Constitution of the United States.

(e) *Power to seize.* Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or individual designated by proper authority to perform guard or police duties, or any agent of any such person, may seize property pursuant to this rule.

(f) *Other seizures.* A seizure of a type not otherwise included in this rule may be made when permissible under the Constitution of the United States as applied to members of the armed forces.

**Rule 317. Interception of wire and oral communications**

(a) *General rule.* Wire or oral communications constitute evidence obtained as a result of an unlawful search or seizure within the meaning of Mil. R. Evid. 311 when such evidence must be excluded under the Fourth Amendment to the Constitution of the United States as applied to members of the armed forces or if such evidence must be excluded under a statute applicable to members of the armed forces.

(b) *Authorization for judicial applications in the United States.* Under 18 U.S.C. § 2516(1), the Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a federal judge of competent jurisdiction for, and such judge may grant in conformity with 18 U.S.C. § 2518, an order authorizing or approving the interception of wire or oral communications by the Department of Defense, the Department of Transportation, or any Military Department for purposes of obtaining evidence concerning the offenses enumerated in 18 U.S.C. § 2516(1), to the extent such offenses are punishable under the Uniform Code of Military Justice.

(c) *Regulations.* Notwithstanding any other provision of these rules, members of the armed forces or their agents may not intercept wire or oral communications for law enforcement purposes unless such interception:

(1) takes place in the United States and is authorized under subdivision (b);

(2) takes place outside the United States and is authorized under regulations issued by the Secretary of Defense or the Secretary concerned; or

(3) is authorized under regulations issued by the Secretary of Defense or the Secretary concerned and is not unlawful under 18 U.S.C. § 2511.

### **Rule 321. Eyewitness identification**

#### *(a) General rule.*

(1) *Admissibility.* Testimony concerning a relevant out of court identification by any person is admissible, subject to an appropriate objection under this rule, if such testimony is otherwise admissible under these rules. The witness making the identification and any person who has observed the previous identification may testify concerning it. When in testimony a witness identifies the accused as being, or not being, a participant in an offense or makes any other relevant identification concerning a person in the courtroom, evidence that on a previous occasion the witness made a similar identification is admissible to corroborate the witness' testimony as to identity even if the credibility of the witness has not been attacked directly, subject to appropriate objection under this rule.

(2) *Exclusionary rule.* An identification of the accused as being a participant in an offense, whether such identification is made at the trial or otherwise, is inadmissible against the accused if:

(A) The accused makes a timely motion to suppress or an objection to the evidence under this rule and if the identification is the result of an unlawful lineup or other unlawful identification process conducted by the United States or other domestic authorities; or

(B) Exclusion of the evidence is required by the due process clause of the Fifth Amendment to the Constitution of the United States as applied to members of the armed forces. Evidence other than an identification of the accused that is obtained as a result of the unlawful lineup or unlawful identification process is inadmissible against the accused if the accused makes a timely motion to suppress or an objection to the evidence under this rule and if exclusion of the evidence is required under the Constitution of the United States as applied to members of the armed forces.

#### *(b) Definition of "unlawful".*

(1) *Lineups and other identification processes.* A

lineup or other identification process is "unlawful" if the identification is unreliable. An identification is unreliable if the lineup or other identification process, under the circumstances, is so suggestive as to create a substantial likelihood of misidentification.

(2) *Lineups: right to counsel.* A lineup is "unlawful" if it is conducted in violation of the following rights to counsel:

(A) *Military lineups.* An accused or suspect is entitled to counsel if, after preferral of charges or imposition of pretrial restraint under R.C.M. 304 for the offense under investigation, the accused is subjected by persons subject to the code or their agents to a lineup for the purpose of identification. When a person entitled to counsel under this rule requests counsel, a judge advocate or a person certified in accordance with Article 27(b) shall be provided by the United States at no expense to the accused or suspect and without regard to indigency or lack thereof before the lineup may proceed. The accused or suspect may waive the rights provided in this rule if the waiver is freely, knowingly, and intelligently made.

(B) *Nonmilitary lineups.* When a person subject to the code is subjected to a lineup for purposes of identification by an official or agent of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States, or any political subdivision of such a State, Commonwealth, or possession, and the provisions of paragraph (A) do not apply, the person's entitlement to counsel and the validity of any waiver of applicable rights shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar lineups.

#### *(c) Motions to suppress and objections.*

(1) *Disclosure.* Prior to arraignment, the prosecution shall disclose to the defense all evidence of a prior identification of the accused as a lineup or other identification process that it intends to offer into evidence against the accused at trial.

#### *(2) Motion or objection.*

(A) When such evidence has been disclosed, any motion to suppress or objection under this rule shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good

**M.R.E. 321(c)(2)(A)**

cause shown. Failure to so move constitutes a waiver of the motion or objection.

(B) If the prosecution intends to offer such evidence and the evidence was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interests of justice.

(C) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule shall be made in accordance with the procedure for challenging evidence under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

(3) *Specificity.* The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the lineup or other identification process, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

(d) *Burden of proof.* When a specific motion or objection has been required under subdivision (c)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence. When an appropriate objection under this rule has been made by the defense, the issue shall be determined by the military judge as follows:

(1) *Right to counsel.* When an objection raises the right to presence of counsel under this rule, the prosecution must prove by a preponderance of the evidence that counsel was present at the lineup or that the accused, having been advised of the right to the presence of counsel, voluntarily and intelligently waived that right prior to the lineup. When the military judge determines that an identification is the result of a lineup conducted without the presence of counsel or an appropriate waiver, any later identification by one present at such unlawful lineup is also a result thereof unless the military judge determines that the contrary has been shown by clear and convincing evidence.

(2) *Unreliable identification.* When an objection

raises the issue of an unreliable identification, the prosecution must prove by a preponderance of the evidence that the identification was reliable under the circumstances; provided, however, that if the military judge finds the evidence of identification inadmissible under this subdivision, a later identification may be admitted if the prosecution proves by clear and convincing evidence that the later identification is not the result of the inadmissible identification.

(e) *Defense evidence.* The defense may present evidence relevant to the issue of the admissibility of evidence as to which there has been an appropriate motion or objection under this rule. An accused may testify for the limited purpose of contesting the legality of the lineup or identification process giving rise to the challenged evidence. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(f) *Rulings.* A motion to suppress or an objection to evidence made prior to plea under this rule shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state his or her essential findings of fact on the record.

(g) *Effect of guilty pleas.* Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under this rule with respect to that offense whether or not raised prior to the plea.

**SECTION IV  
RELEVANCY AND ITS LIMITS**

**Rule 401. Definition of "relevant evidence"**

"Relevant evidence" means evidence having any

is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

**Rule 407. Subsequent remedial measures**

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

**Rule 408. Compromise and offer to compromise**

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

**Rule 409. Payment of medical and similar expenses**

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

**Rule 410. Inadmissibility of pleas, plea discussions, and related statements**

(a) *In general.* Except as otherwise provided in this rule, evidence of the following is not admissible in

any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;

(3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the Government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding where in another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a court-martial proceedings for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel.

(b) *Definitions.* A "statement made in the course of plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" includes the written statement submitted by the accused in furtherance of such request.

**Rule 411. Liability insurance**

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

**Rule 412. Nonconsensual 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 subdivision (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 factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

**Rule 413. Evidence of similar crimes in sexual assault cases**

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial, or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, "offenses of sexual assault" means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved—

(1) any sexual act or sexual contact, without consent, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(2) contact, without consent of the victim, between any part of the accused's body, or an object

**M.R.E. 413(d)(2)**

held or controlled by the accused, and the genitals or anus of another person;

(3) contact, without consent of the victim, between the genitals or anus of the accused and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1) through (4).

(e) For purposes of this rule, the term 'sexual act' means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule, contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

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

(4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term "sexual contact" means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purposes of this rule, the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

**Rule 414. Evidence of similar crimes in child molestation cases**

(a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 5 days before the scheduled date of trial or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, 'child' means a person below the age of sixteen, and 'offense of child molestation' means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved—

(1) any sexual act or sexual contact with a child proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(2) any sexually explicit conduct with children proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(3) contact between any part of the accused's body, or an object controlled or held by the accused, and the genitals or anus of a child;

(4) contact between the genitals or anus of the accused and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1) through (5) of this subdivision.

(e) For purposes of this rule, the term 'sexual act' means:

(1) contact between the penis and the vulva or the penis and the anus, and for purposes of this rule, contact occurs upon penetration, however slight, of the penis into the vulva or anus;

(2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

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

(4) the intentional touching, not through the clothing, of the genitalia of another person who has

not attained the age of 16 years, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term “sexual contact” means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purposes of this rule, the term “sexually explicit conduct” means actual or simulated:

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between person of the same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadistic or masochistic abuse; or

(5) lascivious exhibition of the genitals or pubic area of any person.

(h) For purposes of this rule, the term “State” includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

## SECTION V

### PRIVILEGES

#### Rule 501. General rule

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States as applied to members of the armed forces;

(2) An Act of Congress applicable to trials by courts-martial;

(3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.

(b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term “person” includes an appropriate representative of the Federal Government, a State, or political subdivision thereof, or any other entity claiming to be the holder of a privilege.

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

#### Rule 502. Lawyer-client privilege

(a) *General rule of privilege.* A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client’s representative and the lawyer or the lawyer’s representative, (2) between the lawyer and the lawyer’s representative, (3) by the client or the client’s lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(b) *Definitions.* As used in this rule:

(1) A “client” is a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding. The term “lawyer” does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist as defined in Article 1, unless the member: (a) is detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding; (b) is authorized by the armed forces, or reasonably

**M.R.E. 502(b)(2)**

believed by the client to be authorized, to render professional legal services to members of the armed forces; or (c) is authorized to practice law and renders professional legal services during off-duty employment.

(3) A “representative” of a lawyer is a person employed by or assigned to assist a lawyer in providing professional legal services.

(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 legal services to the client or those reasonably necessary for the transmission of the communication.

(c) *Who may claim the privilege.* The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer or the lawyer’s representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule under the following circumstances:

(1) *Crime or fraud.* If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants through same deceased client.* As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of duty by lawyer or client.* As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) *Document attested by lawyer.* As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients.* As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common,

when offered in an action between any of the clients.

**Rule 503. Communications to clergy**

(a) *General rule of privilege.* A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman’s assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) *Definitions.* As used in this rule:

(1) A “clergyman” is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) A communication is “confidential” if made to a clergyman in the clergyman’s capacity as a spiritual adviser or to a clergyman’s assistant in the assistant’s official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) *Who may claim the privilege.* The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman’s assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman’s assistant to do so is presumed in the absence of evidence to the contrary.

**Rule 504. Husband-wife privilege**

(a) *Spousal incapacity.* A person has a privilege to refuse to testify against his or her spouse.

(b) *Confidential communication made during marriage.*

(1) *General rule of privilege.* A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

(2) *Definition.* A communication is “confidential” if made privately by any person to the spouse of the person and is not intended to be disclosed to third

persons other than those reasonably necessary for transmission of the communication.

(3) *Who may claim the privilege.* The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) *Exceptions.*

(1) *Spousal incapacity only.* There is no privilege under subdivision (a) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

(2) *Spousal incapacity and confidential communications.* There is no privilege under subdivisions (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or with respect to the privilege in subdivision (b), the relationship was a sham at the time of the communication; or

(C) In proceedings in which a spouse is charged, in accordance with Article 133 or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328; with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421–2424; or with violation of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.

## Rule 505. Classified information

(a) *General rule of privilege.* Classified information is privileged from disclosure if disclosure would be detrimental to the national security. As with other rules of privilege this rule applies to all stages of the proceedings.

(b) *Definitions.* As used in this rule:

(1) *Classified information.* “Classified information” means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulations, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y).

(2) *National security.* “National security” means the national defense and foreign relations of the United States.

(c) *Who may claim the privilege.* The privilege may be claimed by the head of the executive or military department or government agency concerned based on a finding that the information is properly classified and that disclosure would be detrimental to the national security. A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his or her behalf. The authority of the witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

(d) *Action prior to referral of charges.* Prior to referral of charges, the convening authority shall respond in writing to a request by the accused for classified information if the privilege in this rule is claimed for such information. The convening authority may:

(1) Delete specified items of classified information from documents made available to the accused;

(2) Substitute a portion or summary of the information for such classified documents;

(3) Substitute a statement admitting relevant facts that the classified information would tend to prove;

(4) Provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused; or

(5) Withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the national security.

Any objection by the accused to withholding of information or to the conditions of disclosure shall be raised through a motion for appropriate relief at a pretrial session.

III-25

tary judge makes a determination under this subsection that the information is subject to disclosure, or if the Government elects not to contest the relevance, necessity, and admissibility of the government information, the Government may proffer a statement admitting for purposes of the court-martial any relevant facts such information would tend to prove or may submit a portion or summary to be used in lieu of the information. The military judge shall order that such statement, portion, summary, or some other form of information which the military judge finds to be consistent with the interests of justice, be used by the accused in place of the government information, unless the military judge finds that use of the government information itself is necessary to afford the accused a fair trial.

(F) *Sanctions.* Government information may not be disclosed over the Government's objection. If the Government continues to object to disclosure of the information following rulings by the military judge, the military judge shall issue any order that the interests of justice require. Such an order may include:

- (i) striking or precluding all or part of the testimony of a witness;
- (ii) declaring a mistrial;
- (iii) finding against the Government on any issue as to which the evidence is relevant and necessary to the defense;
- (iv) dismissing the charges, with or without prejudice; or
- (v) dismissing the charges or specifications or both to which the information relates.

(j) *Appeals of orders and rulings.* In a court-martial in which a punitive discharge may be adjudged, the Government may appeal an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification, directs the disclosure of government information, or imposes sanctions for nondisclosure of government information. The government may also appeal an order or ruling in which the military judge refuses to issue a protective order sought by the United States to prevent the disclosure of government information, or to enforce such an order previously issued by appropriate authority. The Government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

(k) *Introduction of government information subject to a claim of privilege.*

(1) *Precautions by military judge.* In order to prevent unnecessary disclosure of government information after there has been a claim of privilege under this rule, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the government information contained therein.

(2) *Contents of writing, recording, or photograph.* The military judge may permit proof of the contents of a writing, recording, or photograph that contains government information that is the subject of a claim of privilege under this rule without requiring introduction into evidence of the original or a duplicate.

(3) *Taking of testimony.* During examination of a witness, the prosecution may object to any question or line of inquiry that may require the witness to disclose government information not previously found relevant and necessary to the defense if such information has been or is reasonably likely to be the subject of a claim of privilege under this rule. Following such an objection, the military judge shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any government information. Such action may include requiring the Government to provide the military judge with a proffer of the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

(l) *Procedures to safeguard against compromise of government information disclosed to courts-martial.* The Secretary of Defense may prescribe procedures for protection against the compromise of government information submitted to courts-martial and appellate authorities after a claim of privilege.

### **Rule 507. Identity of informant**

(a) *Rule of privilege.* The United States or a State or subdivision thereof has a privilege to refuse to disclose the identity of an informant. An "informant" is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime.

III-31

**M.R.E. 507(a)**

Unless otherwise privileged under these rules, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity.

(b) *Who may claim the privilege.* The privilege may be claimed by an appropriate representative of the United States, regardless of whether information was furnished to an officer of the United States or a State or subdivision thereof. The privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof, except the privilege shall not be allowed if the prosecution objects.

(c) *Exceptions.*

(1) *Voluntary disclosures; informant as witness.* No privilege exists under this rule: (A) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informant's own action; or (B) if the informant appears as a witness for the prosecution.

(2) *Testimony on the issue of guilt or innocence.* If a claim of privilege has been made under this rule, the military judge shall, upon motion by the accused, determine whether disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defense, the possible significance of the informant's testimony, and other relevant factors. If it appears from the evidence in the case or from other showing by a party that an informant may be able to give testimony necessary to the accused's defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

(3) *Legality of obtaining evidence.* If a claim of privilege has been made under this rule with respect to a motion under Mil. R. Evid. 311, the military judge shall, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the Constitution of the United States as applied to members of the armed forces. In making this determination, the military judge may make any order required by the interests of justice.

(d) *Procedures.* If a claim of privilege has been made under this rule, the military judge may make any order required by the interests of justice. If the

military judge determines that disclosure of the identity of the informant is required under the standards set forth in this rule, and the prosecution elects not to disclose the identity of the informant, the matter shall be reported to the convening authority. The convening authority may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances. If, after a reasonable period of time disclosure is not made, the military judge, *sua sponte* or upon motion of either counsel and after a hearing if requested by either party, may dismiss the charge or specifications or both to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused.

**Rule 508. Political vote**

A person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

**Rule 509. Deliberations of courts and juries**

Except as provided in Mil. R. Evid. 606, the deliberations of courts and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged.

**Rule 510. Waiver of privilege by voluntary disclosure**

(a) A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This rule does not apply if the disclosure is itself a privileged communication.

(b) Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege

to which he or she may be entitled pertaining to the confidential matter or communication.

**Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege**

(a) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

(b) The telephonic transmission of information otherwise privileged under these rules does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under these rules does not affect the privileged character of such information if use of such means of communication is necessary and in furtherance of the communication.

**Rule 512. Comment upon or inference from claim of privilege; instruction**

(a) *Comment or inference not permitted.*

(1) The claim of a privilege by the accused whether in the present proceeding or upon a prior occasion is not a proper subject of comment by the military judge or counsel for any party. No inference may be drawn therefrom.

(2) The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn therefrom except when determined by the military judge to be required by the interests of justice.

(b) *Claiming privilege without knowledge of members.* In a trial before a court-martial with members, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members. This subdivision does not apply to a special court-martial without a military judge.

(c) *Instruction.* Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction

that no inference may be drawn therefrom except as provided in subdivision (a)(2).

**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, in a case arising under the UCMJ, 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

**M.R.E. 513(c)**

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 spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or 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 VI**

### **WITNESSES**

#### **Rule 601. General rule of competency**

Every person is competent to be a witness except as otherwise provided in these rules.

#### **Rule 602. Lack of personal knowledge**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the mat-

(5) *Other exceptions.* [Transferred to M.R.E. 807]

(6) *Forfeiture by wrongdoing.* A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

#### **Rule 805. Hearsay within hearsay**

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

#### **Rule 806. Attacking and supporting credibility of declarant**

When a hearsay statement, or a statement defined in Mil. R. Evid. 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

#### **Rule 807. Residual exception.**

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer

the statement and the particulars of it, including the name and address of the declarant.

## **SECTION IX AUTHENTICATION AND IDENTIFICATION**

#### **Rule 901. Requirement of authentication or identification**

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular persons or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a

III-43

purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by Act of Congress, by rules prescribed by the Supreme Court pursuant to statutory authority, or by applicable regulations prescribed pursuant to statutory authority.

### **Rule 902. Self-authentication**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States, or any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal.* A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of

any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution of attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records.* A copy of an official record or report of entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraphs (1), (2), or (3) of this rule or complying with any Act of Congress, rule prescribed by the Supreme Court pursuant to statutory authority, or an applicable regulation prescribed pursuant to statutory authority.

(4a) *Documents or records of the United States accompanied by attesting certificates.* Documents or records kept under the authority of the United States by any department, bureau, agency, office, or court thereof when attached to or accompanied by an attesting certificate of the custodian of the document or record without further authentication.

(5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals.* Printed material purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like.* Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Presumptions under Acts of Congress and regulations.* Any signature, document, or other matter declared by Act of Congress or by applicable regulation prescribed pursuant to statutory authority to be presumptively or *prima facie* genuine or authentic.

(11) *Certified domestic records of regularly conducted activity.* The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Mil. R. Evid. 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

### **Rule 903. Subscribing witness' testimony unnecessary**

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

## **SECTION X**

### **CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS**

#### **Rule 1001. Definitions**

For purposes of this section the following definitions are applicable:

(1) *Writings and recordings.* "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting,

printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs.* "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original.* An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any print-out or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate.* A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

#### **Rule 1002. Requirement of an original**

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, this Manual, or by Act of Congress.

#### **Rule 1003. Admissibility of duplicates**

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

#### **Rule 1004. Admissibility of other evidence of contents**

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) *Originals lost or destroyed.* All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) *Original not obtainable.* No original can be obtained by any available judicial process or procedure; or

(3) *Original in possession of opponent.* At a time when an original was under the control of the party

court of inquiry may detail or employ interpreters who shall interpret for the court or commission.

#### § 829. Art. 29. Absent and additional members

(a) No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.

(b) Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below five members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

(c) Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below three members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three members. The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the military judge, if any, the accused and counsel for both sides.

(d) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 8 16(1)(B) or (2)(C) of this title (article 16(1)(B) or (2)(C)), after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new military judge, the accused, and counsel for both sides.

### SUBCHAPTER VI. PRE-TRIAL PROCEDURE

Sec.	Art.
830.	30. Charges and specifications.
831.	31. Compulsory self-incrimination prohibited.
832.	32. Investigation.
833.	33. Forwarding of charges.
834.	34. Advice of staff judge advocate and reference for trial.
835.	35. Service of charges.

#### § 830. Art. 30. Charges and specifications

(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

#### § 831. Art. 31. Compulsory self-incrimination prohibited

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

#### § 832. Art. 32. Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in section 838 of this title (article 38) and in regulations prescribed under that section. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for

notwithstanding the number of members of the court and without regard to section 829 of this title (article 29).

(b) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in cases in which a military judge has been detailed to the court, the military judge.

#### § 840. Art. 40. Continuances

The military judge or a court-martial without a military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

#### § 841. Art. 41. Challenges

(a)(1) The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge, or, if none, the court, shall determine the relevance and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(2) If exercise of a challenge for cause reduces the court below the minimum number of members required by section 816 of this title (article 16), all parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court. However, peremptory challenges shall not be exercised at that time.

(b)(1) Each accused and the trial counsel are entitled initially to one peremptory challenge of the members of the court. The military judge may not be challenged except for cause.

(2) If exercise of a peremptory challenge reduces the court below the minimum number of members required by section 816 of this title (article 16), the parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any remaining peremptory challenge (not previously waived) against the remaining members of the court before additional members are detailed to the court.

(c) Whenever additional members are detailed to the court, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.

(As amended Nov. 5, 1990, Pub.L. 101-510, Div. A, Title V, § 541(b)-(d), 104 Stat. 1565.)

#### § 842. Art. 42. Oaths

(a) Before performing their respective duties, military judges, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant or associate defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed

in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a military judge, trial counsel, assistant trial counsel, defense counsel, or assistant or associate defense counsel may be taken at any time by any judge advocate or other person certified to be qualified or competent for the duty, and if such an oath is taken it need not again be taken at the time the judge advocate, or other person is detailed to that duty.

(b) Each witness before a court-martial shall be examined on oath.

#### § 843. Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.

(b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(2)(A) A person charged with having committed a child abuse offense against a child is liable to be tried by court-martial if the sworn charges and specifications are received before the child attains the age of 25 years by an officer exercising summary court-martial jurisdiction with respect to that person.

(B) In subparagraph (A), the term "child abuse offense" means an act that involves sexual or physical abuse of a person who has not attained the age of 16 years and constitutes any of the following offenses:

(i) Rape or carnal knowledge in violation of section 920 of this title (article 120).

(ii) Maiming in violation of section 924 of this title (article 124).

(iii) Sodomy in violation of section 925 of this title (article 125).

(iv) Aggravated assault or assault consummated by a battery in violation of section 928 of this title (article 128).

(v) Indecent assault, assault with intent to commit murder, voluntary manslaughter, rape, or sodomy, or indecent acts or liberties with a child in violation of section 934 of this title (article 134).

(3) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.

(c) Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this section (article).

(d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.

(e) For an offense the trial of which in time of war is certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article is extended to six

months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

(f) When the United States is at war, the running of any statute of limitations applicable to any offense under this chapter—

(1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not;

(2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States; or

(3) committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency;

is suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

(g)(1) If charges or specifications are dismissed as defective or insufficient for any cause and the period prescribed by the applicable statute of limitations—

(A) has expired; or

(B) will expire within 180 days after the date of dismissal of the charges and specifications, trial and punishment under new charges and specifications are not barred by the statute of limitations if the conditions specified in paragraph (2) are met.

(2) The conditions referred to in paragraph (1) are that the new charges and specifications must—

(A) be received by an officer exercising summary court-martial jurisdiction over the command within 180 days after the dismissal of the charges or specifications; and

(B) allege the same acts or omissions that were alleged in the dismissed charges or specifications (or allege acts or omissions that were included in the dismissed charges or specifications).

#### § 844. Art. 44. Former jeopardy

(a) No person may, without his consent, be tried a second time for the same offense.

(b) No proceeding in which an accused has been found guilty by court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

(c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article.

#### § 845. Art. 45. Pleas of the accused

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be

entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

#### § 846. Art. 46. Opportunity to obtain witnesses and other evidence

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

#### § 847. Art. 47. Refusal to appear or testify

(a) Any person not subject to this chapter who—

(1) has been duly subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board;

(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce; is guilty of an offense against the United States.

(b) Any person who commits an offense named in subsection (a) shall be tried on indictment or information in a United States district court or in a court of original criminal jurisdiction in any of the Territories, Commonwealths, or possessions of the United States, and jurisdiction is conferred upon those courts for that purpose. Upon conviction, such a person shall be fined or imprisoned, or both, at the court's discretion.

(c) The United States attorney or the officer prosecuting for the United States in any such court of original criminal jurisdiction shall, upon the certification of the facts to him by the military court, commission, court of inquiry, or board, file an information against and prosecute any person violating this article.

(d) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses.

## APPENDIX 12 MAXIMUM PUNISHMENT CHART

This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	Offense	Discharge	Confinement	Forfeitures
77	Principals ( <i>see</i> Part IV, Para. 1 and pertinent offenses)			
78	Accessory after the fact ( <i>see</i> Part IV, Para. 3.e.)			
79	Lesser included offenses ( <i>see</i> Part IV, Para. 2 and pertinent offenses)			
80	Attempts ( <i>see</i> Part IV, Para. 4.e.)			
81	Conspiracy ( <i>see</i> Part IV, Para. 5.e.)			
82	Solicitation			
	If solicited offense committed, or attempted, <i>see</i> Part IV, Para. 6.e.			
	If solicited offense not committed:			
	Solicitation to desert <sup>1</sup> .....	DD, BCD	3 yrs. <sup>1</sup>	Total
	Solicitation to mutiny <sup>1</sup> .....	DD, BCD	10 yrs. <sup>1</sup>	Total
	Solicitation to commit act of misbehavior before enemy <sup>1</sup> .....	DD, BCD	10 yrs. <sup>1</sup>	Total
	Solicitation to commit act of sedition <sup>1</sup> .....	DD, BCD	10 yrs. <sup>1</sup>	Total
83	Fraudulent enlistment, appointment .....	DD, BCD	2 yrs.	Total
	Fraudulent separation .....	DD, BCD	5 yrs.	Total
84	Effecting unlawful enlistment, appointment, separation .....	DD, BCD	5 yrs.	Total
85	Desertion			
	In time of war .....	Death, DD, BCD	Life <sup>4</sup>	Total
	Intent to avoid hazardous duty, shirk important service <sup>1</sup> .....	DD, BCD	5 yrs. <sup>1</sup>	Total
	Other cases			
	Terminated by apprehension .....	DD, BCD	3 yrs. <sup>1</sup>	Total
	Otherwise terminated .....	DD, BCD	2 yrs. <sup>1</sup>	Total
86	Absence without leave, etc.			
	Failure to go, going from place of duty .....	None	1 mo.	2/3 1 mo.
	Absence from unit, organization, etc.			
	Not more than 3 days .....	None	1 mo.	2/3 1 mo.
	More than 3, not more than 30 days .....	None	6 mos.	2/3 6 mos.
	More than 30 days .....	DD, BCD	1 yr.	Total
	More than 30 days and terminated by apprehension .....	DD, BCD	1 yr., 6 mos.	Total
	Absence from guard or watch .....	None	3 mos.	2/3 3 mos.
	Absence from guard or watch with intent to abandon .....	BCD	6 mos.	Total
	Absence with intent to avoid maneuvers, field exercises .....	BCD	6 mos.	Total
87	Missing movement			
	Through design .....	DD, BCD	2 yrs.	Total
	Through neglect .....	BCD	1 yr.	Total
88	Contempt toward officials .....	Dismissal	1 yr.	Total
89	Disrespect toward superior commissioned officer .....	BCD	1 yr.	Total
90	Assaulting, willfully disobeying superior commissioned officer			
	In time of war .....	Death, DD, BCD	Life <sup>4</sup>	Total
	Striking, drawing or lifting up any weapon or offering any violence toward superior commissioned officer execution of duty <sup>1</sup> .....	DD, BCD	10 yrs. <sup>1</sup>	Total
	Willfully disobeying lawful order of superior commissioned officer <sup>1</sup> .....	DD, BCD	5 yrs. <sup>1</sup>	Total
91	Insubordinate conduct toward warrant, noncommissioned, petty officer			
	Striking or assaulting:			
	Warrant officer .....	DD, BCD	5 yrs.	Total
	Superior noncommissioned officer .....	DD, BCD	3 yrs.	Total
	Other noncommissioned or petty officer .....	DD, BCD	1 yr.	Total
	Willfully disobeying:			
	Warrant officer .....	DD, BCD	2 yrs.	Total
	Noncommissioned or petty officer .....	BCD	1 yr.	Total
	Contempt, disrespect toward:			
	Warrant Officer .....	BCD	9 mos.	Total
	Superior noncommissioned or petty officer .....	BCD	6 mos.	Total
	Other noncommissioned or petty officer .....	None	3 mos.	2/3 3 mos.

A12-1

**App. 12, Art. 92**

This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	Offense	Discharge	Confinement	Forfeitures
92	Failure to obey order, regulation			
	Violation, failure to obey general order or regulation <sup>2</sup> .....	DD, BCD	2 yrs.	Total
	Violation, failure to obey other order <sup>2</sup> .....	BCD	6 mos.	Total
	Derelection in performance of duties			
	Through neglect, culpable inefficiency .....	None	3 mos.	2/3 3 mos.
	Willful .....	BCD	6 mos.	Total
93	Cruelty, maltreatment of subordinates .....	DD, BCD	1 yr.	Total
94	Mutiny & sedition .....	Death, DD, BCD	Life <sup>4</sup>	Total
95	Resisting apprehension, flight, breach of arrest, escape			
	Resisting apprehension .....	BCD	1 yr.	Total
	Flight from apprehension .....	BCD	1 yr.	Total
	Breaking arrest .....	BCD	6 mos.	Total
	Escape from custody, pretrial confinement, or confinement on bread and water or diminished rations .....	DD, BCD	1 yr.	Total
	Escape from post-trial confinement .....	DD, BCD	5 yrs.	Total
96	Releasing prisoner without proper authority .....	DD, BCD	2 yrs.	Total
	Suffering prisoner to escape through neglect .....	BCD	1 yr.	Total
	Suffering prisoner to escape through design .....	DD, BCD	2 yrs.	Total
97	Unlawful detention .....	DD, BCD	3 yrs.	Total
98	Noncompliance with procedural rules, etc.			
	Unnecessary delay in disposition of case .....	BCD	6 mos.	Total
	Knowingly, intentionally failing to comply, enforce code .....	DD, BCD	5 yrs.	Total
99	Misbehavior before enemy .....	Death, DD, BCD	Life <sup>4</sup>	Total
100	Subordinate compelling surrender .....	Death, DD, BCD	Life <sup>4</sup>	Total
101	Improper use of countersign .....	Death, DD, BCD	Life <sup>4</sup>	Total
102	Forcing safeguard .....	Death, DD, BCD	Life <sup>4</sup>	Total
103	Captured, abandoned property; failure to secure, etc.			
	Of value of \$500.00 or less .....	BCD	6 mos.	Total
	Of value of more than \$500.00 .....	DD, BCD	5 yrs.	Total
	Any firearm or explosive .....	DD, BCD	5 yrs.	Total
	Looting, pillaging .....	DD, BCD	Life <sup>4</sup>	Total
104	Aiding the enemy .....	Death, DD, BCD	Life <sup>4</sup>	Total
105	Misconduct as prisoner .....	DD, BCD	Life <sup>4</sup>	Total
106	Spying .....	Mandatory Death, DD, BCD	Not applicable	Total
106a	Espionage			
	Cases listed in Art. 106a(a)(1)(A)-(D) .....	Death, DD, BCD	Life <sup>4</sup>	Total
	Other cases .....	DD, BCD	Life <sup>4</sup>	Total
107	False official statements .....	DD, BCD	5 yrs.	Total
108	Military property; loss, damage, destruction, disposition			
	Selling, otherwise disposing			
	Of value of \$500.00 or less .....	BCD	1 yr.	Total
	Of value of more than \$500.00 .....	DD, BCD	10 yrs.	Total
	Any firearm, explosive or incendiary device .....	DD, BCD	10 yrs.	Total
	Damaging, destroying, losing or suffering to be lost, damaged, destroyed, sold, or wrongfully disposed:			
	Through neglect, of a value of:			
	\$500.00 or less .....	None	6 mos.	2/3 6 mos.
	More than \$500.00 .....	BCD	1 yr.	Total
	Willfully, of a value of			
	\$500.00 or less .....	BCD	1 yr.	Total
	More than \$500.00 .....	DD, BCD	10 yrs.	Total
	Any firearm, explosive, or incendiary device .....	DD, BCD	10 yrs.	Total

This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	Offense	Discharge	Confinement	Forfeitures
109	Property other than military property of U.S.: loss, damage, destruction, disposition: Wasting, spoiling, destroying, or damaging property of a value of: \$500.00 or less .....	BCD	1 yr.	Total
	More than \$500.00 .....	DD, BCD	5 yrs.	Total
110	Hazarding a vessel Willfully and wrongfully .....	Death, DD, BCD	Life <sup>4</sup>	Total
	Negligently .....	DD, BCD	2 yrs.	Total
111	Drunken driving Resulting in personal injury .....	DD, BCD	1 yr., 6 mos.	Total
	Other cases .....	BCD	6 mos.	Total
112	Drunk on duty .....	BCD	9 mos.	Total
112a	Wrongful use, possession, etc. of controlled substances <sup>3</sup> Wrongful use, possession, manufacture, or introduction of: Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances .....	DD, BCD	5 yrs.	Total
	Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances .....	DD, BCD	2 yrs.	Total
	Wrongful distribution of, or, with intent to distribute, wrongful possession, manufacture, introduction, or wrongful importation of or exportation of: Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances .....	DD, BCD	15 yrs.	Total
	Phenobarbital and Schedule IV and V controlled substances .....	DD, BCD	10 yrs.	Total
113	Misbehavior of sentinel or lookout In time of war .....	Death, DD, BCD	Life <sup>4</sup>	Total
	In other time: While receiving special pay under 37 U.S.C. 310 .....	DD, BCD	10 yrs.	Total
	Other places .....	DD, BCD	1 yr.	Total
114	Dueling .....	DD, BCD	1 yr.	Total
115	Malingering Feigning illness, etc. In time of war, or while receiving special pay under 37 U.S.C. 310 .....	DD, BCD	3 yrs.	Total
	Other .....	DD, BCD	1 yr.	Total
	Intentional self-inflicted injury In time of war, or while receiving special pay under 37 U.S.C. 310 .....	DD, BCD	10 yrs.	Total
	Other .....	DD, BCD	5 yrs.	Total
116	Riot .....	DD, BCD	10 yrs.	Total
	Breach of peace .....	None	6 mos.	2/3 6 mos.
117	Provoking speech, gestures .....	None	6 mos.	2/3 6 mos.
118	Murder Article 118(1) or (4) .....	Death, mandatory minimum life with parole, DD, BCD	Life <sup>4</sup>	Total
	Article 118(2) or (3) .....	DD, BCD	Life <sup>4</sup>	Total
119	Manslaughter Voluntary .....	DD, BCD	15 yrs.	Total
	Involuntary .....	DD, BCD	10 yrs.	Total
119a	Death or injury to an Unborn Child (see Part IV, Para. 44a.(a)(1))			
120	Rape .....	Death, DD, BCD	Life <sup>4</sup>	Total
	Carnal knowledge With child at least 12 .....	DD, BCD	20 yrs.	Total
	With child under the age of 12 .....	DD, BCD	Life <sup>4</sup>	Total
121	Larceny Of military property of a value of \$500.00 or less .....	BCD	1 yr.	Total

**App. 12, Art. 121**

This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	Offense	Discharge	Confinement	Forfeitures
	Of property other than military property of a value of \$500.00 or less	BCD	6 mos.	Total
	Of military property of a value of more than \$500.00 or of any military motor vehicle, aircraft, vessel, firearm, or explosive . . . . .	DD, BCD	10 yrs.	Total
	Of property other than military property of a value of more than \$500.00 or any motor vehicle, aircraft, vessel, firearm, or explosive	DD, BCD	5 yrs.	Total
	Wrongful appropriation			
	Of value of \$500.00 or less . . . . .	None	3 mos.	2/3 3 mos.
	Of value of more than \$500.00 . . . . .	BCD	6 mos.	Total
	Of any motor vehicle, aircraft, vessel, firearm, or explosive . . . . .	DD, BCD	2 yrs.	Total
122	Robbery			
	Committed with a firearm . . . . .	DD, BCD	15 yrs.	Total
	Other cases . . . . .	DD, BCD	10 yrs.	Total
123	Forgery . . . . .	DD, BCD	5 yrs.	Total
123a	Checks, etc., insufficient funds, intent to deceive			
	To procure anything of value of:			
	\$500.00 or less . . . . .	BCD	6 mos.	Total
	More than \$500.00 . . . . .	DD, BCD	5 yrs.	Total
	For payment of past due obligation, and other cases . . . . .	BCD	6 mos.	Total
124	Maiming . . . . .	DD, BCD	7 yrs.	Total
125	Sodomy			
	By force and without consent . . . . .	DD, BCD	Life <sup>4</sup>	Total
	With child under age of 16 years and at least 12 . . . . .	DD, BCD	20 yrs.	Total
	With child under the age of 12 . . . . .	DD, BCD	Life <sup>4</sup>	Total
	Other cases . . . . .	DD, BCD	5 yrs.	Total
126	Arson			
	Aggravated . . . . .	DD, BCD	20 yrs.	Total
	Other cases, where property value is:			
	\$500.00 or less . . . . .	DD, BCD	1 yr.	Total
	More than \$500.00 . . . . .	DD, BCD	5 yrs.	Total
127	Extortion . . . . .	DD, BCD	3 yrs.	Total
128	Assaults			
	Simple Assault:			
	Generally . . . . .	None	3 mos.	2/3 3 mos.
	With an unloaded firearm . . . . .	DD, BCD	3 yrs.	Total
	Assault consummated by battery . . . . .	BCD	6 mos.	Total
	Assault upon commissioned officer of U.S. or friendly power not in execution of office . . . . .	DD, BCD	3 yrs.	Total
	Assault upon warrant officer, not in execution of office . . . . .	DD, BCD	1 yr., 6 mos.	Total
	Assault upon noncommissioned or petty officer not in execution of office . . . . .	BCD	6 mos.	Total
	Assault upon, in execution of office, person serving as sentinel, lookout, security policeman, military policeman, shore patrol, master at arms, or civil law enforcement . . . . .	DD, BCD	3 yrs.	Total
	Assault consummated by battery upon child under age of 16 years . . . . .	DD, BCD	2 yrs.	Total
	Assault with dangerous weapon or means likely to produce grievous bodily harm or death:			
	Committed with loaded firearm . . . . .	DD, BCD	8 yrs.	Total
	Other cases . . . . .	DD, BCD	3 yrs.	Total
	Assault in which grievous bodily harm is intentionally inflicted:			
	With a loaded firearm . . . . .	DD, BCD	10 yrs.	Total
	Other cases . . . . .	DD, BCD	5 yrs.	Total
129	Burglary . . . . .	DD, BCD	10 yrs.	Total
130	Housebreaking . . . . .	DD, BCD	5 yrs.	Total
131	Perjury . . . . .	DD, BCD	5 yrs.	Total
132	Frauds against the United States			
	Offenses under article 132(1) or (2) . . . . .	DD, BCD	5 yrs.	Total
	Offenses under article 132(3) or (4)			

This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	Offense	Discharge	Confinement	Forfeitures
	\$500.00 or less	BCD	6 mos.	Total
	More than \$500.00	DD, BCD	5 yrs.	Total
133	Conduct unbecoming officer (see Part IV, para. 59e)	Dismissal	1 yr. or as prescribed	Total
134	Abusing public animal	None	3 mos.	2/3 3 mos.
	Adultery	DD, BCD	1 yr.	Total
	Assault, indecent	DD, BCD	5 yrs.	Total
	Assault			
	With intent to commit murder or rape	DD, BCD	20 yrs.	Total
	With intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary	DD, BCD	10 yrs.	Total
	With intent to commit housebreaking	DD, BCD	5 yrs.	Total
	Bigamy	DD, BCD	2 yrs.	Total
	Bribery	DD, BCD	5 yrs.	Total
	Graft	DD, BCD	3 yrs.	Total
	Burning with intent to defraud	DD, BCD	10 yrs.	Total
	Check, worthless, making and uttering—by dishonorably failing to maintain funds	BCD	6 mos.	Total
	Cohabitation, wrongful	None	4 mos.	2/3 4 mos.
	Correctional custody, escape from	DD, BCD	1 yr.	Total
	Correctional custody, breach of	BCD	6 mos.	Total
	Debt, dishonorably failing to pay	BCD	6 mos.	Total
	Disloyal statements	DD, BCD	3 yrs.	Total
	Disorderly conduct			
	Under such circumstances as to bring discredit	None	4 mos.	2/3 4 mos.
	Other cases	None	1 mo.	2/3 1 mo.
	Drunkenness			
	Aboard ship or under such circumstances as to bring discredit	None	3 mos.	2/3 3 mos.
	Other cases	None	1 mo.	2/3 1 mo.
	Drunk and disorderly			
	Aboard ship	BCD	6 mos.	Total
	Under such circumstances as to bring discredit	None	6 mos.	2/3 6 mos.
	Other cases	None	3 mos.	2/3 3 mos.
	Drinking liquor with prisoner	None	3 mos.	2/3 3 mos.
	Drunk prisoner	None	3 mos.	2/3 3 mos.
	Drunkenness—incapacitating oneself for performance of duties through prior indulgence in intoxicating liquor or drugs	None	3 mos.	2/3 3 mos.
	Endangerment, reckless	BCD	1 yr.	Total
	False or unauthorized pass offenses			
	Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling	DD, BCD	3 yrs.	Total
	All other cases	BCD	6 mos.	Total
	False pretenses, obtaining services under			
	Of a value of \$500.00 or less	BCD	6 mos.	Total
	Of a value of more than \$500.00	DD, BCD	5 yrs.	Total
	False swearing	DD, BCD	3 yrs.	Total
	Firearm, discharging—through negligence	None	3 mos.	2/3 3 mos.
	Firearm, discharging—willfully, under such circumstances as to endanger human life	DD, BCD	1 yr.	Total
	Fleeing scene of accident	BCD	6 mos.	Total
	Fraternization	Dismissal	2 yrs.	Total
	Gambling with subordinates	None	3 mos.	2/3 3 mos.
	Homicide, negligent	DD, BCD	3 yrs.	Total
	Impersonation			
	With intent to defraud	DD, BCD	3 yrs.	Total
	All other cases	BCD	6 mos.	Total
	Indecent act, liberties with child	DD, BCD	7 yrs.	Total
	Indecent exposure	BCD	6 mos.	Total
	Indecent language			
	Communicated to child under 16 yrs	DD, BCD	2 yrs.	Total
	Other cases	BCD	6 mos.	Total

**App. 12, Art. 134**

This chart was compiled for convenience purposes only and is not the authority for specific punishments. See Part IV and R.C.M. 1003 for specific limits and additional information concerning maximum punishments.

Article	Offense	Discharge	Confinement	Forfeitures
	Indecent acts with another	DD, BCD	5 yrs.	Total
	Jumping from vessel into the water	BCD	6 mos.	Total
	Kidnapping	DD, BCD	Life <sup>4</sup>	Total
	Mail, taking, opening, secreting, destroying, or stealing	DD, BCD	5 yrs.	Total
	Mails, depositing or causing to be deposited obscene matters in	DD, BCD	5 yrs.	Total
	Misprision of serious offense	DD, BCD	3 yrs.	Total
	Obstructing justice	DD, BCD	5 yrs.	Total
	Wrongful interference with an adverse administrative proceeding	DD, BCD	5 yrs.	Total
	Pandering	DD, BCD	5 yrs.	Total
	Prostitution	DD, BCD	1 yr.	Total
	Parole, violation of	BCD	6 mos.	2/3 6 mos.
	Perjury, subornation of	DD, BCD	5 yrs.	Total
	Public record, altering, concealing, removing, mutilating, obliterating, or destroying	DD, BCD	3 yrs.	Total
	Quarantine, breaking	None	6 mos.	2/3 6 mos.
	Reckless endangerment	BCD	1 yr.	Total
	Restriction, breaking	None	1 mo.	2/3 1 mo.
	Seizure, destruction, removal, or disposal of property to prevent Self-injury without intent to avoid service	DD, BCD	1 yr.	Total
	In time of war, or in a hostile fire pay zone	DD	5 yrs.	Total
	Other	DD	2 yrs.	Total
	Sentinel, lookout			
	Disrespect to	None	3 mos.	2/3 3 mos.
	Loitering or wrongfully sitting on post by			
	In time of war or while receiving special pay	DD, BCD	2 yrs.	Total
	Other cases	BCD	6 mos.	Total
134	Soliciting another to commit an offense (see Part IV, para. 105e)			
	Of a value of \$500.00 or less	BCD	6 mos.	Total
	Of a value of more than \$500.00	DD, BCD	3 yrs.	Total
	Straggling	None	3 mos.	2/3 3 mos.
	Testify, wrongfully refusing to	DD, BCD	5 yrs.	Total
	Threat, bomb, or hoax	DD, BCD	5 yrs.	Total
	Threat, communicating	DD, BCD	3 yrs.	Total
	Unlawful entry	BCD	6 mos.	Total
	Weapon, concealed, carrying	BCD	1 yr.	Total
	Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button	BCD	6 mos.	Total

Notes:

1. Suspended in time of war.
2. See paragraph 16e(1) & (2) Note, Part IV
3. When any offense under paragraph 37, Part IV, is committed: while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. sec. 310; in time of war; or in a confinement facility used by or under the control of the armed forces, the maximum period of confinement authorized for such offense shall be increased by 5 years.
4. With or without eligibility for parole.

**APPENDIX 4**  
**Charge Sheet (DD FORM 458)**

CHARGE SHEET				
I. PERSONAL DATA				
1. NAME OF ACCUSED (Last, First, MI) James, Reiben J.		2. SSN 111-11-1111	3. GRADE OR RANK PFC	4. PAY GRADE E-3
5. UNIT OR ORGANIZATION Co A, 1st Battalion, 61st Inf Bde, Fort Blank, MO			6. CURRENT SERVICE	
			a. INITIAL DATE 1 April 1983	b. TERM 3 years
7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	
a. BASIC \$500	b. SEA/FOREIGN DUTY None	c. TOTAL \$500	Restriction	
			9. DATE(S) IMPOSED 1 August 1984	
II. CHARGES AND SPECIFICATIONS				
10. CHARGE: I VIOLATION OF THE UCMJ, ARTICLE 86				
<p>SPECIFICATION: In that Private First Class Reuben J. James, U.S. Army, Company A, 61st Battalion, 1st Infantry Brigade, Fort Blank, Missouri, on active duty, did, on or about 15 July 1984, without authority, absent himself from his unit, to wit: Company A, 1st Battalion, 61st Infantry Brigade, located at Fort Blank, Missouri, and did remain so absent until on or about 30 July 1984.</p> <p>Charge II: Violation of the UCMJ, Article 112a</p> <p>Specification: In that Private First Class Reuben J. James, U.S. Army, Company A, 1st Battalion, 1st Infantry Brigade, Fort Blank, Missouri, on active duty, did at Fort Blank, Missouri, on or about 12 July 1984, wrongfully possess 10 grams of marijuana.</p>				
III. PREFERRAL				
11. NAME OF ACCUSER (Last, First, MI) Richards, Jonathan E.		12. GRADE Captain	13. ORGANIZATION OF ACCUSER Co A, 1st Bn, 61st Inf Bde	
14. SIGNATURE OF ACCUSER <i>Jonathan E. Richards</i>			15. DATE 1 August 1984	
<p><b>AFFIDAVIT:</b> Before me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this <u>1st</u> day of <u>August</u>, 19 <u>84</u>, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.</p>				
<u>Will M. Wilson</u> <small>Type of Name of Officer</small>		<u>61st Bn, 1st Inf Bde</u> <small>Organization of Officer</small>		
<u>Captain</u> <small>Grade</small>		<u>Adjutant</u> <small>Official Capacity to Administer Oath (See R.C.M. 367(b)—must be commissioned officer)</small>		
<u><i>Will M. Wilson</i></u> <small>Signature</small>				

DD FORM 458  
84 AUG

EDITION OF OCT 68 IS OBSOLETE.

A4-1

APPENDIX 4

12. On 2 August, 19 84, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308 (a)). (See R.C.M. 308 if notification cannot be made.)

Jonathan E. Richards Co A, 1st Rn, 61st Inf Bde  
Typed Name of Immediate Commander Organization of Immediate Commander

Captain  
Grade

Jonathan E. Richards  
Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1100 hours, 2 August, 19 84 at 1st Battalion, 1st Inf Brigade  
Designation of Command

Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)

Will M. Wilson FOR THE COMMANDER  
Typed Name of Officer Official Capacity of Officer Signing

Adjutant  
Official Capacity of Officer Signing

Captain  
Grade

Will M. Wilson  
Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
<u>1st Infantry Brigade</u>	<u>Fort Blank, Missouri</u>	<u>7 August 1984</u>

Referred for trial to the special court-martial convened by CMCO number 12 dated

1 August, 19 84, subject to the following instructions:<sup>2</sup> None

By of  
Command or Order

Carl E. Nevins Commander, 1st Inf Brigade  
Typed Name of Officer Official Capacity of Officer Signing

Colonel  
Grade

Carl E. Nevins  
Signature

15. On 8 August, 19 84, I caused to be served a copy hereof on ~~(name of)~~ the above named accused.

Hamilton Burger Captain, JAGC  
Typed Name of Trial Counsel Grade or Rank of Trial Counsel

Hamilton Burger  
Signature

FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken.  
 2 - See R.C.M. 601(e) concerning instructions. If none, so state.

# Overview of Command Options

Option	Reprimand	Forfeiture	Reduction (1)	Confinement Enlisted	Confinement Officers	Discharge Enlisted	Discharge Officers
<b>Nothing</b>							
<b>Admin Letter</b>	Yes	No	No	No	No	No	No
<b>NJP by 0-3 and below</b>	Yes	7 days	E-2 through E-4 can be reduced one grade.	No	No	No	No
<b>NJP by 0-4 through 0-6</b>	Yes	Yes (1/2 month x 2 months)	E-2 through E-4 can be reduced to E-1. E-5 and E-6: one grade.	No	No	No	No
<b>Summary Court (2)</b>	Yes	Yes (2/3ds pay per one month)	E-1 through E-4 to E-1. Others, one grade.	30 days max for E-4 and below only.	No	No	No
<b>Special</b>	Yes	Yes (2/3ds pay for one year)	Any enlisted can be reduced to E-1.	1 year	No	BCD	No
<b>General (Requires Article 32)</b>	Yes	Yes (Total forfeitures)	Any enlisted can be reduced to E-1.	Max allowed (or death)	Max allowed (or death)	BCD, DD	Dismissal

- (1) Commissioned and warrant officers cannot be reduced as part of the UCMJ process.
- (2) Special notes about Summary Courts-Martial:
  - a. Commissioned and warrant officers cannot be tried by summary courts-martial.
  - b. Enlisted person may refuse trial by summary courts-martial.
  - c. Persons tried by summary courts-martial are not entitled to be represented by military counsel.
- (3) In NJP, the accused can also be required to perform extra duties, undergo restriction or correctional custody, and for officers, placed into arrest in quarters. Navy policy permits only general officers to impose NJP on officers.

## 10 USCS § 7480 (2001)

### **§ 7480. Special agents of the Naval Criminal Investigative Service: authority to execute warrants and make arrests**

(a) Authority. **The Secretary of the Navy may authorize any Department of the Navy civilian employee described in subsection (b) to have the same authority to execute and serve warrants and other processes issued under the authority of the United States and to make arrests without a warrant as may be authorized under section 1585a of this title for special agents of the Defense Criminal Investigative Service.**

(b) **Agents to have authority. Subsection (a) applies to any employee of the Department of the Navy who is a special agent of the Naval Criminal Investigative Service** (or any successor to that service) whose duties include conducting, supervising, or coordinating investigations of criminal activity in programs and operations of the Department of the Navy.

(c) **Guidelines for exercise of authority.** The authority provided under subsection (a) shall be exercised in accordance with guidelines prescribed by the Secretary of the Navy and approved by the Secretary of Defense and the Attorney General and any other applicable guidelines prescribed by the Secretary of the Navy, the Secretary of Defense, or the Attorney General.

## 10 USCS § 1585a (2001)

### **§ 1585a. Special agents of the Defense Criminal Investigative Service: authority to execute warrants and make arrests**

(a) Authority. The Secretary of Defense may authorize any DCIS special agent described in subsection (b)--

(1) to execute and serve any warrant or other process issued under the authority of the United States; and

**(2) to make arrests without a warrant--**

**(A) for any offense against the United States committed in the presence of that agent; and**

**(B) for any felony cognizable under the laws of the United States if the agent has probable cause to believe that the person to be arrested has committed or is committing the felony.**

(b) **Agents to have authority. Subsection (a) applies to any DCIS special agent whose duties include conducting, supervising, or coordinating investigations of criminal activity in programs and operations of the Department of Defense.**

(c) **Guidelines on exercise of authority.** The authority provided under subsection (a) shall be exercised in accordance with guidelines prescribed by the Inspector General of the Department of Defense and approved by the Attorney General and any other applicable guidelines prescribed by the Secretary of Defense or the Attorney General.

(d) **DCIS special agent defined.** In this section, the term "DCIS special agent" means an employee of the Department of Defense who is a special agent of the Defense Criminal Investigative Service (or any successor to that service).

GUIDELINES FOR THE EXERCISE OF LAW ENFORCEMENT AUTHORITIES BY  
CIVILIAN SPECIAL AGENTS OF THE NAVAL CRIMINAL INVESTIGATIVE  
SERVICE

**(Boldfaced** supplied during editing and not in original)

Authority and Scope

On October 30, 2000, the President signed into law the National Defense Authorization Act for Fiscal Year 2001. One of the provisions of the Act amended title 10, United States Code (U.S.C) by inserting a new section 7480, empowering the Secretary of the Navy to authorize civilian Special Agents of the Naval Criminal Investigative Service (NCIS) to execute warrants and make arrests pursuant to guidelines approved by the Secretary of Defense and the Attorney General. This document, when approved by the Secretary of Defense and the Attorney General, constitutes a statement of policy guidelines that will govern such activities by NCIS Special Agents.

Since 10 U. S. C. § 1585 already provides statutory authority regarding the carrying of firearms, this document does not address the issue of firearms. **These guidelines also do not apply to the NCIS Special Agents' authority to apprehend military personnel or to execute searches authorized by military commanding officers.** These guidelines provide for coordination with the appropriate United States Attorney's offices, to include the exercise of existing authority to apply for warrants pursuant to 28 C.F.R. parts 60.1 -60.3. The authority to make arrests and to apply for and execute warrants pursuant to the provisions of these guidelines is to be exercised in furtherance of the NCIS mission as specified in Secretary of the Navy Instruction 5520.3B and within the limitations of Secretary of the Navy Instruction 5820.7B.

ARREST

Required Training

Prior to being authorized to make arrests, NCIS Special Agents must have completed the Criminal Investigator Training Program at the Federal Law Enforcement Training Center (FLETC), Glynco, Georgia, or have received equivalent Federal criminal investigative training, such as that provided by the Federal Bureau of Investigation or the Drug Enforcement Administration. Equivalent Federal training is sufficient only if the Special Agent in Charge, the employee, and the NCIS training staff agree that further basic criminal investigative training is unnecessary. Periodic training on the law of arrest should be conducted throughout a Special Agent's career.

Arrest With A Warrant

**It is NCIS policy that when the need to make an arrest is reasonably foreseeable, a warrant shall be obtained. Arrests with warrants may only be made in connection with official NCIS activities. Decisions to seek arrest warrants should be coordinated with the appropriate U.S. Attorney's Office.**

Arrest Without A Warrant

Authority for warrantless felony arrests exists for felonies committed in the Special Agent's presence, as well as for crimes not committed in the Special Agent's presence, if the Special Agent has probable cause to believe that the person to be arrested has committed or is committing a Federal felony **and the Special Agent believes that obtaining a warrant would substantially increase the potential for escape or destruction of evidence. Authority to make warrantless misdemeanor arrests is limited to Federal crimes committed in the Special Agent's presence. Such misdemeanor arrests are discouraged.**

Taken from <http://infoweb.ncis.navy.mil/07/ArrestGuidelines.html>

## NCIS Add-On Search and Seizure In-Class Practical Exercise

<p><b>You are an NCIS agent. Below are places or things you want to search.</b></p> <p><b>1. You do not have anyone's consent.</b></p> <p><b>2. In each case you have PC to search.</b></p> <p><b>3. In each case, there is no exigent circumstance (emergency scene, hot pursuit, or immediate destruction of evidence.)</b></p> <p><b>Indicate what is required to conduct the search.</b></p>	<p>NOTHING</p> <p>(No REP)</p>	<p><b>If a search warrant/authorization is required, check ALL that would work.</b></p>		
		<p>Search authorization by CO</p>	<p>Federal Search Warrant</p>	<p>State Search Warrant</p>
The pants pockets of a sailor for contraband - sailor on-base.				
The pants pockets of a sailor for contraband - sailor off-base at Burger King.				
The pants pockets of a civilian for contraband - on-base.				
The pants pockets of a civilian for contraband - off-base.				
Off-base apartment to search for drugs.				
Off-base apartment to search for stolen government property.				
On-base quarters to search for drugs.				
On-base quarters to search for stolen government property.				
A government owned tool box in the government motor pool.				
A refrigerator in the break room in the mail room on-base.				
A Marine's off-base storage locker.				
A government desk that the suspect uses at his office on-base.				

<b>In the below scenarios, presume that you are lawfully in the barracks room of an active duty member.</b>		<b>If a search warrant/authorization is required, check ALL that would work.</b>		
	<b>NOTHING (No REP)</b>	<b>Search authorization by CO</b>	<b>Federal Search Warrant</b>	<b>State Search Warrant</b>
A government owned desk shared by the roommates.				
A sailor's suitcase lying in the middle of the floor.				
A government owned footlocker/floorlocker				
<b>In the below scenarios, presume the <i>Carroll</i> doctrine does NOT apply.</b>		<b>If a search warrant/authorization is required, check ALL that would work.</b>		
	<b>NOTHING (No REP)</b>	<b>Search authorization by CO</b>	<b>Federal Search Warrant</b>	<b>State Search Warrant</b>
Glove compartment in government vehicle located on-base.				
Cockpit area in government aircraft (not luggage). Aircraft located at civilian airport in Atlanta.				
Cargo area in government vehicle located off-base in the Wal-Mart parking lot.				
Boxes of supplies or tools in government vehicle.				
Government owned duffle bag in government vehicle located on-base.				
Government owned duffle bag in government vehicle located off-base.				
Contents of a personally owned vehicle on-base.				
Contents of a personally owned vehicle off-base.				

**CAUTION: This is a student handout intended for use in classroom discussion.**

**It is not a search and seizure guide.**

## Article 31(b) In Class Practical Exercise

<b>In the below fact situations, you are a NCIS agent and intend to question the person named. Before questioning the person, do you need to give Article 31(b) or Miranda warnings?</b>	Article 31 required?		Miranda required?	
	Yes	No	Yes	No
1. Smith is a civilian and he might know something about a larceny. You stop by his office.				
2. Jones is in the Navy and he might know something about a larceny. You see him at his workplace.				
3. Smith is a civilian and you suspect him of an offense. You make an appointment and go to his office to talk to him about the offense of which he is suspected.				
4. Jones is a Marine and you suspect him of an offense. You see him at the BX on base, walk up to him, identify yourself as a NCIS agent, and begin to talk to him about the offense of which he is suspected.				
5. Jones is a Marine and you suspect him of an offense. You see him at the Waffle House off base, walk up to him, identify yourself as a NCIS agent, and begin to talk to him about the offense of which he is suspected.				
6. Jones is in the Navy and is apprehended for an offense. You are going to question him about that offense.				
7. Jones is in the Navy and she might know something about a larceny. You begin to question her about the larceny. After talking to her for a while, it now appears that she is involved in the larceny.				
8. Smith is a civilian and is suspected of larceny. Attempts to have him come see you and talk have been unsuccessful. Smith is arrested.				
9. Smith is a civilian and is suspected of larceny. Attempts to have him come see you and talk have been unsuccessful. You call Smith's supervisor and have the supervisor direct Smith come to your office for questioning.				
10. Jones is a Marine and your information indicates he is involved in selling drugs to fellow Marines. You go undercover, make friends with Jones, and after a while, you begin asking Jones where he gets his drugs.				

LEXSEE 210 F.3D 990

**UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHAE WAN CHON, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BUDDY COSTA, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MAHLON K. KAPULE, JR., Defendant-Appellant.**

**No. 98-10469, No. 98-10470, No. 98-10478**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

*210 F.3d 990; 2000 U.S. App. LEXIS 7052; 2000 Daily Journal DAR 4090*

**November 3, 1999, Argued and Submitted, Honolulu, Hawaii**

**April 20, 2000, Filed**

**SUBSEQUENT HISTORY: [\*\*1]**

Certiorari Denied October 2, 2000, Reported at: *2000 U.S. LEXIS 6404*.

**PRIOR HISTORY:** Appeals from the United States District Court for the District of Hawaii. D.C. No. CR-97-01189-ACK. Alan C. Kay, District Judge, Presiding.

**DISPOSITION:** AFFIRMED.

**COUNSEL:** Rustam A. Barbee, Honolulu, Hawaii, for defendant-appellant Mahlon K. Kapule, Jr.; Wayne E. Costa, Jr., Honolulu, Hawaii, for defendant-appellant Buddy Costa; and Ray Allen Findlay, Honolulu, Hawaii, for defendant-appellant Chae Wan Chon.

Craig H. Nakamura and Leon Schydlower, Assistant United States Attorneys, Honolulu, Hawaii, for the plaintiff-appellee.

**JUDGES:** Before: Dorothy W. Nelson, Alex Kozinski, and William A. Fletcher, Circuit Judges. Opinion by Judge D.W. Nelson.

**OPINION BY:** Dorothy W. Nelson

**OPINION: [\*991]**

D.W. NELSON, Circuit Judge:

Buddy Costa and Mahlon K. Kapule appeal their convictions for stealing and selling [\*992] United States property, and Chae Wan Chon for knowingly purchasing government property, in violation of *18 U.S.C. § 641*. The district court sentenced Costa to twenty-one months

imprisonment, Kapule to five months imprisonment, and Chon to three years probation.

On appeal, Chon, Costa, and Kapule assert that the district court made four separate errors: (1) the court held that the involvement [\*\*2] of the Naval Criminal Investigative Service (NCIS) in investigating the theft of government property was permissible under the independent military purpose exception of *10 U.S.C. § 375*; n1 (2) it failed to suppress the evidence obtained as a result of the NCIS investigation; (3) the court failed to order discovery of all materials pertinent to NCIS activities targeting civilians; and (4) the court declined to preclude Special Assistant United States Attorney (SAUSA) Philip Sundel from prosecuting the case due to a conflict of interest.

n1 *10 U.S.C. § 375* restricts the direct participation of military personnel in civilian law enforcement activities: "The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity . . . under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law." *10 U.S.C. § 375* (1998).

**[\*\*3]**

**FACTUAL AND PROCEDURAL BACKGROUND**

In May 1996, Costa and Kapule broke into the Navy Public Works Center in Honolulu, Hawaii, and stole two flatbed trucks, spools of copper wire, and other military equipment. They later sold the stolen wire to Chon, owner of Aiea Recycling Company. On December 10, 1997, a grand jury indicted Costa and Kapule for stealing

and selling United States property, and Chon for knowingly receiving such property, in violation of *18 U.S.C. § 641*.

The indictments were principally the result of leads developed by the NCIS, the investigative unit of the Navy. Most significantly, a cooperating witness informed NCIS agents that he saw copper wire being unloaded from a Navy flatbed truck at Aiea. The agents, accompanied by the FBI, subsequently went to Aiea and questioned Chon as well as seven other civilians who were present on the property. The NCIS obtained Chon's written consent to search the premises and recovered 30 spools of copper wire valued at \$ 17,950.55. Chon stated that he had purchased the wire from an individual named "Buddy" and provided the NCIS agents with Buddy's license plate number.

Later that day, Chon was asked to [\*\*4] go to the Naval Station where he was again interviewed by NCIS agents. Chon told the agents that Buddy had come to him several times during a four-day period seeking to sell him wire. In addition to discussing these transactions, Chon informed the NCIS agents that Buddy had been accompanied by two other males and provided descriptions of them.

Based on the information gleaned from Chon, the NCIS interviewed Kapule's cousin, conducted two photographic line-ups for Chon to identify Kapule, interviewed Costa's former employer, questioned Costa, Kapule, and Kapule's father, and conducted a search of Kapule's residence. These investigative activities were fruitful as the NCIS agents, working with the Honolulu Police Department and the FBI, recovered additional stolen property at Kapule's residence and obtained confessions from Costa and Kapule.

During the trial proceedings, Chon, joined by Costa and Kapule, filed a Motion to Compel Discovery seeking information related to any activities of the NCIS and its predecessor agency, the Naval Investigative Service (NIS), that targeted civilians. The magistrate judge denied this motion, noting that the request was a "far reaching fishing expedition. [\*\*5] " Chon, again joined by Costa and Kapule, also filed a Motion to Suppress Evidence and to Dismiss the Indictment (Motion to Suppress/Dismiss), [\*993] arguing that the NCIS had violated the Posse Comitatus Act (PCA). During the hearing on the Motion to Suppress/Dismiss, the Defendants made a separate motion for the removal of the prosecutor (Motion for Removal), SAUSA Sundel, claiming a conflict of interest based on his status as an active duty Navy Judge Advocate General. On March 31, 1998, the district court issued an order denying the Motion to Suppress/Dismiss and Motion for Removal.

In May 1998, Chon, Costa, and Kapule entered conditional pleas of guilty and reserved the right to appeal the district court's denial of their Motion to Suppress/Dismiss and Motion to Compel Discovery. Five months later, Chon, Costa, and Kapule filed their notices of appeal. By orders entered on November 30, 1998 and December 24, 1998, this court consolidated the appeals. We affirm.

## DISCUSSION

### *I. Posse Comitatus Act*

The PCA prohibits Army and Air Force military personnel from participating in civilian law enforcement activities. *See 18 U.S.C. § 1385* (1994). n2 Although [\*\*6] the PCA does not directly reference the Navy or Marine Corps, we do not construe this omission as congressional approval for Navy involvement in enforcing civilian laws. *See United States v. Kahn, 35 F.3d 426, 431 (9th Cir. 1994)*. Congress has, in fact, required the Secretary of Defense to "prescribe such regulations as may be necessary" to prohibit "direct participation by a member of the Army, Navy, Air Force, or Marine Corps" in law enforcement activities. *10 U.S.C. § 375* (1998). The Department of Defense (DoD) thereafter, by directive, made the PCA applicable to the Navy and the Marine Corps as a "matter of DoD policy," DoD Directive 5525.5(C); the Secretary of the Navy, using nearly identical language, has adopted this policy, *see SECNAV-INST 5820.7B*.

n2 *18 U.S.C. § 1385* stipulates that "whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." *18 U.S.C. § 1385* (1994).

[\*\*7]

The government argues that § 375 does not apply to the NCIS because most of its agents are civilians. The government bases its claim on SECNAVINST 5820.7B(a)(b) and DoD Directive 5525.5(B), which exempt four categories of people from PCA-like restrictions: (1) members of reserve components when not on active duty; (2) members of the National Guard when not in the Federal Service; (3) civilian employees of DoD unless under the direct command and control of a military officer; and (4) military service members when off duty and in a private capacity. We take these exemptions to mean that the PCA and PCA-like restrictions function to proscribe use of the strength and authority of the mili-

tary rather than use of the private force of the individuals who make up the institution. In other words, while DoD personnel may participate in civilian law enforcement activities in their private capacities, they may not do so under the auspices of the military.

Under this analysis, we find that the PCA-like restrictions adopted by DoD with respect to the Navy apply to the NCIS. Here, the NCIS was the driving force behind going to Aiea and questioning Chon, searching the premises, questioning Costa [\*\*8] and Kapule and obtaining their confessions, searching Kapule's home, and recovering stolen government property. In doing so, civilian NCIS agents represented and furthered the interests of the Navy, and were delegated the same authority to do so as military NCIS agents. When the civilian world is confronted by agents of the Navy, it is unlikely to make the fine distinctions asserted by the government between military and civilian NCIS agents.

The government also contends that the NCIS should be exempt from PCA-like [\*\*994] restrictions because it is headed by a civilian director with a civilian chain of command. As the record indicates, however, the NCIS Director has a direct reporting relationship to the Chief of Naval Operations, a military officer. Despite a civilian Director, the NCIS continues to be a unit of, and accountable to, the Navy. We thereby hold that the NCIS is bound by the limitations of § 375.

Here, however, the NCIS agents' activities were permissible because there was an independent military purpose for their investigation - the protection of military equipment. See DoD Directive 5525.5(A)(2)(a)(5); n3 SECNAVINST 5820.7B(9)(2)(a)(5). Other courts have relied on the [\*\*9] military purpose exception to sanction military assistance in law enforcement activities where the illegal acts were perpetrated by military personnel or where civilians committed illegal acts on military bases. See e.g. *Applewhite v. United States Air Force*, 995 F.2d 997, 1001 (10th Cir. 1993) (holding that the military may investigate illegal drug transactions by active duty military personnel); *United States v. Banks*, 539 F.2d 14, 16 (9th Cir. 1976) (allowing military personnel to act upon on-base violations of civil law committed by civilians); *United States v. Thompson*, 30 M.J. 570, 574 (1990) (allowing military jurisdiction over a military member who stole both civilian and military property). As "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), we rule in accordance with DoD Directive 5525.5(A)(2)(a)(5) and hold that the NCIS investigation was permissible as it was undertaken for the independent military [\*\*10] purpose of recovering military equip-

ment. Because the NCIS action here was valid, we need not address whether the exclusionary rule applies where the PCA is violated.

n3 DoD Directive 5525.5(A)(2) allows for direct assistance in civilian law enforcement activities where the actions "are taken for the primary purpose of furthering a military or foreign affairs function of the United States . . ." The directive specifies that such actions include the "protection of DoD personnel, DoD equipment, and official guests of the Department of Defense." DoD Directive 5525.5(A)(2)(a)(5).

## II. Motion to Compel Discovery

Chon, Costa, and Kapule submitted a discovery request to the government which included such items as copies of all materials pertinent to NCIS activities targeting civilians, materials implicating widespread and repeated violations of the PCA in the State of Hawaii and within the United States, information reflecting warnings to the NIS/NCIS against violating the PCA, and materials of all Organized [\*\*11] Crime Drug Enforcement Task Force activities targeting civilians. The district court, opining that the requested discovery was a "far reaching fishing expedition," ruled that the government had met its obligations under *Fed. R. Crim. R. 16(a)(1)(C)*. n4 We review discovery rulings for an abuse of discretion. See *United States v. De Cruz*, 82 F.3d 856, 866 (9th Cir. 1996). Under that standard, this court cannot reverse unless we have a definite and firm conviction that the district court committed a clear error of judgment. See *Valley Eng'rs Inc. v. Electric Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998). To justify reversal of a conviction, Chon, Costa, and Kapule must show a likelihood "that the [\*\*995] verdict would have been different had the government complied with the discovery rules." *De Cruz*, 82 F.3d at 866 (quoting *United States v. Baker*, 10 F.3d 1374, 1398 n.8 (9th Cir. 1993)).

n4 *Fed. R. Crim. P. 16(a)(1)(C)* stipulates that "upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at

the trial, or were obtained from or belong to the defendant." *Fed. R. Crim. P. 16(a)(1)(C)*.

[\*\*12]

In *United States v. Armstrong*, 517 U.S. 456, 134 L. Ed. 2d 687, 116 S. Ct. 1480 (1996), the Supreme Court considered the parameters of *Fed. R. Crim. P. 16(a)(1)(C)* and ruled that defendants are entitled to the discovery of only those materials that are relevant to the defendant's response to the Government's case in chief:

While it might be argued that as a general matter, the concept of a "defense" includes any claim that is a "sword," challenging the prosecution's conduct of the case, the term may encompass only the narrower class of "shield" claims, which refute the Government's arguments that the defendant committed the crime charged. Rule 16(a)(1)(C) tends to support the "shield-only" reading. If "defense" means an argument in response to the prosecution's case in chief, there is a perceptible symmetry between documents "material to the preparation of the defendant's defense," and, in the very next phrase, documents "intended for use by the government as evidence in chief at the trial."

*Id.* at 462. Under *Armstrong*, the appellants here are entitled to the discovery of only those materials relevant to the charges of theft and [\*\*13] conversion of government property and receipt of such property. As the discovery request is considerably broader and the materials in question do not serve the purpose of fortifying the

appellants' "shield claims," we find that the district court satisfied the requirements of *FRCP 16(a)(1)(C)*.

### III. Conflict of Interest

Upon entering their conditional pleas of guilty, Chon, Costa, and Kapule reserved the right to appeal the district court's denial of their Motion to Suppress/Dismiss and Motion to Compel Discovery. Pursuant to *Fed. R. Crim. P. 11(a)(2)*, n5 they thereby waived all other issues not expressly reserved for appeal. See *United States v. Martinez-Vitela*, 193 F.3d 1047, 1050-51 (9th Cir. 1999). The appellants here maintain that SAUSA Sundel's status as an active duty Naval officer is an additional basis for dismissal pursuant to their Motion to Dismiss/Suppress. This contention is at odds with the record.

n5 *Fed. R. Crim. P. 11(a)(2)* stipulates that "with the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion."

[\*\*14]

The appellants acknowledge that they filed a motion to remove SAUSA Sundel independent of their motion to suppress the evidence and dismiss the indictment; the two motions were distinct despite the Motion for Removal being raised orally during the hearing for the Motion to Suppress/Dismiss. The district court, moreover, denied the Motion for Removal separate and apart from its denial of the Motion to Suppress/Dismiss. Appellants may not now state that they have subsumed the conflict of interest issue into the larger issue of the Motion to Suppress/Dismiss and have it be so.

*AFFIRMED.*

## PART IV PUNITIVE ARTICLES

### Discussion

Paragraphs 1 and 2 discuss the two articles of the code that are located in the punitive article subchapter of the code, but which are not punitive as such: Article 77, principals; and Article 79, lesser included offenses.

R.C.M. 307 prescribes rules for preferral of charges. The discussion under that rule explains how to allege violations under the code using the format of charge and specification.

Beginning with paragraph 3, the punitive articles of the code are discussed using the following sequence:

- a. Text of the article
- b. Elements of the offense or offenses
- c. Explanation
- d. Lesser included offenses
- e. Maximum punishment
- f. Sample specifications

The term “elements,” as used in Part IV, includes both the statutory elements of the offense and any aggravating factors listed under the President’s authority which increases the maximum permissible punishment when specified aggravating factors are pleaded and proven.

The prescriptions of maximum punishments in subparagraph e of each paragraph of this part must be read in conjunction with R.C.M. 1003, which prescribes additional punishments that may be available and additional limitations on punishments. The sample specifications provided in subparagraph f of each paragraph in this part are guides. The specifications may be varied in form and content as necessary. *See* R.C.M. 307 for additional guidance.

---

### 1. Article 77—Principals

a. *Text.* “Any person punishable under this chapter who—

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or

(2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.”

b. *Explanation.*

(1) *Purpose.* Article 77 does not define an offense. Its purpose is to make clear that a person need not personally perform the acts necessary to constitute an offense to be guilty of it. A person who aids, abets, counsels, commands, or procures the commission of an offense, or who causes an act to be done which, if done by that person directly, would be an offense is equally guilty of the offense as one who

commits it directly, and may be punished to the same extent.

Article 77 eliminates the common law distinctions between principal in the first degree (“perpetrator”); principal in the second degree (one who aids, counsels, commands, or encourages the commission of an offense and who is present at the scene of the crime—commonly known as an “aider and abettor”); and accessory before the fact (one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime). All of these are now “principals.”

(2) *Who may be liable for an offense.*

(a) *Perpetrator.* A perpetrator is one who actually commits the offense, either by the perpetrator’s own hand, or by causing an offense to be committed by knowingly or intentionally inducing or setting in motion acts by an animate or inanimate agency or instrumentality which result in the commission of an offense. For example, a person who knowingly conceals contraband drugs in an automobile, and then induces another person, who is unaware and has no reason to know of the presence of drugs, to drive the automobile onto a military installation, is, although not present in the automobile, guilty of wrongful introduction of drugs onto a military installation. (On these facts, the driver would be guilty of no crime.) Similarly, if, upon orders of a superior, a soldier shot a person who appeared to the soldier to be an enemy, but was known to the superior as a friend, the superior would be guilty of murder (but the soldier would be guilty of no offense).

(b) *Other Parties.* If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must:

(i) Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and

(ii) Share in the criminal purpose of design.

One who, without knowledge of the criminal venture or plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime. *See* the parentheticals in the examples in paragraph 1b(2)(a) above. In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person

¶1.b.(2)(b)(ii)

(for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime *if* such a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) *Presence.*

(a) *Not necessary.* Presence at the scene of the crime is not necessary to make one a party to the crime and liable as a principal. For example, one who, knowing that person intends to shoot another person and intending that such an assault be carried out, provides the person with a pistol, is guilty of assault when the offense is committed, even though not present at the scene.

(b) *Not sufficient.* Mere presence at the scene of a crime does not make one a principal unless the requirements of paragraph 1b(2)(a) or (b) have been met.

(4) *Parties whose intent differs from the perpetrator's.* When an offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must prove that the accused had that intent or state of mind, whether the accused is charged as a perpetrator or an "other party" to crime. It is possible for a party to have a state of mind more or less culpable than the perpetrator of the offense. In such a case, the party may be guilty of a more or less serious offense than that committed by the perpetrator. For example, when a homicide is committed, the perpetrator may act in the heat of sudden passion caused by adequate provocation and be guilty of manslaughter, while the party who, without such passion, hands the perpetrator a weapon and encourages the perpetrator to kill the victim, would be guilty of murder. On the other hand, if a party assists a perpetrator in an assault on a person who, known only to the perpetrator, is an officer, the party would be guilty only of assault, while the perpetrator would be guilty of assault on an officer.

(5) *Responsibility for other crimes.* A principal may be convicted of crimes committed by another principal if such crimes are likely to result as a natural and probable consequence of the criminal venture or design. For example, the accused who is a party to a burglary is guilty as a principal not only of the offense of burglary, but also, if the perpetrator kills an occupant in the course of the burglary, of

murder. (*see also* paragraph 5 concerning liability for offenses committed by co-conspirators.)

(6) *Principals independently liable.* One may be a principal, even if the perpetrator is not identified or prosecuted, or is acquitted.

(7) *Withdrawal.* A person may withdraw from a common venture or design and avoid liability for any offenses committed after the withdrawal. To be effective, the withdrawal must meet the following requirements:

(a) It must occur before the offense is committed;

(b) The assistance, encouragement, advice, instigation, counsel, command, or procurement given by the person must be effectively countermanded or negated; and

(c) The withdrawal must be clearly communicated to the would-be perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for law enforcement authorities to prevent the offense.

**2. Article 78—Accessory after the fact**

a. *Text.* "Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct."

b. *Elements.*

(1) That an offense punishable by the code was committed by a certain person;

(2) That the accused knew that this person had committed such offense;

(3) That thereafter the accused received, comforted, or assisted the offender; and

(4) That the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

c. *Explanation.*

(1) *In general.* The assistance given a principal by an accessory after the fact is not limited to assistance designed to effect the escape or concealment of the principal, but also includes acts performed to conceal the commission of the offense by the principal (for example, by concealing evidence of the offense).

(2) *Failure to report offense.* The mere failure to

report a known offense will not make one an accessory after the fact. Such failure may violate a general order or regulation, however, and thus constitute an offense under Article 92. *See* paragraph 16. If the offense involved is a serious offense, failure to report it may constitute the offense of misprision of a serious offense, under Article 134. *See* paragraph 95.

(3) *Offense punishable by the code.* The term “offense punishable by this chapter” in the text of the article means any offense described in the code.

(4) *Status of principal.* The principal who committed the offense in question need not be subject to the code, but the offense committed must be punishable by the code.

(5) *Conviction or acquittal of principal.* The prosecution must prove that a principal committed the offense to which the accused is allegedly an accessory after the fact. However, evidence of the conviction or acquittal of the principal in a separate trial is not admissible to show that the principal did or did not commit the offense. Furthermore, an accused may be convicted as an accessory after the fact despite the acquittal in a separate trial of the principal whom the accused allegedly comforted, received, or assisted.

(6) *Accessory after the fact not a lesser included offense.* The offense of being an accessory after the fact is not a lesser included offense of the primary offense.

(7) *Actual knowledge.* Actual knowledge is required but may be proved by circumstantial evidence.

d. *Lesser included offense.* Article 80- attempts

e. *Maximum punishment.* Any person subject to the code who is found guilty as an accessory after the fact to an offense punishable by the code shall be subject to the maximum punishment authorized for the principal offense, except that in no case shall the death penalty nor more than one-half of the maximum confinement authorized for that offense be adjudged, nor shall the period of confinement exceed 10 years in any case, including offenses for which life imprisonment may be adjudged.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), knowing that (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, \_\_\_\_\_ had committed an offense punisha-

ble by the Uniform Code of Military Justice, to wit: \_\_\_\_\_, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, in order to (hinder) (prevent) the (apprehension) (trial) (punishment) of the said \_\_\_\_\_, (receive) (comfort) (assist) the said \_\_\_\_\_ by \_\_\_\_\_.

### 3. Article 79—Conviction of lesser included offenses

a. *Text.* “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.”

b. *Explanation.*

(1) *In general.* A lesser offense is included in a charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged. This requirement of notice may be met when:

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

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

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

The notice requirement may also be met, depending on the allegations in the specification, even though an included offense requires proof of an element not required in the offense charged. For example, assault with a dangerous weapon may be included in a robbery.

(2) *Multiple lesser included offenses.* When the offense charged is a compound offense comprising two or more included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged. For example, robbery includes both larceny and assault. Therefore, in a proper case, a court-martial may find an accused not guilty of

¶3.b.(2)

robbery, but guilty of wrongful appropriation and assault.

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

(4) *Specific lesser included offenses.* Specific lesser included offenses, if any, are listed for each offense discussed in this Part, but the lists are not all-inclusive.

#### 4. Article 80—Attempts

a. *Text.*

“(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.”

b. *Elements.*

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

c. *Explanation.*

(1) *In general.* To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose.

(2) *More than preparation.* Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to applying a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) *Factual impossibility.* A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt. For example, if A, without justification or excuse and with intent to kill B, points a gun at B and pulls the trigger, A is guilty of attempt to murder, even though, unknown to A, the gun is defective and will not fire. Similarly, a person who reaches into the pocket of another with the intent to steal that person’s billfold is guilty of an attempt to commit larceny, even though the pocket is empty.

(4) *Voluntary abandonment.* It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended crime, solely because of the person’s own sense that it was wrong, prior to the completion of the crime. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. A person who is entitled to the defense of voluntary abandonment may nonetheless be guilty of a lesser included, completed offense. For example, a person who voluntarily abandoned an attempted armed robbery may nonetheless be guilty of assault with a dangerous weapon.

(5) *Solicitation.* Soliciting another to commit an

offense does not constitute an attempt. *See* paragraph 6 for a discussion of article 82, solicitation.

(6) *Attempts not under Article 80.* While most attempts should be charged under Article 80, the following attempts are specifically addressed by some other article, and should be charged accordingly:

- (a) Article 85—desertion
- (b) Article 94—mutiny or sedition.
- (c) Article 100—subordinate compelling
- (d) Article 104—aiding the enemy
- (e) Article 106a—espionage
- (f) Article 128—assault

(7) *Regulations.* An attempt to commit conduct which would violate a lawful general order or regulation under Article 92 (*see* paragraph 16) should be charged under Article 80. It is not necessary in such cases to prove that the accused intended to violate the order or regulation, but it must be proved that the accused intended to commit the prohibited conduct.

d. *Lesser included offenses.* If the accused is charged with an attempt under Article 80, and the offense attempted has a lesser included offense, then the offense of attempting to commit the lesser included offense would ordinarily be a lesser included offense to the charge of attempt. For example, if an accused was charged with attempted larceny, the offense of attempted wrongful appropriation would be a lesser included offense, although it, like the attempted larceny, would be a violation of Article 80.

e. *Maximum punishment.* Any person subject to the code who is found guilty of an attempt under Article 80 to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be adjudged, nor shall any mandatory minimum punishment provisions apply; and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, attempt to (describe offense with sufficient detail to include

expressly or by necessary implication every element).

## 5. Article 81—Conspiracy

a. *Text.* “Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

c. *Explanation.*

(1) *Co-conspirators.* Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established. The accused must be subject to the code, but the other co-conspirators need not be. A person may be guilty of conspiracy although incapable of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the car to be used in a robbery. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. However, the conspirator who joined an existing conspiracy can be convicted of this offense only if, at or after the time of joining the conspiracy, an overt act in furtherance of the object of the agreement is committed.

(2) *Agreement.* The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

(3) *Object of the agreement.* The object of the agreement must, at least in part, involve the com-

¶5.c.(3)

mission of one or more offenses under the code. An agreement to commit several offenses is ordinarily but a single conspiracy. Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense. Examples include dueling, bigamy, incest, adultery, and bribery.

(4) *Overt act.*

(a) The overt act must be independent of the agreement to commit the offense; must take place at the time of or after the agreement; must be done by one or more of the conspirators, but not necessarily the accused; and must be done to effectuate the object of the agreement.

(b) The overt act need not be in itself criminal, but it must be a manifestation that the agreement is being executed. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough, no matter how preliminary or preparatory in nature, as long as it is a manifestation that the agreement is being executed.

(c) An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details of the execution of the conspiracy.

(5) *Liability for offenses.* Each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it.

(6) *Withdrawal.* A party to the conspiracy who abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connection with the conspiracy. A conspirator who effectively abandons or withdraws from the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the abandonment or withdrawal. However, a person who has abandoned or withdrawn from

the conspiracy is not liable for offenses committed thereafter by the remaining conspirators. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) *Factual impossibility.* It is not a defense that the means adopted by the conspirators to achieve their object, if apparently adapted to that end, were actually not capable of success, or that the conspirators were not physically able to accomplish their intended object.

(8) *Conspiracy as a separate offense.* A conspiracy to commit an offense is a separate and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged, tried, and punished. The commission of the intended offense may also constitute the overt act which is an element of the conspiracy to commit that offense.

(9) *Special conspiracies under Article 134.* The United States Code prohibits conspiracies to commit certain specific offenses which do not require an overt act. These conspiracies should be charged under Article 134. Examples include conspiracies to impede or injure any Federal officer in the discharge of duties under 18 U.S.C. § 372, conspiracies against civil rights under 18 U.S.C. § 241, and certain drug conspiracies under 21 U.S.C. § 846. See paragraph 60c(4)(c)(ii).

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Any person subject to the code who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense which is the object of the conspiracy, except that in no case shall the death penalty be imposed.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, conspire with \_\_\_\_\_ (and \_\_\_\_\_) to commit an offense under the Uniform Code of Military Justice, to wit: (larceny of \_\_\_\_\_, of a value of (about) \$ \_\_\_\_\_, the property of \_\_\_\_\_), and in order to effect the object of the conspiracy the said \_\_\_\_\_ (and \_\_\_\_\_) did \_\_\_\_\_.

## 6. Article 82—Solicitation

### a. Text.

“(a) Any person subject to this chapter who solicits or advises another or other to desert in violation of section 885 of this title (Article 85) or mutiny in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of section 899 of this title (Article 99) or sedition in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.”

### b. Elements.

(1) That the accused solicited or advised a certain person or persons to commit any of the four offenses named in Article 82; and

(2) That the accused did so with the intent that the offense actually be committed.

[Note: If the offense solicited or advised was attempted or committed, add the following element]

(3) That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation.

### c. Explanation.

(1) *Instantaneous offense.* The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to influence another or others to commit any of the four offenses named in Article 82. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice.

(2) *Form of solicitation.* Solicitation may be by means other than word of mouth or writing. Any act or conduct which reasonably may be construed as a serious request or advice to commit one of the four offenses named in Article 82 may constitute solicitation. It is not necessary that the accused act alone in

the solicitation or in the advising; the accused may act through other persons in committing this offense.

(3) *Solicitations in violation of Article 134.* Solicitation to commit offenses other than violations of the four offenses named in Article 82 may be charged as violations of Article 134. See paragraph 105. However, some offenses require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under Articles 82 and 134. When the accused’s act of solicitation constitutes, by itself, a separate offense, the accused should be charged with that separate, distinct offense—for example, pandering (see paragraph 97) and obstruction of justice (see paragraph 96) in violation of Article 134.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* If the offense solicited or advised is committed or (in the case of soliciting desertion or mutiny) attempted, then the accused shall be punished with the punishment provided for the commission of the offense solicited or advised. If the offense solicited or advised is not committed or (in the case of soliciting desertion or mutiny) attempted, then the following punishment may be imposed:

(1) To desert—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) To mutiny—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) To commit an act of misbehavior before the enemy—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(4) To commit an act of sedition—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

### f. Sample specifications.

(1) *For soliciting desertion (Article 85) or mutiny (Article 94).*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise) \_\_\_\_\_ (and \_\_\_\_\_) to (desert in violation of Article 85) (mutiny in violation of Article 94)

[Note: If the offense solicited or advised is attempted or committed, add the following at the end of the

¶6.f.(1)

*specification:* ]

and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about \_\_\_\_\_, 20\_\_\_\_\_, (at/on board—location), (attempted) (committed) by \_\_\_\_\_ (and\_\_\_\_\_).

(2) *For soliciting an act of misbehavior before the enemy (Article 99) or sedition (Article 94).*

In that \_\_\_\_\_ (personal jurisdiction data) did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise), \_\_\_\_\_ (and\_\_\_\_\_ ) to commit (an act of misbehavior before the enemy in violation of Article 99) (sedition in violation of Article 94)

[*Note: If the offense solicited or advised is committed, add the following at the end of the specification:*]

and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about \_\_\_\_\_ 20\_\_\_\_\_, (at/on board—location), committed by \_\_\_\_\_ (and\_\_\_\_\_).

**7. Article 83—Fraudulent enlistment, appointment, or separation**

a. *Text.*

“Any person who—

(1) procures his own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for that enlistment or appointment and receives pay or allowances thereunder; or

(2) procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation;

shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Fraudulent enlistment or appointment.*

(a) That the accused was enlisted or appointed in an armed force;

(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or

facts regarding qualifications of the accused for enlistment or appointment;

(c) That the accused’s enlistment or appointment was obtained or procured by that knowingly false representation or deliberate concealment; and

(d) That under this enlistment or appointment that accused received pay or allowances or both.

(2) *Fraudulent separation.*

(a) That the accused was separated from an armed force;

(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts about the accused’s eligibility for separation; and

(c) That the accused’s separation was obtained or procured by that knowingly false representation or deliberate concealment.

c. *Explanation.*

(1) *In general.* A fraudulent enlistment, appointment, or separation is one procured by either a knowingly false representation as to any of the qualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or a deliberate concealment as to any of those disqualifications. Matters that may be material to an enlistment, appointment, or separation include any information used by the recruiting, appointing, or separating officer in reaching a decision as to enlistment, appointment, or separation in any particular case, and any information that normally would have been so considered had it been provided to that officer.

(2) *Receipt of pay or allowances.* A member of the armed forces who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under Article 83 only if that member has received pay or allowances under the fraudulent enlistment or appointment. Acceptance of food, clothing, shelter, or transportation from the government constitutes receipt of allowances. However, whatever is furnished the accused while in custody, confinement, arrest, or other restraint pending trial for fraudulent enlistment or appointment is not considered an allowance. The receipt of pay or allowances may be proved by circumstantial evidence.

(3) *One offense.* One who procures one’s own enlistment, appointment, or separation by several misrepresentations or concealment as to qualifica-

tions for the one enlistment, appointment, or separation so procured, commits only one offense under Article 83.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Fraudulent enlistment or appointment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Fraudulent separation.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *For fraudulent enlistment or appointment.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, by means of (knowingly false representations that (here state the fact or facts material to qualification for enlistment or appointment which were represented), when in fact (here state the true fact of facts)) (deliberate concealment of the fact that (here state the fact or facts disqualifying the accused for enlistment or appointment which were concealed)), procure himself/herself to be (enlisted as a \_\_\_\_\_) (appointed as a \_\_\_\_\_) in the (here state the armed force in which the accused procured the enlistment or appointment), and did thereafter, (at/on board—location), receive (pay) (allowances) (pay and allowances) under the enlistment) (appointment) so procured.

(2) *For fraudulent separation.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, by means of (knowingly false representations that (here state the fact or facts material to eligibility for separation which were represented), when in fact (here state the true fact or facts)) (deliberate concealment of the fact that (here state the fact or facts concealed which made the accused ineligible for separation)), procure himself/herself to be separated from the (here state the armed force from which the accused procured his/her separation).

## 8. Article 84—Effecting unlawful enlistment, appointment, or separation

a. *Text.* “Any person subject to this chapter who effects an enlistment or appointment in or a separation from the armed forces of any person who is

known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused effected the enlistment, appointment, or separation of the person named;

(2) That this person was ineligible for this enlistment, appointment, or separation because it was prohibited by law, regulation, or order; and

(3) That the accused knew of the ineligibility at the time of the enlistment, appointment, or separation.

c. *Explanation.* It must be proved that the enlistment, appointment, or separation was prohibited by law, regulation, or order when effected and that the accused then knew that the person enlisted, appointed, or separated was ineligible for the enlistment, appointment, or separation.

d. *Lesser included offense.* Article 80—attempts

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

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, effect (the (enlistment) (appointment) of \_\_\_\_\_ as a \_\_\_\_\_ in (here state the armed force in which the person was enlisted or appointed)) (the separation of \_\_\_\_\_ from (here state the armed force from which the person was separated)), then well knowing that the said \_\_\_\_\_ was ineligible for such (enlistment) (appointment) (separation) because (here state facts whereby the enlistment, appointment, or separation was prohibited by law, regulation, or order).

## 9. Article 85—Desertion

a. *Text.*

(a) Any member of the armed forces who—

(1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently;

(2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) without being regularly separated from one

¶9.a.(a)(3)

of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States [Note: This provision has been held not to state a separate offense by the United States Court of Military Appeals in *United States v. Huff*, 7 U.S.C.M.A. 247, 22 C.M.R. 37 (1956)]; is guilty of desertion.

(b) Any commissioned officer of the armed forces who, after tender of his resignation and before notice of its acceptance, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

(c) Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct.”

b. *Elements.*

(1) *Desertion with intent to remain away permanently.*

(a) That the accused absented himself or herself from his or her unit, organization, or place of duty;

(b) That such absence was without authority;

(c) That the accused, at the time the absence began or at some time during the absence, intended to remain away from his or her unit, organization, or place of duty permanently; and

(d) That the accused remained absent until the date alleged.

[Note: If the absence was terminated by apprehension, add the following element]

(e) That the accused’s absence was terminated by apprehension.

(2) *Desertion with intent to avoid hazardous duty or to shirk important service.*

(a) That the accused quit his or her unit, organization, or other place of duty;

(b) That the accused did so with the intent to avoid a certain duty or shirk a certain service;

(c) That the duty to be performed was hazardous or the service important;

(d) That the accused knew that he or she would be required for such duty or service; and

(e) That the accused remained absent until the date alleged.

(3) *Desertion before notice of acceptance of resignation.*

(a) That the accused was a commissioned officer of an armed force of the United States, and had tendered his or her resignation;

(b) That before he or she received notice of the acceptance of the resignation, the accused quit his or her post or proper duties;

(c) That the accused did so with the intent to remain away permanently from his or her post or proper duties; and

(d) That the accused remained absent until the date alleged.

[Note: If the absence was terminated by apprehension, add the following element]

(e) That the accused’s absence was terminated by apprehension.

(4) *Attempted desertion.*

(a) That the accused did a certain overt act;

(b) That the act was done with the specific intent to desert;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to effect the commission of the offense of desertion.

c. *Explanation.*

(1) *Desertion with intent to remain away permanently.*

(a) *In general.* Desertion with intent to remain away permanently is complete when the person absents himself or herself without authority from his or her unit, organization, or place of duty, with the intent to remain away therefrom permanently. A prompt repentance and return, while material in extenuation, is no defense. It is not necessary that the person be absent entirely from military jurisdiction and control.

(b) *Absence without authority* —inception, duration, termination. See paragraph 10c.

(c) *Intent to remain away permanently.*

(i) The intent to remain away permanently from the unit, organization, or place of duty may be formed any time during the unauthorized absence. The intent need not exist throughout the absence, or for any particular period of time, as long as it exists at some time during the absence.

(ii) The accused must have intended to remain away permanently from the unit, organization, or place of duty. When the accused had such an intent, it is no defense that the accused also intended to report for duty elsewhere, or to enlist or accept an appointment in the same or a different armed force.

(iii) The intent to remain away permanently may be established by circumstantial evidence. Among the circumstances from which an inference may be drawn that an accused intended to remain absent permanently or; that the period of absence was lengthy; that the accused attempted to, or did, dispose of uniforms or other military property; that the accused purchased a ticket for a distant point or was arrested, apprehended, or surrendered a considerable distance from the accused's station; that the accused could have conveniently surrendered to military control but did not; that the accused was dissatisfied with the accused's unit, ship, or with military service; that the accused made remarks indicating an intention to desert; that the accused was under charges or had escaped from confinement at the time of the absence; that the accused made preparations indicative of an intent not to return (for example, financial arrangements); or that the accused enlisted or accepted an appointment in the same or another armed force without disclosing the fact that the accused had not been regularly separated, or entered any foreign armed service without being authorized by the United States. On the other hand, the following are included in the circumstances which may tend to negate an inference that the accused intended to remain away permanently: previous long and excellent service; that the accused left valuable personal property in the unit or on the ship; or that the accused was under the influence of alcohol or drugs during the absence. These lists are illustrative only.

(iv) Entries on documents, such as personnel accountability records, which administratively refer to an accused as a "deserter" are not evidence of intent to desert.

(v) Proof of, or a plea of guilty to, an unauthorized absence, even of extended duration, does not, without more, prove guilt of desertion.

(d) *Effect of enlistment or appointment in the same or a different armed force.* Article 85a(3) does not state a separate offense. Rather, it is a rule of evidence by which the prosecution may prove intent to remain away permanently. Proof of an enlistment

or acceptance of an appointment in a service without disclosing a preexisting duty status in the same or a different service provides the basis from which an inference of intent to permanently remain away from the earlier unit, organization, or place of duty may be drawn. Furthermore, if a person, without being regularly separated from one of the armed forces, enlists or accepts an appointment in the same or another armed force, the person's presence in the military service under such an enlistment or appointment is not a return to military control and does not terminate any desertion or absence without authority from the earlier unit or organization, unless the facts of the earlier period of service are known to military authorities. If a person, while in desertion, enlists or accepts an appointment in the same or another armed force, and deserts while serving the enlistment or appointment, the person may be tried and convicted for each desertion.

(2) *Quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service.*

(a) *Hazardous duty or important service.* "Hazardous duty" or "important service" may include service such as duty in a combat or other dangerous area; embarkation for certain foreign or sea duty; movement to a port of embarkation for that purpose; entrainment for duty on the border or coast in time of war or threatened invasion or other disturbances; strike or riot duty; or employment in aid of the civil power in, for example, protecting property, or quelling or preventing disorder in times of great public disaster. Such services as drill, target practice, maneuvers, and practice marches are not ordinarily "hazardous duty or important service." Whether a duty is hazardous or a service is important depends upon the circumstances of the particular case, and is a question of fact for the court-martial to decide.

(b) *Quits.* "Quits" in Article 85 means "goes absent without authority."

(c) *Actual knowledge.* Article 85 a(2) requires proof that the accused actually knew of the hazardous duty or important service. Actual knowledge may be proved by circumstantial evidence.

(3) *Attempting to desert.* Once the attempt is made, the fact that the person desists, voluntarily or otherwise, does not cancel the offense. The offense is complete, for example, if the person, intending to desert, hides in an empty freight car on a military

IV-11

¶9.c.(3)

reservation, intending to escape by being taken away in the car. Entering the car with the intent to desert is the overt act. For a more detailed discussion of attempts, *see* paragraph 4. For an explanation concerning intent to remain away permanently, *see* subparagraph 9c(1)(c).

(4) *Prisoner with executed punitive discharge.* A prisoner whose dismissal or dishonorable or bad-conduct discharge has been executed is not a “member of the armed forces” within the meaning of Articles 85 or 86, although the prisoner may still be subject to military law under Article 2( a)(7). If the facts warrant, such a prisoner could be charged with escape from confinement under Article 95 or an offense under Article 134.

d. *Lesser included offense.* Article 86—absence without leave

e. *Maximum punishment.*

(1) *Completed or attempted desertion with intent to avoid hazardous duty or to shirk important service.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Other cases of completed or attempted desertion.*

(a) *Terminated by apprehension.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(b) *Terminated otherwise.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) *In time of war.* Death or such other punishment as a court-martial may direct.

f. *Sample specifications.*

(1) *Desertion with intent to remain away permanently.*

In that \_\_\_\_\_ (personal jurisdiction data), did, on or about \_\_\_\_\_ 20\_\_\_\_\_, (a time of war) without authority and with intent to remain away therefrom permanently, absent himself/herself from his/her (unit) (organization) (place of duty), to wit: \_\_\_\_\_, located at \_\_\_\_\_, and did remain so absent in desertion until (he/she was apprehended) on or about \_\_\_\_\_ 20\_\_\_\_\_.

(2) *Desertion with intent to avoid hazardous duty or shirk important service.*

In that \_\_\_\_\_ (personal jurisdiction data),

ta), did, on or about \_\_\_\_\_ 20\_\_\_\_\_, (a time of war) with intent to (avoid hazardous duty) (shirk important service), namely: \_\_\_\_\_, quit his/her (unit) (organization) (place of duty), to wit: \_\_\_\_\_, located at \_\_\_\_\_, and did remain so absent in desertion until on or about \_\_\_\_\_ 20\_\_\_\_\_.

(3) *Desertion prior to acceptance of resignation.*

In that \_\_\_\_\_ (personal jurisdiction data) having tendered his/her resignation and prior to due notice of the acceptance of the same, did, on or about \_\_\_\_\_ 20\_\_\_\_\_, (a time of war) without leave and with intent to remain away therefrom permanently, quit his/her (post) (proper duties), to wit: \_\_\_\_\_, and did remain so absent in desertion until (he/she was apprehended) on or about \_\_\_\_\_ 20\_\_\_\_\_.

(4) *Attempted desertion.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board-location), on or about \_\_\_\_\_ 20\_\_\_\_\_, (a time of war) attempt to (absent himself/herself from his/her (unit) (organization) (place of duty) to wit: \_\_\_\_\_, without authority and with intent to remain away therefrom permanently) (quit his/her (unit) (organization) (place of duty), to wit: \_\_\_\_\_, located at \_\_\_\_\_, with intent to (avoid hazardous duty) (shirk important service) namely \_\_\_\_\_) (\_\_\_\_\_).

## 10. Article 86—Absence without leave

a. *Text.* “Any member of the armed forces who, without authority—

(1) fails to go to his appointed place of duty at the time prescribed;

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed; shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Failure to go to appointed place of duty.*

(a) That a certain authority appointed a certain time and place of duty for the accused;

(b) That the accused knew of that time and place; and

(c) That the accused, without authority, failed to go to the appointed place of duty at the time prescribed.

(2) *Going from appointed place of duty.*

(a) That a certain authority appointed a certain time and place of duty for the accused;

(b) That the accused knew of that time and place; and

(c) That the accused, without authority, went from the appointed place of duty after having reported at such place.

(3) *Absence from unit, organization, or place of duty.*

(a) That the accused absented himself or herself from his or her unit, organization, or place of duty at which he or she was required to be;

(b) That the absence was without authority from anyone competent to give him or her leave; and

(c) That the absence was for a certain period of time. [Note: if the absence was terminated by apprehension, add the following element]

(d) That the absence was terminated by apprehension.

(4) *Abandoning watch or guard.*

(a) That the accused was a member of a guard, watch, or duty;

(b) That the accused absented himself or herself from his or her guard, watch, or duty section;

(c) That absence of the accused was without authority; and

[Note: If the absence was with intent to abandon the accused's guard, watch, or duty section, add the following element]

(d) That the accused intended to abandon his or her guard, watch, or duty section.

(5) *Absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises.*

(a) That the accused absented himself or herself from his or her unit, organization, or place of duty at which he or she was required to be;

(b) That the absence of the accused was without authority;

(c) That the absence was for a certain period of time;

(d) That the accused knew that the absence

would occur during a part of a period of maneuvers or field exercises; and

(e) That the accused intended to avoid all or part of a period of maneuvers or field exercises.

c. *Explanation.*

(1) *In general.* This article is designed to cover every case not elsewhere provided for in which any member of the armed forces is through the member's own fault not at the place where the member is required to be at a prescribed time. It is not necessary that the person be absent entirely from military jurisdiction and control. The first part of this article—relating to the appointed place of duty—applies whether the place is appointed as a rendezvous for several or for one only.

(2) *Actual knowledge.* The offenses of failure to go to and going from appointed place of duty require proof that the accused actually knew of the appointed time and place of duty. The offense of absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises requires proof that the accused actually knew that the absence would occur during a part of a period of maneuvers or field exercises. Actual knowledge may be proved by circumstantial evidence.

(3) *Intent.* Specific intent is not an element of unauthorized absence. Specific intent is an element for certain aggravated unauthorized absences.

(4) *Aggravated forms of unauthorized absence.* There are variations of unauthorized absence under Article 86(3) which are more serious because of aggravating circumstances such as duration of the absence, a special type of duty from which the accused absents himself or herself, and a particular specific intent which accompanies the absence. These circumstances are not essential elements of a violation of Article 86. They simply constitute special matters in aggravation. The following are aggravated unauthorized absences:

(a) Unauthorized absence for more than 3 days (duration).

(b) Unauthorized absence for more than 30 days (duration).

(c) Unauthorized absence from a guard, watch, or duty (special type of duty).

(d) Unauthorized absence from guard, watch, or duty section with the intent to abandon it (special type of duty and specific intent).

¶10.c.(4)(e)

(e) Unauthorized absence with the intent to avoid maneuvers or field exercises (special type of duty and specific intent).

(5) *Control by civilian authorities.* A member of the armed forces turned over to the civilian authorities upon request under Article 14 (*see* R.C.M. 106) is not absent without leave while held by them under that delivery. When a member of the armed forces, being absent with leave, or absent without leave, is held, tried, and acquitted by civilian authorities, the member's status as absent with leave, or absent without leave, is not thereby changed, regardless how long held. The fact that a member of the armed forces is convicted by the civilian authorities, or adjudicated to be a juvenile offender, or the case is "diverted" out of the regular criminal process for a probationary period does not excuse any unauthorized absence, because the member's inability to return was the result of willful misconduct. If a member is released by the civilian authorities without trial, and was on authorized leave at the time of arrest or detention, the member may be found guilty of unauthorized absence only if it is proved that the member actually committed the offense for which detained, thus establishing that the absence was the result of the member's own misconduct.

(6) *Inability to return.* The status of absence without leave is not changed by an inability to return through sickness, lack of transportation facilities, or other disabilities. But the fact that all or part of a period of unauthorized absence was in a sense enforced or involuntary is a factor in extenuation and should be given due weight when considering the initial disposition of the offense. When, however, a person on authorized leave, without fault, is unable to return at the expiration thereof, that person has not committed the offense of absence without leave.

(7) *Determining the unit or organization of an accused.* A person undergoing transfer between activities is ordinarily considered to be attached to the activity to which ordered to report. A person on temporary additional duty continues as a member of the regularly assigned unit and if the person is absent from the temporary duty assignment, the person becomes absent without leave from both units, and may be charged with being absent without leave from either unit.

(8) *Duration.* Unauthorized absence under Article 86(3) is an instantaneous offense. It is complete at the instant an accused absents himself or herself

without authority. Duration of the absence is a matter in aggravation for the purpose of increasing the maximum punishment authorized for the offense. Even if the duration of the absence is not over 3 days, it is ordinarily alleged in an Article 86(3) specification. If the duration is not alleged or if alleged but not proved, an accused can be convicted of and punished for only 1 day of unauthorized absence.

(9) *Computation of duration.* In computing the duration of an unauthorized absence, any one continuous period of absence found that totals not more than 24 hours is counted as 1 day; any such period that totals more than 24 hours and not more than 48 hours is counted as 2 days, and so on. The hours of departure and return on different dates are assumed to be the same if not alleged and proved. For example, if an accused is found guilty of unauthorized absence from 0600 hours, 4 April, to 1000 hours, 7 April of the same year (76 hours), the maximum punishment would be based on an absence of 4 days. However, if the accused is found guilty simply of unauthorized absence from 4 April to 7 April, the maximum punishment would be based on an absence of 3 days.

(10) *Termination—methods of return to military control.*

(a) *Surrender to military authority.* A surrender occurs when a person presents himself or herself to any military authority, whether or not a member of the same armed force, notifies that authority of his or her unauthorized absence status, and submits or demonstrates a willingness to submit to military control. Such a surrender terminates the unauthorized absence.

(b) *Apprehension by military authority.* Apprehension by military authority of a known absentee terminates an unauthorized absence.

(c) *Delivery to military authority.* Delivery of a known absentee by anyone to military authority terminates the unauthorized absence.

(d) *Apprehension by civilian authorities at the request of the military.* When an absentee is taken into custody by civilian authorities at the request of military authorities, the absence is terminated.

(e) *Apprehension by civilian authorities without prior military request.* When an absentee is in the hands of civilian authorities for other reasons and these authorities make the absentee available for

return to military control, the absence is terminated when the military authorities are informed of the absentee's availability.

(11) *Findings of more than one absence under one specification.* An accused may properly be found guilty of two or more separate unauthorized absences under one specification, provided that each absence is included within the period alleged in the specification and provided that the accused was not misled. If an accused is found guilty of two or more unauthorized absences under a single specification, the maximum authorized punishment shall not exceed that authorized if the accused had been found guilty as charged in the specification.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Failing to go to, or going from, the appointed place of duty.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(2) *Absence from unit, organization, or other place of duty.*

(a) For not more than 3 days. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(b) For more than 3 days but not more than 30 days. Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

(c) For more than 30 days. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(d) For more than 30 days and terminated by apprehension. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(3) *From guard or watch.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(4) *From guard or watch with intent to abandon.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(5) *With intent to avoid maneuvers or field exercises.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specifications.*

(1) *Failing to go or leaving place of duty.* In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, without

authority, (fail to go at the time prescribed to) (go from) his/her appointed place of duty, to wit: (here set forth the appointed place of duty).

(2) *Absence from unit, organization, or place of duty.* In that \_\_\_\_\_ (personal jurisdiction data), did, on or about \_\_\_\_\_ 20\_\_\_\_\_, without authority, absent himself/herself from his/her (unit) (organization) (place of duty at which he/she was required to be), to wit: \_\_\_\_\_, located at \_\_\_\_\_, and did remain so absent until (he/she was apprehended) on or about \_\_\_\_\_ 20\_\_\_\_\_.

(3) *Absence from unit, organization, or place of duty with intent to avoid maneuvers or field exercises.* In that \_\_\_\_\_ (personal jurisdiction data), did, on or about \_\_\_\_\_ 20\_\_\_\_\_, without authority and with intent to avoid (maneuvers) (field exercises), absent himself/herself from his/her (unit) (organization) (place of duty at which he/she was required to be), to wit: \_\_\_\_\_ located at (\_\_\_\_\_), and did remain so absent until on or about \_\_\_\_\_ 20\_\_\_\_\_.

(4) *Abandoning watch or guard.* In that \_\_\_\_\_ (personal jurisdiction data), being a member of the \_\_\_\_\_ (guard) (watch) (duty section), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, without authority, go from his/her (guard) (watch) (duty section) (with intent to abandon the same).

## 11. Article 87—Missing movement

a. *Text.*

“Any person subject to this chapter who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused was required in the course of duty to move with a ship, aircraft or unit;

(2) That the accused knew of the prospective movement of the ship, aircraft or unit;

(3) That the accused missed the movement of the ship, aircraft or unit; and

(4) That the accused missed the movement through design or neglect.

c. *Explanation.*

¶11.c.(1)

(1) *Movement*. “Movement” as used in Article 87 includes a move, transfer, or shift of a ship, aircraft, or unit involving a substantial distance and period of time. Whether a particular movement is substantial is a question to be determined by the court-martial considering all the circumstances. Changes which do not constitute a “movement” include practice marches of a short duration with a return to the point of departure, and minor changes in location of ships, aircraft, or units, as when a ship is shifted from one berth to another in the same shipyard or harbor or when a unit is moved from one barracks to another on the same post.

(2) *Mode of movement*.

(a) *Unit*. If a person is required in the course of duty to move with a unit, the mode of travel is not important, whether it be military or commercial, and includes travel by ship, train, aircraft, truck, bus, or walking. The word “unit” is not limited to any specific technical category such as those listed in a table of organization and equipment, but also includes units which are created before the movement with the intention that they have organizational continuity upon arrival at their destination regardless of their technical designation, and units intended to be disbanded upon arrival at their destination.

(b) *Ship, aircraft*. If a person is assigned as a crew member or is ordered to move as a passenger aboard a particular ship or aircraft, military or chartered, then missing the particular sailing or flight is essential to establish the offense of missing movement.

(3) *Design*. “Design” means on purpose, intentionally, or according to plan and requires specific intent to miss the movement.

(4) *Neglect*. “Neglect” means the omission to take such measures as are appropriate under the circumstances to assure presence with a ship, aircraft, or unit at the time of a scheduled movement, or doing some act without giving attention to its probable consequences in connection with the prospective movement, such as a departure from the vicinity of the prospective movement to such a distance as would make it likely that one could not return in time for the movement.

(5) *Actual knowledge*. In order to be guilty of the offense, the accused must have actually known of the prospective movement that was missed. Knowledge of the exact hour or even of the exact date of

the scheduled movement is not required. It is sufficient if the approximate date was known by the accused as long as there is a causal connection between the conduct of the accused and the missing of the scheduled movement. Knowledge may be proved by circumstantial evidence.

(6) *Proof of absence*. That the accused actually missed the movement may be proved by documentary evidence, as by a proper entry in a log or a morning report. This fact may also be proved by the testimony of personnel of the ship, aircraft, or unit (or by other evidence) that the movement occurred at a certain time, together with evidence that the accused was physically elsewhere at that time.

d. *Lesser included offenses*.

(1) *Design*.

(a) Article 87—missing movement through neglect

(b) Article 86—absence without authority

(c) Article 80—attempts

(2) *Neglect*. Article 86—absence without authority

e. *Maximum punishment*.

(1) *Design*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Neglect*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification*.

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, through (neglect) (design) miss the movement of (Aircraft No. \_\_\_\_\_) (Flight \_\_\_\_\_) (the USS \_\_\_\_\_) (Company A, 1st Battalion, 7th Infantry) ( \_\_\_\_\_) with which he/she was required in the course of duty to move.

**12. Article 88—Contempt toward officials**

a. *Text*.

“Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.”

b. *Elements*.

(1) That the accused was a commissioned officer of the United States armed forces;

(2) That the accused used certain words against an official or legislature named in the article;

(3) That by an act of the accused these words came to the knowledge of a person other than the accused; and

(4) That the words used were contemptuous, either in themselves or by virtue of the circumstances under which they were used.

[Note: If the words were against a Governor or legislature, add the following element]

(5) That the accused was then present in the State, Territory, Commonwealth, or possession of the Governor or legislature concerned.

c. *Explanation.* The official or legislature against whom the words are used must be occupying one of the offices or be one of the legislatures named in Article 88 at the time of the offense. Neither “Congress” nor “legislature” includes its members individually. “Governor” does not include “lieutenant governor.” It is immaterial whether the words are used against the official in an official or private capacity. If not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion, even though emphatically expressed, may not be charged as a violation of the article. Similarly, expressions of opinion made in a purely private conversation should not ordinarily be charged. Giving broad circulation to a written publication containing contemptuous words of the kind made punishable by this article, or the utterance of contemptuous words of this kind in the presence of military subordinates, aggravates the offense. The truth or falsity of the statements is immaterial.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dismissal, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, [use (orally and publicly) (\_\_\_\_\_) the following contemptuous words] [in a contemptuous manner, use (orally and publicly) (\_\_\_\_\_) the following words] against the [(President) (Vice President) (Congress) (Secretary of \_\_\_\_\_)] [(Governor) (legislature) of the (State

of \_\_\_\_\_) (Territory of \_\_\_\_\_) (\_\_\_\_\_), a (State) (Territory) (\_\_\_\_\_) in which he/she, the said \_\_\_\_\_, was then (on duty), (present)], to wit: “\_\_\_\_\_,” or words to that effect.

### 13. Article 89—Disrespect toward a superior commissioned officer

#### a. *Text.*

“Any person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct.”

#### b. *Elements.*

(1) That the accused did or omitted certain acts or used certain language to or concerning a certain commissioned officer;

(2) That such behavior or language was directed toward that officer;

(3) That the officer toward whom the acts, omissions, or words were directed was the superior commissioned officer of the accused;

(4) That the accused then knew that the commissioned officer toward whom the acts, omissions, or words were directed was the accused’s superior commissioned officer; and

(5) That, under the circumstances, the behavior or language was disrespectful to that commissioned officer.

#### c. *Explanation.*

##### (1) *Superior commissioned officer.*

(a) *Accused and victim in same armed force.* If the accused and the victim are in the same armed force, the victim is a “superior commissioned officer” of the accused when either superior in rank or command to the accused; however, the victim is not a “superior commissioned officer” of the accused if the victim is inferior in command, even though superior in rank.

(b) *Accused and victim in different armed forces.* If the accused and the victim are in different armed forces, the victim is a “superior commissioned officer” of the accused when the victim is a commissioned officer and superior in the chain of command over the accused or when the victim, not a medical officer or a chaplain, is senior in grade to the accused and both are detained by a hostile entity so that recourse to the normal chain of command is

¶13.c.(1)(b)

prevented. The victim is not a “superior commissioned officer” of the accused merely because the victim is superior in grade to the accused.

(c) *Execution of office.* It is not necessary that the “superior commissioned officer” be in the execution of office at the time of the disrespectful behavior.

(2) *Knowledge.* If the accused did not know that the person against whom the acts or words were directed was the accused’s superior commissioned officer, the accused may not be convicted of a violation of this article. Knowledge may be proved by circumstantial evidence.

(3) *Disrespect.* Disrespectful behavior is that which detracts from the respect due the authority and person of a superior commissioned officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual. Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense. Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer.

(4) *Presence.* It is not essential that the disrespectful behavior be in the presence of the superior, but ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation.

(5) *Special defense—unprotected victim.* A superior commissioned officer whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that officer’s rank or position under similar circumstances loses the protection of this article. That accused may not be convicted of being disrespectful to the officer who has so lost the entitlement to respect protected by Article 89.

d. *Lesser included offenses.*

(1) Article 117—provoking speeches or gestures

(2) Article 80—attempts

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or

about \_\_\_\_\_ 20 \_\_\_\_\_, behave himself/herself with disrespect toward \_\_\_\_\_, his/her superior commissioned officer, then known by the said \_\_\_\_\_ to be his/her superior commissioned officer, by (saying to him/her “\_\_\_\_\_,” or words to that effect) (contemptuously turning from and leaving him/her while he/she, the said \_\_\_\_\_, was talking to him/her, the said \_\_\_\_\_) (\_\_\_\_\_).

**14. Article 90—Assaulting or willfully disobeying superior commissioned officer**

a. *Text.* “Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.”

b. *Elements.*

(1) *Striking or assaulting superior commissioned officer.*

(a) That the accused struck, drew, or lifted up a weapon against, or offered violence against, a certain commissioned officer;

(b) That the officer was the superior commissioned officer of the accused;

(c) That the accused then knew that the officer was the accused’s superior commissioned officer; and

(d) That the superior commissioned officer was then in the execution of office.

(2) *Disobeying superior commissioned officer.*

(a) That the accused received a lawful command from a certain commissioned officer;

(b) That this officer was the superior commissioned officer of the accused;

(c) That the accused then knew that this officer was the accused’s superior commissioned officer; and

(d) That the accused willfully disobeyed the lawful command.

*c. Explanation.*

(1) *Striking or assaulting superior commissioned officer.*

(a) *Definitions.*

(i) *Superior commissioned officer.* The definitions in paragraph 13c(1)(a) and (b) apply here and in subparagraph c(2).

(ii) *Strikes.* “Strikes” means an intentional blow, and includes any offensive touching of the person of an officer, however slight.

(iii) *Draws or lifts up any weapon against.* The phrase “draws or lifts up any weapon against” covers any simple assault committed in the manner stated. The drawing of any weapon in an aggressive manner or the raising or brandishing of the same in a threatening manner in the presence of and at the superior is the sort of act proscribed. The raising in a threatening manner of a firearm, whether or not loaded, of a club, or of anything by which a serious blow or injury could be given is included in “lifts up.”

(iv) *Offers any violence against.* The phrase “offers any violence against” includes any form of battery or of mere assault not embraced in the preceding more specific terms “strikes” and “draws or lifts up.” If not executed, the violence must be physically attempted or menaced. A mere threatening in words is not an offering of violence in the sense of this article.

(b) *Execution of office.* An officer is in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage. In general, any striking or use of violence against any superior officer by a person over whom it is the duty of that officer to maintain discipline at the time, would be striking or using violence against the officer in the execution of office. The commanding officer on board a ship or the commanding officer of a unit in the field is generally considered to be on duty at all times.

(c) *Knowledge.* If the accused did not know the officer was the accused’s superior commissioned officer, the accused may not be convicted of this offense. Knowledge may be proved by circumstantial evidence.

(d) *Defenses.* In a prosecution for striking or

assaulting a superior commissioned officer in violation of this article, it is a defense that the accused acted in the proper discharge of some duty, or that the victim behaved in a manner toward the accused such as to lose the protection of this article ( see paragraph 13c(5)). For example, if the victim initiated an unlawful attack on the accused, this would deprive the victim of the protection of this article, and, in addition, could excuse any lesser included offense of assault as done in self-defense, depending on the circumstances ( see paragraph 54c; R.C.M. 916(e)).

(2) *Disobeying superior commissioned officer.*

(a) *Lawfulness of the order.*

(i) *Inference of lawfulness.* An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime.

(ii) *Authority of issuing officer.* The commissioned officer issuing the order must have authority to give such an order. Authorization may be based on law, regulation, or custom of the service.

(iii) *Relationship to military duty.* The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person’s conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

(iv) *Relationship to statutory or constitutional rights.* The order must not conflict with the statutory or constitutional rights of the person receiving the order.

(b) *Personal nature of the order.* The order must be directed specifically to the subordinate. Violations of regulations, standing orders or directives, or failure to perform previously established duties

¶14.c.(2)(b)

are not punishable under this article, but may violate Article 92.

(c) *Form and transmission of the order.* As long as the order is understandable, the form of the order is immaterial, as is the method by which it is transmitted to the accused.

(d) *Specificity of the order.* The order must be a specific mandate to do or not to do a specific act. An exhortation to “obey the law” or to perform one’s military duty does not constitute an order under this article.

(e) *Knowledge.* The accused must have actual knowledge of the order and of the fact that the person issuing the order was the accused’s superior commissioned officer. Actual knowledge may be proved by circumstantial evidence.

(f) *Nature of the disobedience.* “Willful disobedience” is an intentional defiance of authority. Failure to comply with an order through heedlessness, remissness, or forgetfulness is not a violation of this article but may violate Article 92.

(g) *Time for compliance.* When an order requires immediate compliance, an accused’s declared intent not to obey and the failure to make any move to comply constitutes disobedience. If an order does not indicate the time within which it is to be complied with, either expressly or by implication, then a reasonable delay in compliance does not violate this article. If an order requires performance in the future, an accused’s present statement of intention to disobey the order does not constitute disobedience of that order, although carrying out that intention may.

(3) *Civilians and discharged prisoners.* A discharged prisoner or other civilian subject to military law (see Article 2) and under the command of a commissioned officer is subject to the provisions of this article.

d. *Lesser included offenses.*

(1) *Striking superior commissioned officer in execution of office.*

(a) Article 90—drawing or lifting up a weapon or offering violence to superior commissioned officer in execution of office

(b) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon

(c) Article 128—assault or assault consummated by a battery upon commissioned officer not in the execution of office

(d) Article 80—attempts

(2) *Drawing or lifting up a weapon or offering violence to superior commissioned officer in execution of office.*

(a) Article 128—assault, assault with dangerous weapon

(b) Article 128—assault upon a commissioned officer not in the execution of office

(c) Article 80—attempts

(3) *Willfully disobeying lawful order of superior commissioned officer.*

(a) Article 92—failure to obey lawful order

(b) Article 89—disrespect to superior commissioned officer

(c) Article 80—attempts

e. *Maximum punishment.*

(1) *Striking, drawing, or lifting up any weapon or offering any violence to superior commissioned officer in the execution of office.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Willfully disobeying a lawful order of superior commissioned officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *In time of war.* Death or such other punishment as a court-martial may direct.

f. *Sample specifications.*

(1) *Striking superior commissioned officer.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (a time of war) strike \_\_\_\_\_, his/her superior commissioned officer, then known by the said \_\_\_\_\_ to be his/her superior commissioned officer, who was then in the execution of his/her office, (in) (on) the \_\_\_\_\_ with (a) (his/her) \_\_\_\_\_.

(2) *Drawing or lifting up a weapon against superior commissioned officer.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (a time of war) (draw) lift up) a weapon, to wit: a \_\_\_\_\_, against \_\_\_\_\_, his/her superior commissioned officer, then known by the

said \_\_\_\_\_ to be his/her superior commissioned officer, who was then in the execution of his/her office.

(3) *Offering violence to superior commissioned officer.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (a time of war) offer violence against \_\_\_\_\_, his/her superior commissioned officer, then known by the said \_\_\_\_\_ to be his/her superior commissioned officer, who was then in the execution of his/her office, by \_\_\_\_\_.

(4) *Willful disobedience of superior commissioned officer.*

In that \_\_\_\_\_ (personal jurisdiction data), having received a lawful command from \_\_\_\_\_, his/her superior commissioned officer, then known by the said \_\_\_\_\_ to be his/her superior commissioned officer, to \_\_\_\_\_, or words to that effect, did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, willfully disobey the same.

### **15. Article 91—Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer**

a. *Text.* “Any warrant officer or enlisted member who—

(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office;

(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office; shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Striking or assaulting warrant, noncommissioned, or petty officer.*

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused struck or assaulted a certain warrant, noncommissioned, or petty officer;

(c) That the striking or assault was committed while the victim was in the execution of office; and

(d) That the accused then knew that the person struck or assaulted was a warrant, noncommissioned, or petty officer.

[Note: If the victim was the superior noncommissioned or petty officer of the accused, add the following elements]

(e) That the victim was the superior noncommissioned, or petty officer of the accused; and

(f) That the accused then knew that the person struck or assaulted was the accused’s superior noncommissioned, or petty officer.

(2) *Disobeying a warrant, noncommissioned, or petty officer.*

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused received a certain lawful order from a certain warrant, noncommissioned, or petty officer;

(c) That the accused then knew that the person giving the order was a warrant, noncommissioned, or petty officer;

(d) That the accused had a duty to obey the order; and

(e) That the accused willfully disobeyed the order.

(3) *Treating with contempt or being disrespectful in language or deportment toward a warrant, noncommissioned, or petty officer.*

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused did or omitted certain acts, or used certain language;

(c) That such behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer;

(d) That the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;

(e) That the victim was then in the execution of office; and

(f) That under the circumstances the accused, by such behavior or language, treated with contempt

¶15.b.(3)(f)

or was disrespectful to said warrant, noncommissioned, or petty officer.

[Note: If the victim was the superior noncommissioned, or petty officer of the accused, add the following elements]

(g) That the victim was the superior noncommissioned, or petty officer of the accused; and

(h) That the accused then knew that the person toward whom the behavior or language was directed was the accused's superior noncommissioned, or petty officer.

c. *Explanation.*

(1) *In general.* Article 91 has the same general objects with respect to warrant, noncommissioned, and petty officers as Articles 89 and 90 have with respect to commissioned officers, namely, to ensure obedience to their lawful orders, and to protect them from violence, insult, or disrespect. Unlike Articles 89 and 90, however, this article does not require a superior-subordinate relationship as an element of any of the offenses denounced. This article does not protect an acting noncommissioned officer or acting petty officer, nor does it protect military police or members of the shore patrol who are not warrant, noncommissioned, or petty officers.

(2) *Knowledge.* All of the offenses prohibited by Article 91 require that the accused have actual knowledge that the victim was a warrant, noncommissioned, or petty officer. Actual knowledge may be proved by circumstantial evidence.

(3) *Striking or assaulting a warrant, noncommissioned, or petty officer.* For a discussion of "strikes" and "in the execution of office," see paragraph 14c. For a discussion of "assault," see paragraph 54c. An assault by a prisoner who has been discharged from the service, or by any other civilian subject to military law, upon a warrant, noncommissioned, or petty officer should be charged under Article 128 or 134.

(4) *Disobeying a warrant, noncommissioned, or petty officer.* See paragraph 14c(2) for a discussion of lawfulness, personal nature, form, transmission, and specificity of the order, nature of the disobedience, and time for compliance with the order.

(5) *Treating with contempt or being disrespectful in language or deportment toward a warrant, noncommissioned, or petty officer.* "Toward" requires that the behavior and language be within the sight or hearing of the warrant, noncommissioned, or petty officer concerned. For a discussion of "in the execu-

tion of his office," see paragraph 14c. For a discussion of disrespect, see paragraph 13c.

d. *Lesser included offenses.*

(1) *Striking or assaulting warrant, noncommissioned, or petty officer in the execution of office.*

(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon

(b) Article 128—assault upon warrant, noncommissioned, or petty officer not in the execution of office

(c) Article 80—attempts

(2) *Disobeying a warrant, noncommissioned, or petty officer.*

(a) Article 92—failure to obey a lawful order

(b) Article 80—attempts

(3) *Treating with contempt or being disrespectful in language or deportment toward warrant, noncommissioned, or petty officer in the execution of office.*

(a) Article 117—using provoking or reproachful speech

(b) Article 80—attempts

e. *Maximum punishment.*

(1) *Striking or assaulting warrant officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Striking or assaulting superior noncommissioned or petty officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(3) *Striking or assaulting other noncommissioned or petty officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(4) *Willfully disobeying the lawful order of a warrant officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(5) *Willfully disobeying the lawful order of a noncommissioned or petty officer.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(6) *Contempt or disrespect to warrant officer.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

(7) *Contempt or disrespect to superior noncommissioned or petty officer.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(8) *Contempt or disrespect to other noncommissioned or petty officer.* Forfeiture of two-thirds pay per month for 3 months, and confinement for 3 months.

f. *Sample specifications.*

(1) *Striking or assaulting warrant, noncommissioned, or petty officer.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (strike) (assault)\_\_\_\_\_, a \_\_\_\_\_ officer, then known to the said \_\_\_\_\_ to be a (superior) \_\_\_\_\_ officer who was then in the execution of his/her office, by \_\_\_\_\_ him/her (in) (on) (the \_\_\_\_\_) with (a) \_\_\_\_\_ (his/her) \_\_\_\_\_.

(2) *Willful disobedience of warrant, noncommissioned, or petty officer.*

In that \_\_\_\_\_ (personal jurisdiction data), having received a lawful order from \_\_\_\_\_, a \_\_\_\_\_ officer, then known by the said \_\_\_\_\_ to be a \_\_\_\_\_ officer, to \_\_\_\_\_, an order which it was his/her duty to obey, did (at/on board— location), on or about \_\_\_\_\_ 20\_\_\_\_\_, willfully disobey the same.

(3) *Contempt or disrespect toward warrant, noncommissioned, or petty officer.*

In that \_\_\_\_\_ (personal jurisdiction data) (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, [did treat with contempt] [was disrespectful in (language) (department) toward] \_\_\_\_\_, a \_\_\_\_\_ officer, then known by the said \_\_\_\_\_ to be a (superior) \_\_\_\_\_ officer, who was then in the execution of his/her office, by (saying to him/her, “ \_\_\_\_\_,” or words to that effect) (spitting at his/her feet) ( \_\_\_\_\_ )

## 16. Article 92—Failure to obey order or regulation

a. *Text.* “Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order

issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Violation of or failure to obey a lawful general order or regulation.*

(a) That there was in effect a certain lawful general order or regulation;

(b) That the accused had a duty to obey it; and

(c) That the accused violated or failed to obey the order or regulation.

(2) *Failure to obey other lawful order.*

(a) That a member of the armed forces issued a certain lawful order;

(b) That the accused had knowledge of the order;

(c) That the accused had a duty to obey the order; and

(d) That the accused failed to obey the order.

(3) *Dereliction in the performance of duties.*

(a) That the accused had certain duties;

(b) That the accused knew or reasonably should have known of the duties; and

(c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

c. *Explanation.*

(1) *Violation of or failure to obey a lawful general order or regulation.*

(a) *Authority to issue general orders and regulations.* General orders or regulations are those orders or regulations generally applicable to an armed force which are properly published by the President or the Secretary of Defense, of Transportation, or of a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by:

(i) an officer having general court-martial jurisdiction;

(ii) a general or flag officer in command; or

(iii) a commander superior to (i) or (ii).

(b) *Effect of change of command on validity of order.* A general order or regulation issued by a commander with authority under Article 92(1) retains its character as a general order or regulation

¶16.c.(1)(b)

when another officer takes command, until it expires by its own terms or is rescinded by separate action, even if it is issued by an officer who is a general or flag officer in command and command is assumed by another officer who is not a general or flag officer.

(c) *Lawfulness.* A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. *See* the discussion of lawfulness in paragraph 14c(2)(a).

(d) *Knowledge.* Knowledge of a general order or regulation need not be alleged or proved, as knowledge is not an element of this offense and a lack of knowledge does not constitute a defense.

(e) *Enforceability.* Not all provisions in general orders or regulations can be enforced under Article 92(1). Regulations which only supply general guidelines or advice for conducting military functions may not be enforceable under Article 92(1).

(2) *Violation of or failure to obey other lawful order.*

(a) *Scope.* Article 92(2) includes all other lawful orders which may be issued by a member of the armed forces, violations of which are not chargeable under Article 90, 91, or 92(1). It includes the violation of written regulations which are not general regulations. *See also* subparagraph (1)(e) above as applicable.

(b) *Knowledge.* In order to be guilty of this offense, a person must have had actual knowledge of the order or regulation. Knowledge of the order may be proved by circumstantial evidence.

(c) *Duty to obey order.*

(i) *From a superior.* A member of one armed force who is senior in rank to a member of another armed force is the superior of that member with authority to issue orders which that member has a duty to obey under the same circumstances as a commissioned officer of one armed force is the superior commissioned officer of a member of another armed force for the purposes of Articles 89 and 90. *See* paragraph 13c(1).

(ii) *From one not a superior.* Failure to obey the lawful order of one not a superior is an offense under Article 92(2), provided the accused had a duty to obey the order, such as one issued by a sentinel or a member of the armed forces police. *See* para-

graph 15b(2) if the order was issued by a warrant, noncommissioned, or petty officer in the execution of office.

(3) *Dereliction in the performance of duties.*

(a) *Duty.* A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.

(b) *Knowledge.* Actual knowledge of duties may be proved by circumstantial evidence. Actual knowledge need not be shown if the individual reasonably should have known of the duties. This may be demonstrated by regulations, training or operating manuals, customs of the service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence.

(c) *Derelict.* A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner. "Willfully" means intentionally. It refers to the doing of an act knowingly and purposefully, specifically intending the natural and probable consequences of the act. "Negligently" means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances. "Culpable inefficiency" is inefficiency for which there is no reasonable or just excuse.

(d) *Ineptitude.* A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Violation or failure to obey lawful general order or regulation.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Violation of failure to obey other lawful order.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

[Note: For (1) and (2), above, the punishment set forth does not apply in the following cases: if in the

absence of the order or regulation which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or if the violation or failure to obey is a breach of restraint imposed as a result of an order. In these instances, the maximum punishment is that specifically prescribed elsewhere for that particular offense.]

(3) *Dereliction in the performance of duties.*

(A) *Through neglect or culpable inefficiency.* Forfeiture of two-thirds pay per month for 3 months and confinement for 3 months.

(B) *Willful.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specifications.*

(1) *Violation or failure to obey lawful general order or regulation.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, (violate) (fail to obey) a lawful general (order) (regulation), to wit: (paragraph \_\_\_\_\_, (Army) (Air Force) Regulation \_\_\_\_\_, dated \_\_\_\_\_ 20 \_\_\_\_\_) (Article \_\_\_\_\_, U.S. Navy Regulations, dated \_\_\_\_\_ 20 \_\_\_\_\_) (General Order No. \_\_\_\_\_, U.S. Navy, dated \_\_\_\_\_ 20 \_\_\_\_\_) ( \_\_\_\_\_ ), b y (wrongfully) \_\_\_\_\_.

(2) *Violation or failure to obey other lawful written order.*

In that \_\_\_\_\_ (personal jurisdiction data), having knowledge of a lawful order issued b y \_\_\_\_\_, t o w i t : ( p a r a - g r a p h \_\_\_\_\_, ( \_\_\_\_\_ the Combat Group Regulation No. \_\_\_\_\_) ( U S S \_\_\_\_\_, R e g u l a t i o n - t i o n \_\_\_\_\_), dated \_\_\_\_\_) ( \_\_\_\_\_ ), an order which it was his/her duty to obey, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, fail to obey the same by (wrongfully) \_\_\_\_\_.

(3) *Failure to obey other lawful order.*

In that \_\_\_\_\_, (personal jurisdiction data) having knowledge of a lawful order issued

by \_\_\_\_\_ (to submit to certain medical t r e a t m e n t ) ( t o \_\_\_\_\_ ) ( n o t to \_\_\_\_\_ ) ( \_\_\_\_\_ ), an order which it was his/her duty to obey, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, fail to obey the same (by (wrongfully) \_\_\_\_\_.)

(4) *Dereliction in the performance of duties.*

In that \_\_\_\_\_, (personal jurisdiction data), who (knew) (should have known) of his/her duties (at/on board—location) (subject-matter jurisdiction data, if required), (on or about \_\_\_\_\_ 20 \_\_\_\_\_) (from a b o u t \_\_\_\_\_ 20 \_\_\_\_\_ t o a b o u t \_\_\_\_\_ 20 \_\_\_\_\_), was derelict in the performance of those duties in that he/she (negligently) (willfully) (by culpable inefficiency) failed \_\_\_\_\_, as it was his/her duty to do.

**17. Article 93—Cruelty and maltreatment**

a. *Text.*

“Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That a certain person was subject to the orders of the accused; and

(2) That the accused was cruel toward, or oppressed, or maltreated that person.

c. *Explanation.*

(1) *Nature of victim.* “Any person subject to his orders” means not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.

(2) *Nature of act.* The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive

¶17.c.(2)

comments or gestures of a sexual nature. The imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (was cruel toward) (did oppress) (maltreat)) \_\_\_\_\_, a person subject to his/her orders, by (kicking him/her in the stomach) (confining him/her for twenty-four hours without water) (\_\_\_\_\_).

**18. Article 94—Mutiny and sedition**

a. *Text.*

“Any person subject to this chapter who—

(1) with intent to usurp or override lawful military authority, refuse, in concert with any other person, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;

(2) with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence, or other disturbance against that authority is guilty of sedition;

(3) fails to do his utmost to prevent and suppress a mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior commissioned officer or commanding officer of a mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

(b) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished by death or such other punishment as a court-martial may direct.”

b. *Elements.*

(1) *Mutiny by creating violence or disturbance.*

(a) That the accused created violence or a disturbance; and

(b) That the accused created this violence or disturbance with intent to usurp or override lawful military authority.

(2) *Mutiny by refusing to obey orders or perform duty.*

(a) That the accused refused to obey orders or otherwise do the accused’s duty;

(b) That the accused in refusing to obey orders or perform duty acted in concert with another person or persons; and

(c) That the accused did so with intent to usurp or override lawful military authority.

(3) *Sedition.*

(a) That the accused created revolt, violence, or disturbance against lawful civil authority;

(b) That the accused acted in concert with another person or persons; and

(c) That the accused did so with the intent to cause the overthrow or destruction of that authority.

(4) *Failure to prevent and suppress a mutiny or sedition.*

(a) That an offense of mutiny or sedition was committed in the presence of the accused; and

(b) That the accused failed to do the accused’s utmost to prevent and suppress the mutiny or sedition.

(5) *Failure to report a mutiny or sedition.*

(a) That an offense of mutiny or sedition occurred;

(b) That the accused knew or had reason to believe that the offense was taking place; and

(c) That the accused failed to take all reasonable means to inform the accused’s superior commissioned officer or commander of the offense.

(6) *Attempted mutiny.*

(a) That the accused committed a certain overt act;

(b) That the act was done with specific intent to commit the offense of mutiny;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to effect the commission of the offense of mutiny.

c. *Explanation.*

(1) *Mutiny.* Article 94(a)(1) defines two types of mutiny, both requiring an intent to usurp or override military authority.

(a) *Mutiny by creating violence or disturbance.* Mutiny by creating violence or disturbance may be committed by one person acting alone or by more than one acting together.

(b) *Mutiny by refusing to obey orders or perform duties.* Mutiny by refusing to obey orders or perform duties requires collective insubordination and necessarily includes some combination of two or more persons in resisting lawful military authority. This concert of insubordination need not be preconceived, nor is it necessary that the insubordination be active or violent. It may consist simply of a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent, that is, with an intent to usurp or override lawful military authority. The intent may be declared in words or inferred from acts, omissions, or surrounding circumstances.

(2) *Sedition.* Sedition requires a concert of action in resistance to civil authority. This differs from mutiny by creating violence or disturbance. See subparagraph c(1)(a) above.

(3) *Failure to prevent and suppress a mutiny or sedition.* “Utmost” means taking those measures to prevent and suppress a mutiny or sedition which may properly be called for by the circumstances, including the rank, responsibilities, or employment of the person concerned. “Utmost” includes the use of such force, including deadly force, as may be reasonably necessary under the circumstances to prevent and suppress a mutiny or sedition.

(4) *Failure to report a mutiny or sedition.* Failure to “take all reasonable means to inform” includes failure to take the most expeditious means available. When the circumstances known to the accused would have caused a reasonable person in similar circumstances to believe that a mutiny or sedition was occurring, this may establish that the accused had such “reason to believe” that mutiny or sedition was occurring. Failure to report an impending mutiny or sedition is not an offense in violation of Article 94. *But see* paragraph 16c(3) (dereliction of duty).

(5) *Attempted mutiny.* For a discussion of attempts, see paragraph 4.

d. *Lesser included offenses.*

(1) *Mutiny by creating violence or disturbance.*

(a) Article 90—assault on commissioned officer

(b) Article 91—assault on warrant, noncommissioned, or petty officer

(c) Article 94—attempted mutiny

(d) Article 116—riot; breach of peace

(e) Article 128—assault

(f) Article 134—disorderly conduct

(2) *Mutiny by refusing to obey orders or perform duties.*

(a) Article 90—willful disobedience of commissioned officer

(b) Article 91—willful disobedience of warrant, noncommissioned, or petty officer

(c) Article 92—failure to obey lawful order

(d) Article 94—attempted mutiny

(3) *Sedition.*

(a) Article 116—riot; breach of peace

(b) Article 128—assault

(c) Article 134—disorderly conduct

(d) Article 80—attempts

e. *Maximum punishment.* For all offenses under Article 94, death or such other punishment as a court-martial may direct.

f. *Sample specifications.*

(1) *Mutiny by creating violence or disturbance.*

In that \_\_\_\_\_ (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, create (violence) (a disturbance) by (attacking the officers of the said ship) (barricading himself/herself in Barracks T7, firing his/her rifle at \_\_\_\_\_, and exhorting other persons to join him/her in defiance of \_\_\_\_\_) (\_\_\_\_\_).

(2) *Mutiny by refusing to obey orders or perform duties.*

In that \_\_\_\_\_ (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board— location) on or about \_\_\_\_\_ 20 \_\_\_\_\_, refuse, in concert with \_\_\_\_\_ (and \_\_\_\_\_) (others whose names are unknown), to (obey the orders of \_\_\_\_\_ to \_\_\_\_\_) (perform his/her duty as \_\_\_\_\_).

(3) *Sedition.*

¶18.f.(3)

In that \_\_\_\_\_ (personal jurisdiction data), with intent to cause the (overthrow) (destruction) (overthrow and destruction) of lawful civil authority, to wit: \_\_\_\_\_, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, in concert with (\_\_\_\_\_) and (\_\_\_\_\_) (others whose names are unknown), create (revolt) (violence) (a disturbance) against such authority by (entering the Town Hall of \_\_\_\_\_ and destroying property and records therein) (marching upon and compelling the surrender of the police of \_\_\_\_\_) (\_\_\_\_\_).

(4) *Failure to prevent and suppress a mutiny or sedition.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, fail to do his/her utmost to prevent and suppress a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (marines) (\_\_\_\_\_) of \_\_\_\_\_, which (mutiny) (sedition) was being committed in his/her presence, in that (he/she took no means to compel the dispersal of the assembly) (he/she made no effort to assist \_\_\_\_\_ who was attempting to quell the mutiny) (\_\_\_\_\_).

(5) *Failure to report a mutiny or sedition.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, fail to take all reasonable means to inform his/her superior commissioned officer or his/her commander of a (mutiny) (sedition) among the (soldiers) (sailors) (airmen) (marines) (\_\_\_\_\_) of \_\_\_\_\_, which (mutiny) (sedition) he/she, the said \_\_\_\_\_ (knew) (had reason to believe) was taking place.

(6) *Attempted mutiny.*

In that \_\_\_\_\_ (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, attempt to (create (violence) (a disturbance) by \_\_\_\_\_) (\_\_\_\_\_).

**19. Article 95—Resistance, flight, breach of arrest, and escape**

a. *Text.*

“Any person subject to this chapter who—

(1) resists apprehension; (2) flees from apprehension; (3) breaks arrest; or (4) escapes from custody or confinement; shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Resisting apprehension.*

(a) That a certain person attempted to apprehend the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused actively resisted the apprehension.

(2) *Flight from apprehension.*

(a) That a certain person attempted to apprehend the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused fled from the apprehension.

(3) *Breaking arrest.*

(a) That a certain person ordered the accused into arrest;

(b) That said person was authorized to order the accused into arrest; and

(c) That the accused went beyond the limits of arrest before being released from that arrest by proper authority.

(4) *Escape from custody.*

(a) That a certain person apprehended the accused;

(b) That said person was authorized to apprehend the accused; and

(c) That the accused freed himself or herself from custody before being released by proper authority.

(5) *Escape from confinement.*

(a) That a certain person ordered the accused into confinement;

(b) That said person was authorized to order the accused into confinement; and

(c) That the accused freed himself or herself from confinement before being released by proper authority. [Note: If the escape was post-trial confine-

ment, add the following element]

(d) That the confinement was the result of a court-martial conviction.

c. *Explanation.*

(1) *Resisting apprehension.*

(a) *Apprehension.* Apprehension is the taking of a person into custody. *See* R.C.M. 302.

(b) *Authority to apprehend.* *See* R.C.M. 302(b) concerning who may apprehend. Whether the status of a person authorized that person to apprehend the accused is a question of law to be decided by the military judge. Whether the person who attempted to make an apprehension had such a status is a question of fact to be decided by the factfinder.

(c) *Nature of the resistance.* The resistance must be active, such as assaulting the person attempting to apprehend. Mere words of opposition, argument, or abuse, and attempts to escape from custody after the apprehension is complete, do not constitute the offense of resisting apprehension although they may constitute other offenses.

(d) *Mistake.* It is a defense that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so. However, the accused's belief at the time that no basis exists for the apprehension is not a defense.

(e) *Illegal apprehension.* A person may not be convicted of resisting apprehension if the attempted apprehension is illegal, but may be convicted of other offenses, such as assault, depending on all the circumstances. An attempted apprehension by a person authorized to apprehend is presumed to be legal in the absence of evidence to the contrary. Ordinarily the legality of an apprehension is a question of law to be decided by the military judge.

(2) *Flight from apprehension.* The flight must be active, such as running or driving away.

(3) *Breaking arrest.*

(a) *Arrest.* There are two types of arrest: pre-trial arrest under Article 9 (*see* R.C.M. 304) and arrest under Article 15 (*see* paragraph 5c.(3), Part V, MCM). This article prohibits breaking any arrest.

(b) *Authority to order arrest.* *See* R.C.M. 304(b) and paragraphs 2 and 5b, Part V, MCM concerning authority to order arrest.

(c) *Nature of restraint imposed by arrest.* In arrest, the restraint is moral restraint imposed by orders fixing the limits of arrest.

(d) *Breaking.* Breaking arrest is committed when the person in arrest infringes the limits set by orders. The reason for the infringement is immaterial. For example, innocence of the offense with respect to which an arrest may have been imposed is not a defense.

(e) *Illegal arrest.* A person may not be convicted of breaking arrest if the arrest is illegal. An arrest ordered by one authorized to do so is presumed to be legal in the absence of some evidence to the contrary. Ordinarily, the legality of an arrest is a question of law to be decided by the military judge.

(4) *Escape from custody.*

(a) *Custody.* "Custody" is restraint of free locomotion imposed by lawful apprehension. The restraint may be physical or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders. Custody is temporary restraint intended to continue until other restraint (arrest, restriction, confinement) is imposed or the person is released.

(b) *Authority to apprehend.* *See* subparagraph (1)(b) above.

(c) *Escape.* For a discussion of escape, *see* subparagraph c(5)(c), below.

(d) *Illegal custody.* A person may not be convicted of this offense if the custody was illegal. An apprehension effected by one authorized to apprehend is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of an apprehension is a question of law to be decided by the military judge.

(e) *Correctional custody.* *See* paragraph 70.

(5) *Escape from confinement.*

(a) *Confinement.* Confinement is physical restraint imposed under R.C.M. 305, 1101, or paragraph 5b, Part V, MCM. For purposes of the element of post-trial confinement (subparagraph b(5)(d), above) and increased punishment therefrom (subparagraph e(4), below), the confinement must have been imposed pursuant to an adjudged sentence of a court-martial and not as a result of pretrial restraint or nonjudicial punishment.

(b) *Authority to order confinement.* *See* R.C.M. 304(b); 1101; and paragraphs 2 and 5b, Part V, MCM concerning who may order confinement.

(c) *Escape.* An escape may be either with or

IV-29

¶19.c.(5)(c)

without force or artifice, and either with or without the consent of the custodian. However, where a prisoner is released by one with apparent authority to do so, the prisoner may not be convicted of escape from confinement. *See also* paragraph 20c(1)(b). Any completed casting off of the restraint of confinement, before release by proper authority, is an escape, and lack of effectiveness of the restraint imposed is immaterial. An escape is not complete until the prisoner is momentarily free from the restraint. If the movement toward escape is opposed, or before it is completed, an immediate pursuit follows, there is no escape until opposition is overcome or pursuit is eluded.

(d) *Status when temporarily outside confinement facility.* A prisoner who is temporarily escorted outside a confinement facility for a work detail or other reason by a guard, who has both the duty and means to prevent that prisoner from escaping, remains in confinement.

(e) *Legality of confinement.* A person may not be convicted of escape from confinement if the confinement is illegal. Confinement ordered by one authorized to do so is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of confinement is a question of law to be decided by the military judge.

d. *Lesser included offenses.*

(1) *Resisting apprehension.* Article 128—assault; assault consummated by a battery

(2) *Breaking arrest.*

(a) Article 134—breaking restriction

(b) Article 80—attempts

(3) *Escape from custody.* Article 80—attempts

(4) *Escape from confinement.* Article 80—attempts

e. *Maximum punishment.*

(1) *Resisting apprehension.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Flight from apprehension.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) *Breaking arrest.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(4) *Escape from custody, pretrial confinement, or confinement on bread and water or diminished ra-*

*tions imposed pursuant to Article 15.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(5) *Escape from post-trial confinement.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *Resisting apprehension.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, resist being apprehended by \_\_\_\_\_, (an armed force policeman) ( \_\_\_\_\_ ), a person authorized to apprehend the accused.

(2) *Flight from apprehension.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, flee apprehension by \_\_\_\_\_, (an armed force policeman) ( \_\_\_\_\_ ), a person authorized to apprehend the accused.

(3) *Breaking arrest.*

In that \_\_\_\_\_ (personal jurisdiction data), having been placed in arrest (in quarters) (in his/her company area) ( \_\_\_\_\_ ) by a person authorized to order the accused into arrest, did, (at/on board—location) on or about \_\_\_\_\_ 20\_\_\_\_\_, break said arrest.

(4) *Escape from custody.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, escape from the custody of \_\_\_\_\_, a person authorized to apprehend the accused.

(5) *Escape from confinement.*

In that \_\_\_\_\_ (personal jurisdiction data), having been placed in (post-trial) confinement in (place of confinement), by a person authorized to order said accused into confinement did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, escape from confinement.

## 20. Article 96—Releasing prisoner without proper authority

### a. Text.

“Any person subject to this chapter who, without proper authority, releases any prisoner committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law.”

### b. Elements.

(1) *Releasing a prisoner without proper authority.*

(a) That a certain prisoner was committed to the charge of the accused; and

(b) That the accused released the prisoner without proper authority.

(2) *Suffering a prisoner to escape through neglect.*

(a) That a certain prisoner was committed to the charge of the accused;

(b) That the prisoner escaped;

(c) That the accused did not take such care to prevent the escape as a reasonably careful person, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances; and

(d) That the escape was the proximate result of the neglect.

(3) *Suffering a prisoner to escape through design.*

(a) That a certain prisoner was committed to the charge of the accused;

(b) That the design of the accused was to suffer the escape of that prisoner; and

(c) That the prisoner escaped as a result of the carrying out of the design of the accused.

### c. Explanation.

(1) *Releasing a prisoner without proper authority.*

(a) *Prisoner.* “Prisoner” includes a civilian or military person who has been confined.

(b) *Release.* The release of a prisoner is removal of restraint by the custodian rather than by the prisoner.

(c) *Authority to release.* See R.C.M. 305(g) as to who may release pretrial prisoners. Normally, the lowest authority competent to order release of a post-trial prisoner is the commander who convened

the court-martial which sentenced the prisoner or the officer exercising general court-martial jurisdiction over the prisoner. See also R.C.M. 1101.

(d) *Committed.* Once a prisoner has been confined, the prisoner has been “committed” in the sense of Article 96, and only a competent authority (see subparagraph (c)) may order release, regardless of failure to follow procedures prescribed by the code, this Manual, or other law.

(2) *Suffering a prisoner to escape through neglect.*

(a) *Suffer.* “Suffer” means to allow or permit; not to forbid or hinder.

(b) *Neglect.* “Neglect” is a relative term. It is the absence of conduct which would have been taken by a reasonably careful person in the same or similar circumstances.

(c) *Escape.* Escape is defined in paragraph 19c(4)(c).

(d) *Status of prisoner after escape not a defense.* After escape, the fact that a prisoner returns, is captured, killed, or otherwise dies is not a defense.

(3) *Suffering a prisoner to escape through design.* An escape is suffered through design when it is intended. Such intent may be inferred from conduct so wantonly devoid of care that the only reasonable inference which may be drawn is that the escape was contemplated as a probable result.

d. *Lesser included offenses.*

(1) *Releasing a prisoner without proper authority.* Article 80—attempts

(2) *Suffering a prisoner to escape through neglect.* None

(3) *Suffering a prisoner to escape through design.*

(a) Article 96—suffering a prisoner to escape through neglect

(b) Article 80—attempts

e. *Maximum punishment.*

(1) *Releasing a prisoner without proper authority.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Suffering a prisoner to escape through neglect.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) *Suffering a prisoner to escape through design.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

¶20.f.

f. *Sample specifications.*

(1) *Releasing a prisoner without proper authority.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, without proper authority, release \_\_\_\_\_, a prisoner committed to his/her charge.

(2) *Suffering a prisoner to escape through neglect or design.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, through (neglect) (design), suffer \_\_\_\_\_, a prisoner committed to his/her charge, to escape.

**21. Article 97—Unlawful detention**

a. *Text.*

“Any person subject to this chapter who, except as provided by law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused apprehended, arrested, or confined a certain person; and

(2) That the accused unlawfully exercised the accused’s authority to do so.

c. *Explanation.*

(1) *Scope.* This article prohibits improper acts by those empowered by the code to arrest, apprehend, or confine. See Articles 7 and 9; R.C.M. 302, 304, 305, and 1101, and paragraphs 2 and 5b, Part V. It does not apply to private acts of false imprisonment or unlawful restraint of another’s freedom of movement by one not acting under such a delegation of authority under the code.

(2) *No force required.* The apprehension, arrest, or confinement must be against the will of the person restrained, but force is not required.

(3) *Defense.* A reasonable belief held by the person imposing restraint that it is lawful is a defense.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specification.* In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or

about \_\_\_\_\_ 20\_\_\_\_\_, unlawfully (apprehend \_\_\_\_\_) (place \_\_\_\_\_ in arrest) (confine \_\_\_\_\_ in \_\_\_\_\_).

**22. Article 98—Noncompliance with procedural rules**

a. *Text.*

“Any person subject to this chapter who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

(2) Knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Unnecessary delay in disposing of case.*

(a) That the accused was charged with a certain duty in connection with the disposition of a case of a person accused of an offense under the code;

(b) That the accused knew that the accused was charged with this duty;

(c) That delay occurred in the disposition of the case;

(d) That the accused was responsible for the delay; and

(e) That, under the circumstances, the delay was unnecessary.

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the code.*

(a) That the accused failed to enforce or comply with a certain provision of the code regulating a proceeding before, during, or after a trial;

(b) That the accused had the duty of enforcing or complying with that provision of the code;

(c) That the accused knew that the accused was charged with this duty; and

(d) That the accused’s failure to enforce or comply with that provision was intentional.

c. *Explanation.*

(1) *Unnecessary delay in disposing of case.* The purpose of section (1) of Article 98 is to ensure expeditious disposition of cases of persons accused of offenses under the code. A person may be responsible for delay in the disposition of a case only when

that person's duties require action with respect to the disposition of that case.

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the code.* Section (2) of Article 98 does not apply to errors made in good faith before, during, or after trial. It is designed to punish intentional failure to enforce or comply with the provisions of the code regulating the proceedings before, during, and after trial. Unlawful command influence under Article 37 may be prosecuted under this Article. *See also* Article 31 and R.C.M. 104.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Unnecessary delay in disposing of case.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the code.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *Unnecessary delay in disposing of case.*

In that \_\_\_\_\_ (personal jurisdiction data), being charged with the duty of ((investigating) (taking immediate steps to determine the proper disposition of) charges preferred against \_\_\_\_\_, a person accused of an offense under the Uniform Code of Military Justice) (\_\_\_\_\_), was, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, responsible for unnecessary delay in (investigating said charges) (determining the proper disposition of said charges (\_\_\_\_\_), in that he/she (did \_\_\_\_\_) (failed to \_\_\_\_\_) (\_\_\_\_\_).

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the code.*

In that \_\_\_\_\_ (personal jurisdiction data), being charged with the duty of \_\_\_\_\_, did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, knowingly and intentionally fail to (enforce) (comply with) Article \_\_\_\_\_, Uniform Code of Military Justice, in that he/she \_\_\_\_\_.

**23. Article 99—Misbehavior before the enemy**

a. *Text.*

“Any member of the armed forces who before or in the presence of the enemy—

(1) runs away;

(2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;

(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;

(4) casts away his arms or ammunition;

(5) is guilty of cowardly conduct;

(6) quits his place of duty to plunder or pillage;

(7) causes false alarms in any command, unit, or place under control of the armed forces;

(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or

(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle; shall be punished by death or such other punishment as a court-martial may direct.”

b. *Elements.*

(1) *Running away.*

(a) That the accused was before or in the presence of the enemy;

(b) That the accused misbehaved by running away; and

(c) That the accused intended to avoid actual or impending combat with the enemy by running away.

(2) *Shamefully abandoning, surrendering, or delivering up command.*

(a) That the accused was charged by orders or circumstances with the duty to defend a certain command, unit, place, ship, or military property;

(b) That, without justification, the accused shamefully abandoned, surrendered, or delivered up that command, unit, place, ship, or military property; and

(c) That this act occurred while the accused was before or in the presence of the enemy.

¶23.b.(3)

(3) *Endangering safety of a command, unit, place, ship, or military property.*

(a) That it was the duty of the accused to defend a certain command, unit, place, ship, or certain military property;

(b) That the accused committed certain disobedience, neglect, or intentional misconduct;

(c) That the accused thereby endangered the safety of the command, unit, place, ship, or military property; and

(d) That this act occurred while the accused was before or in the presence of the enemy.

(4)  *Casting away arms or ammunition.*

(a) That the accused was before or in the presence of the enemy; and

(b) That the accused cast away certain arms or ammunition.

(5) *Cowardly conduct.*

(a) That the accused committed an act of cowardice;

(b) That this conduct occurred while the accused was before or in the presence of the enemy; and

(c) That this conduct was the result of fear.

(6)  *Quitting place of duty to plunder or pillage.*

(a) That the accused was before or in the presence of the enemy;

(b) That the accused quit the accused's place of duty; and

(c) That the accused's intention in quitting was to plunder or pillage public or private property.

(7)  *Causing false alarms.*

(a) That an alarm was caused in a certain command, unit, or place under control of the armed forces of the United States;

(b) That the accused caused the alarm;

(c) That the alarm was caused without any reasonable or sufficient justification or excuse; and

(d) That this act occurred while the accused was before or in the presence of the enemy.

(8)  *Willfully failing to do utmost to encounter enemy.*

(a) That the accused was serving before or in the presence of the enemy;

(b) That the accused had a duty to encounter, engage, capture, or destroy certain enemy troops,

combatants, vessels, aircraft, or a certain other thing; and

(c) That the accused willfully failed to do the utmost to perform that duty.

(9)  *Failing to afford relief and assistance.*

(a) That certain troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or an ally of the United States were engaged in battle and required relief and assistance;

(b) That the accused was in a position and able to render relief and assistance to these troops, combatants, vessels, or aircraft, without jeopardy to the accused's mission;

(c) That the accused failed to afford all practicable relief and assistance; and

(d) That, at the time, the accused was before or in the presence of the enemy.

c.  *Explanation.*

(1)  *Running away.*

(a)  *Running away.* "Running away" means an unauthorized departure to avoid actual or impending combat. It need not, however, be the result of fear, and there is no requirement that the accused literally run.

(b)  *Enemy.* "Enemy" includes organized forces of the enemy in time of war, any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations. "Enemy" is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and all the citizens of the other.

(c)  *Before the enemy.* Whether a person is "before the enemy" is a question of tactical relation, not distance. For example, a member of an anti-aircraft gun crew charged with opposing anticipated attack from the air, or a member of a unit about to move into combat may be before the enemy although miles from the enemy lines. On the other hand, an organization some distance from the front or immediate area of combat which is not a part of a tactical operation then going on or in immediate prospect is not "before or in the presence of the enemy" within the meaning of this article.

(2)  *Shamefully abandoning, surrendering, or delivering up of command.*

(a)  *Scope.* This provision concerns primarily

commanders chargeable with responsibility for defending a command, unit, place, ship or military property. Abandonment by a subordinate would ordinarily be charged as running away.

(b) *Shameful*. Surrender or abandonment without justification is shameful within the meaning of this article.

(c) *Surrender; deliver up*. “Surrender” and “deliver up” are synonymous for the purposes of this article.

(d) *Justification*. Surrender or abandonment of a command, unit, place, ship, or military property by a person charged with its can be justified only by the utmost necessity or extremity.

(3) *Endangering safety of a command, unit, place, ship, or military property*.

(a) *Neglect*. “Neglect” is the absence of conduct which would have been taken by a reasonably careful person in the same or similar circumstances.

(b) *Intentional misconduct*. “Intentional misconduct” does not include a mere error in judgment.

(4) *Casting away arms or ammunition*. Self-explanatory.

(5) *Cowardly conduct*.

(a) *Cowardice*. “Cowardice” is misbehavior motivated by fear.

(b) *Fear*. Fear is a natural feeling of apprehension when going into battle. The mere display of apprehension does not constitute this offense.

(c) *Nature of offense*. Refusal or abandonment of a performance of duty before or in the presence of the enemy as a result of fear constitutes this offense.

(d) *Defense*. Genuine and extreme illness, not generated by cowardice, is a defense.

(6) *Quitting place of duty to plunder or pillage*.

(a) *Place of duty*. “Place of duty” includes any place of duty, whether permanent or temporary, fixed or mobile.

(b) *Plunder or pillage*. “Plunder or pillage” means to seize or appropriate public or private property unlawfully.

(c) *Nature of offense*. The essence of this offense is quitting the place of duty with intent to plunder or pillage. Merely quitting with that purpose is sufficient, even if the intended misconduct is not done.

(7) *Causing false alarms*. This provision covers spreading of false or disturbing rumors or reports, as well as the false giving of established alarm signals.

(8) *Willfully failing to do utmost to encounter enemy*. Willfully refusing a lawful order to go on a combat patrol may violate this provision.

(9) *Failing to afford relief and assistance*.

(a) *All practicable relief and assistance*. “All practicable relief and assistance” means all relief and assistance which should be afforded within the limitations imposed upon a person by reason of that person’s own specific tasks or mission.

(b) *Nature of offense*. This offense is limited to a failure to afford relief and assistance to forces “engaged in battle.”

d. *Lesser included offenses*.

(1) *Running away*.

(a) Article 85—desertion with intent to avoid hazardous or important service

(b) Article 86—absence without authority; going from appointed place of duty

(c) Article 80—attempts

(2) *Shamefully abandoning, surrendering, or delivering up command*. Article 80—attempts

(3) *Endangering safety of a command, unit, place, ship, or military property*.

(a) *Through disobedience of order*. Article 92—failure to obey lawful order

(b) Article 80—attempts

(4) *Casting away arms or ammunition*.

(a) Article 108—military property of the United States—loss, damage, destruction, or wrongful disposition.

(b) Article 80—attempts

(5) *Cowardly conduct*.

(a) Article 85—desertion with intent to avoid hazardous duty or important service

(b) Article 86—absence without authority

(c) Article 99—running away

(d) Article 80—attempts

(6) *Quitting place of duty to plunder or pillage*.

(a) Article 86(2)—going from appointed place of duty

(b) Article 80—attempts

(7) *Causing false alarms*. Article 80—attempts

¶23.d.(8)

(8) *Willfully failing to do utmost to encounter enemy.* Article 80—attempts

(9) *Failing to afford relief and assistance.* Article 80—attempts

e. *Maximum punishment.* All offenses under Article 99. Death or such other punishment as a court-martial may direct.

f. *Sample specifications.*

(1) *Running away.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or a b o u t \_\_\_\_\_ 2 0 \_\_\_\_\_, (before) (in the presence of) the enemy, run away (from his/her company) (and hide) (\_\_\_\_\_), (and did not return until after the engagement had been concluded) (\_\_\_\_\_).

(2) *Shamefully abandoning, surrendering, or delivering up command.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or a b o u t \_\_\_\_\_ 2 0 \_\_\_\_\_, (before) (in the presence of) the enemy, shamefully (abandon) (surrender) (deliver up) \_\_\_\_\_, which it was his/her duty to defend.

(3) *Endangering safety of a command, unit, place, ship, or military property.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or a b o u t \_\_\_\_\_ 2 0 \_\_\_\_\_, (before) (in the presence of) the enemy, endanger the safety of \_\_\_\_\_, which it was his/her duty to defend, by (disobeying an order from \_\_\_\_\_ to engage the enemy)(neglecting his/her duty as a sentinel by engaging in a card game while on his/her post) (intentional misconduct in that he/she became drunk and fired flares, thus revealing the location of his/her unit) (\_\_\_\_\_).

(4) *Casting away arms or ammunition.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or a b o u t \_\_\_\_\_ 2 0 \_\_\_\_\_, (before) (in the presence of) the enemy, cast away his/her (rifle) (ammunition) (\_\_\_\_\_).

(5) *Cowardly conduct.*

In that \_\_\_\_\_ (personal jurisdiction data), (at/on board—location), on or a b o u t \_\_\_\_\_ 2 0 \_\_\_\_\_,

(before) (in the presence of) the enemy, was guilty of cowardly conduct as a result of fear, in that \_\_\_\_\_.

(6) *Quitting place of duty to plunder or pillage.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or a b o u t \_\_\_\_\_ 2 0 \_\_\_\_\_, (before) (in the presence of) the enemy, quit his/her place of duty for the purpose of (plundering) (pillaging) (plundering and pillaging).

(7) *Causing false alarms.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or a b o u t \_\_\_\_\_ 2 0 \_\_\_\_\_, (before) (in the presence of) the enemy, cause a false alarm in (Fort \_\_\_\_\_ ) (the said ship) (the camp) (\_\_\_\_\_ ) by (needlessly and without authority (causing the call to arms to be sounded) (sounding the general alarm)) (\_\_\_\_\_).

(8) *Willfully failing to do utmost to encounter enemy.*

In that \_\_\_\_\_ (personal jurisdiction data), being (before) (in the presence of) the enemy, did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, by, (ordering his/her troops to halt their advance) (\_\_\_\_\_), willfully fail to do his/her utmost to (encounter) (engage) (capture) (destroy), as it was his/her duty to do, (certain enemy troops which were in retreat) (\_\_\_\_\_).

(9) *Failing to afford relief and assistance.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or a b o u t \_\_\_\_\_ 2 0 \_\_\_\_\_, (before) (in the presence of) the enemy, fail to afford all practicable relief and assistance to (the USS \_\_\_\_\_, which was engaged in battle and had run aground, in that he/she failed to take her in tow) (certain troops of the ground forces of \_\_\_\_\_, which were engaged in battle and were pinned down by enemy fire, in that he/she failed to furnish air cover) (\_\_\_\_\_ ) as he/she properly should have done.

## 24. Article 100—Subordinate compelling surrender

a. *Text.*

“Any person subject to this chapter who compels

or attempts to compel the commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct.”

b. *Elements.*

(1) *Compelling surrender.*

(a) That a certain person was in command of a certain place, vessel, aircraft, or other military property or of a body of members of the armed forces;

(b) That the accused did an overt act which was intended to and did compel that commander to give it up to the enemy or abandon it; and

(c) That the place, vessel, aircraft, or other military property or body of members of the armed forces was actually given up to the enemy or abandoned.

(2) *Attempting to compel surrender.*

(a) That a certain person was in command of a certain place, vessel, aircraft, or other military property or of a body of members of the armed forces;

(b) That the accused did a certain overt act;

(c) That the act was done with the intent to compel that commander to give up to the enemy or abandon the place, vessel, aircraft, or other military property or body of members of the armed forces;

(d) That the act amounted to more than mere preparation; and

(e) That the act apparently tended to bring about the compelling of surrender or abandonment.

(3) *Striking the colors or flag.*

(a) That there was an offer of surrender to an enemy;

(b) That this offer was made by striking the colors or flag to the enemy or in some other manner;

(c) That the accused made or was responsible for the offer; and

(d) That the accused did not have proper authority to make the offer.

c. *Explanation.*

(1) *Compelling surrender.*

(a) *Nature of offense.* The offenses under this article are similar to mutiny or attempted mutiny designed to bring about surrender or abandonment. Unlike some cases of mutiny, however, concert of

action is not an essential element of the offenses under this article. The offense is not complete until the place, military property, or command is actually abandoned or given up to the enemy.

(b) *Surrender.* “Surrender” and “to give it up to an enemy” are synonymous.

(c) *Acts required.* The surrender or abandonment must be compelled or attempted to be compelled by acts rather than words.

(2) *Attempting to compel surrender.* The offense of attempting to compel a surrender or abandonment does not require actual abandonment or surrender, but there must be some act done with this purpose in view, even if it does not accomplish the purpose.

(3) *Striking the colors or flag.*

(a) *In general.* To “strike the colors or flag” is to haul down the colors or flag in the face of the enemy or to make any other offer of surrender. It is traditional wording for an act of surrender.

(b) *Nature of offense.* The offense is committed when one assumes the authority to surrender a military force or position when not authorized to do so either by competent authority or by the necessities of battle. If continued battle has become fruitless and it is impossible to communicate with higher authority, those facts will constitute proper authority to surrender. The offense may be committed whenever there is sufficient contact with the enemy to give the opportunity of making an offer of surrender and it is not necessary that an engagement with the enemy be in progress. It is unnecessary to prove that the offer was received by the enemy or that it was rejected or accepted. The sending of an emissary charged with making the offer or surrender is an act sufficient to prove the offer, even though the emissary does not reach the enemy.

(4) *Enemy.* For a discussion of “enemy,” see paragraph 23c(1)(b).

d. *Lesser included offense.* Striking the colors or flag. Article 80— attempts

e. *Maximum punishment.* All offenses under Article 100. Death or such other punishment as a court-martial may direct.

f. *Sample specifications.*

(1) *Compelling surrender or attempting to compel surrender.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on—board location), on or about \_\_\_\_\_ 20\_\_\_\_\_, (at-

¶24.f.(1)

tempt to) compel \_\_\_\_\_, the commander of \_\_\_\_\_, (to give up to the enemy) (to a b a n d o n ) s a i d \_\_\_\_\_, by \_\_\_\_\_.

(2) *Striking the colors or flag.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, without proper authority, offer to surrender to the enemy by (striking the (colors)(flag)) (\_\_\_\_\_).

**25. Article 101—Improper use of countersign**

a. *Text.*

“Any person subject to this chapter who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished by death or such other punishment as a court-martial may direct.”

b. *Elements.*

(1) *Disclosing the parole or countersign to one not entitled to receive it.*

(a) That, in time of war, the accused disclosed the parole or countersign to a person, identified or unidentified; and

(b) That this person was not entitled to receive it.

(2) *Giving a parole or countersign different from that authorized.*

(a) That, in time of war, the accused knew that the accused was authorized and required to give a certain parole or countersign; and

(b) That the accused gave to a person entitled to receive and use this parole or countersign a different parole or countersign from that which the accused was authorized and required to give.

c. *Explanation.*

(1) *Countersign.* A countersign is a word, signal, or procedure given from the principal headquarters of a command to aid guards and sentinels in their scrutiny of persons who apply to pass the lines. It consists of a secret challenge and a password, signal, or procedure.

(2) *Parole.* A parole is a word used as a check on the countersign; it is given only to those who are

entitled to inspect guards and to commanders of guards.

(3) *Who may receive countersign.* The class of persons entitled to receive the countersign or parole will expand and contract under the varying circumstances of war. Who these persons are will be determined largely, in any particular case, by the general or special orders under which the accused was acting. Before disclosing such a word, a person subject to military law must determine at that person’s peril that the recipient is a person authorized to receive it.

(4) *Intent, motive, negligence, mistake, ignorance not defense.* The accused’s intent or motive in disclosing the countersign or parole is immaterial to the issue of guilt, as is the fact that the disclosure was negligent or inadvertent. It is no defense that the accused did not know that the person to whom the countersign or parole was given was not entitled to receive it.

(5) *How accused received countersign or parole.* It is immaterial whether the accused had received the countersign or parole in the regular course of duty or whether it was obtained in some other way.

(6) *In time of war.* See R.C.M. 103(19).

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Death or such other punishment as a court-martial may direct.

f. *Sample specifications.*

(1) *Disclosing the parole or countersign to one not entitled to receive it.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, a time of war, disclose the (parole)(countersign), to wit: \_\_\_\_\_, to \_\_\_\_\_, a person who was not entitled to receive it.

(2) *Giving a parole or countersign different from that authorized.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, a time of war, give to \_\_\_\_\_, a person entitled to receive and use the (parole)(countersign), a (parole)(countersign), namely: \_\_\_\_\_ which was different from that which, to his/her knowledge, he/she was authorized and required to give, to wit: \_\_\_\_\_.

**26. Article 102—Forcing a safeguard**a. *Text.*

“Any person subject to this chapter who forces a safeguard shall suffer death or such other punishment as a court-martial may direct.”

b. *Elements.*

(1) that a safeguard had been issued or posted for the protection of a certain person or persons, place, or property;

(2) That the accused knew or should have known of the safeguard; and

(3) That the accused forced the safeguard.

c. *Explanation.*

(1) *Safeguard.* A safeguard is a detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral affected by the relationship of belligerent forces in their prosecution of war or during circumstances amounting to a state of belligerency. The term also includes a written order left by a commander with an enemy subject or posted upon enemy property for the protection of that person or property. A safeguard is not a device adopted by a belligerent to protect its own property or nationals or to ensure order within its own forces, even if those forces are in a theater of combat operations, and the posting of guards or of off-limits signs does not establish a safeguard unless a commander takes those actions to protect enemy or neutral persons or property. The effect of a safeguard is to pledge the honor of the nation that the person or property shall be respected by the national armed forces.

(2) *Forcing a safeguard.* “Forcing a safeguard” means to perform an act or acts in violation of the protection of the safeguard.

(3) *Nature of offense.* Any trespass on the protection of the safeguard will constitute an offense under this article, whether the safeguard was imposed in time of war or in circumstances amounting to a state of belligerency short of a formal state of war.

(4) *Knowledge.* Actual knowledge of the safeguard is not required. It is sufficient if an accused should have known of the existence of the safeguard.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Death or such other punishment as a court-martial may direct.

f. *Sample specification.* In

that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, force a safeguard, (known by him/her to have been placed over the premises occupied by \_\_\_\_\_ at \_\_\_\_\_ by (overwhelming the guard posted for the protection of the same) ( \_\_\_\_\_ )) ( \_\_\_\_\_ ).

**27. Article 103—Captured or abandoned property**a. *Text.*

(a) All persons subject to this chapter shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody, or control.

(b) Any person subject to this chapter who—

(1) fails to carry out the duties prescribed in subsection ( a );

(2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he receives or expects any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or

(3) engages in looting or pillaging; shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Failing to secure public property taken from the enemy.*

(a) That certain public property was taken from the enemy;

(b) That this property was of a certain value; and

(c) That the accused failed to do what was reasonable under the circumstances to secure this property for the service of the United States.

(2) *Failing to report and turn over captured or abandoned property.*

(a) That certain captured or abandoned public or private property came into the possession, custody, or control of the accused;

(b) That this property was of a certain value; and

(c) That the accused failed to give notice of its receipt and failed to turn over to proper authority,

¶27.b.(2)(c)

without delay, the captured or abandoned public or private property.

(3) *Dealing in captured or abandoned property.*

(a) That the accused bought, sold, traded, or otherwise dealt in or disposed of certain public or private captured or abandoned property;

(b) That this property was of certain value; and

(c) That by so doing the accused received or expected some profit, benefit, or advantage to the accused or to a certain person or persons connected directly or indirectly with the accused.

(4) *Looting or pillaging.*

(a) That the accused engaged in looting, pillaging, or looting and pillaging by unlawfully seizing or appropriating certain public or private property;

(b) That this property was located in enemy or occupied territory, or that it was on board a seized or captured vessel; and

(c) That this property was:

(i) left behind, owned by, or in the custody of the enemy, an occupied state, an inhabitant of an occupied state, or a person under the protection of the enemy or occupied state, or who, immediately prior to the occupation of the place where the act occurred, was under the protection of the enemy or occupied state; or

(ii) part of the equipment of a seized or captured vessel; or

(iii) owned by, or in the custody of the officers, crew, or passengers on board a seized or captured vessel.

c. *Explanation.*

(1) *Failing to secure public property taken from the enemy.*

(a) *Nature of property.* Unlike the remaining offenses under this article, failing to secure public property taken from the enemy involves only public property. Immediately upon its capture from the enemy public property becomes the property of the United States. Neither the person who takes it nor any other person has any private right in this property.

(b) *Nature of duty.* Every person subject to military law has an immediate duty to take such steps as are reasonably within that person's power to secure public property for the service of the United States and to protect it from destruction or loss.

(2) *Failing to report and turn over captured or abandoned property.*

(a) *Reports.* Reports of receipt of captured or abandoned property are to be made directly or through such channels as are required by current regulations, orders, or the customs of the service.

(b) *Proper authority.* "Proper authority" is any authority competent to order disposition of the property in question.

(3) *Dealing in captured or abandoned property.* "Disposed of" includes destruction or abandonment.

(4) *Looting or pillaging.* "Looting or pillaging" means unlawfully seizing or appropriating property which is located in enemy or occupied territory.

(5) *Enemy.* For a discussion of "enemy," see paragraph 23c(1)(b).

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Failing to secure public property taken from the enemy; failing to secure, give notice and turn over, selling, or otherwise wrongfully dealing in or disposing of captured or abandoned property:*

(a) of a value of \$500.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) of a value of more than \$500.00 or any firearm or explosive. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Looting or pillaging.* Any punishment, other than death, that a court-martial may direct. See R.C.M. 1003.

f. *Sample specifications.*

(1) *Failing to secure public property taken from the enemy.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, fail to secure for the service of the United States certain public property taken from the enemy, to wit: \_\_\_\_\_, of a value of (about) \$\_\_\_\_\_.

(2) *Failing to report and turn over captured or abandoned property.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, fail to give notice and turn over to proper authority without

delay certain (captured) (abandoned) property which had come into his/her (possession) (custody) (control), to wit: \_\_\_\_\_, of a value of (about), \$ \_\_\_\_\_.

(3) *Dealing in captured or abandoned property.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, (buy) (sell) (trade) (deal in) (dispose of) ( \_\_\_\_\_ ) certain (captured) (abandoned) property, to wit: \_\_\_\_\_, (a firearm) (an explosive), of a value of (about) \$ \_\_\_\_\_, thereby (receiving) (expecting) a (profit) (benefit) (advantage) to (himself/herself) ( \_\_\_\_\_, his/her accomplice) ( \_\_\_\_\_, his/her brother) ( \_\_\_\_\_).

(4) *Looting or pillaging.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, engage in (looting) (pillage) (looting and pillaging) by unlawfully (seizing) (appropriating) \_\_\_\_\_, (property which had been left behind) (the property of \_\_\_\_\_), ( a n i n h a b i t a n t of \_\_\_\_\_ ) ( \_\_\_\_\_ ).

**28. Article 104—Aiding the enemy**

a. *Text.*

“Any person who—

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct.”

b. *Elements.*

(1) *Aiding the enemy.*

- (a) That the accused aided the enemy; and
- (b) That the accused did so with certain arms, ammunition, supplies, money, or other things.

(2) *Attempting to aid the enemy.*

- (a) That the accused did a certain overt act;
- (b) That the act was done with the intent to aid the enemy with certain arms, ammunition, supplies, money, or other things;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to bring about the offense of aiding the enemy with certain arms, ammunition, supplies, money, or other things.

(3) *Harboring or protecting the enemy.*

(a) That the accused, without proper authority, harbored or protected a person;

(b) That the person so harbored or protected was the enemy; and

(c) That the accused knew that the person so harbored or protected was an enemy.

(4) *Giving intelligence to the enemy.*

(a) That the accused, without proper authority, knowingly gave intelligence information to the enemy; and

(b) That the intelligence information was true, or implied the truth, at least in part.

(5) *Communicating with the enemy.*

(a) That the accused, without proper authority, communicated, corresponded, or held intercourse with the enemy, and;

(b) That the accused knew that the accused was communicating, corresponding, or holding intercourse with the enemy.

c. *Explanation.*

(1) *Scope of Article 104.* This article denounces offenses by all persons whether or not otherwise subject to military law. Offenders may be tried by court-martial or by military commission.

(2) *Enemy.* For a discussion of “enemy,” see paragraph 23c(1)(b).

(3) *Aiding or attempting to aid the enemy.* It is not a violation of this article to furnish prisoners of war subsistence, quarters, and other comforts or aid to which they are lawfully entitled.

(4) *Harboring or protecting the enemy.*

(a) *Nature of offense.* An enemy is harbored or protected when, without proper authority, that enemy is shielded, either physically or by use of any artifice, aid, or representation from any injury or misfortune which in the chance of war may occur.

(b) *Knowledge.* Actual knowledge is required, but may be proved by circumstantial evidence.

(5) *Giving intelligence to the enemy.*

(a) *Nature of offense.* Giving intelligence to the enemy is a particular case of corresponding with the

¶28.c.(5)(a)

enemy made more serious by the fact that the communication contains intelligence that may be useful to the enemy for any of the many reasons that make information valuable to belligerents. This intelligence may be conveyed by direct or indirect means.

(b) *Intelligence*. “Intelligence” imports that the information conveyed is true or implies the truth, at least in part.

(c) *Knowledge*. Actual knowledge is required but may be proved by circumstantial evidence.

(6) *Communicating with the enemy*.

(a) *Nature of the offense*. No unauthorized communication, correspondence, or intercourse with the enemy is permissible. The intent, content, and method of the communication, correspondence, or intercourse are immaterial. No response or receipt by the enemy is required. The offense is complete the moment the communication, correspondence, or intercourse issues from the accused. The communication, correspondence, or intercourse may be conveyed directly or indirectly. A prisoner of war may violate this Article by engaging in unauthorized communications with the enemy. *See also* paragraph 29c(3).

(b) *Knowledge*. Actual knowledge is required but may be proved by circumstantial evidence.

(c) *Citizens of neutral powers*. Citizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war relating to communication with the enemy.

d. *Lesser included offense*. For harboring or protecting the enemy, giving intelligence to the enemy, or communicating with the enemy. Article 80—attempts

e. *Maximum punishment*. Death or such other punishment as a court-martial or military commission may direct.

f. *Sample specifications*.

(1) *Aiding or attempting to aid the enemy*.

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, (attempt to) aid the enemy with (arms) (ammunition) (supplies) (money) ( \_\_\_\_\_ ), by (furnishing and delivering to \_\_\_\_\_, members of the enemy’s armed forces \_\_\_\_\_) ( \_\_\_\_\_ ).

(2) *Harboring or protecting the enemy*.

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, without proper authority, knowingly (harbor) (protect) \_\_\_\_\_, an enemy, by (concealing the said \_\_\_\_\_ in his/her house) ( \_\_\_\_\_ ).

(3) *Giving intelligence to the enemy*.

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, without proper authority, knowingly give intelligence to the enemy, by (informing a patrol of the enemy’s forces of the whereabouts of a military patrol of the United States forces) ( \_\_\_\_\_ ).

(4) *Communicating with the enemy*.

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, without proper authority, knowingly (communicate with) (correspond with) (hold intercourse with) the enemy (by writing and transmitting secretly through the lines to one \_\_\_\_\_, whom he/she, the said \_\_\_\_\_, knew to be (an officer of the enemy’s armed forces)( \_\_\_\_\_ ) a communication in words and figures substantially as follows, to wit: \_\_\_\_\_) ((indirectly by publishing in \_\_\_\_\_, a newspaper published at \_\_\_\_\_, a communication in words and figures as follows, to wit: \_\_\_\_\_, which communication was intended to reach the enemy))(( \_\_\_\_\_ ))).

**29. Article 105—Misconduct as a prisoner**

a. *Text*.

“Any person subject to this chapter who, while in the hands of the enemy in time of war—

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreats them without justifiable cause; shall be punished as a court-martial may direct.”

b. *Elements*.

(1) *Acting without authority to the detriment of*

another for the purpose of securing favorable treatment.

(a) That without proper authority the accused acted in a manner contrary to law, custom, or regulation;

(b) That the act was committed while the accused was in the hands of the enemy in time of war;

(c) That the act was done for the purpose of securing favorable treatment of the accused by the captors; and

(d) That other prisoners held by the enemy, either military or civilian, suffered some detriment because of the accused's act.

(2) *Maltreating prisoners while in a position of authority.*

(a) That the accused maltreated a prisoner held by the enemy;

(b) That the act occurred while the accused was in the hands of the enemy in time of war;

(c) That the accused held a position of authority over the person maltreated; and

(d) That the act was without justifiable cause.

c. *Explanation.*

(1) *Enemy.* For a discussion of "enemy," see paragraph 23c(1)(b).

(2) *In time of war.* See R.C.M. 103(19).

(3) *Acting without authority to the detriment of another for the purpose of securing favorable treatment.*

(a) *Nature of offense.* Unauthorized conduct by a prisoner of war must be intended to result in improvement by the enemy of the accused's condition and must operate to the detriment of other prisoners either by way of closer confinement, reduced rations, physical punishment, or other harm. Examples of this conduct include reporting plans of escape being prepared by others or reporting secret food caches, equipment, or arms. The conduct of the prisoner must be contrary to law, custom, or regulation.

(b) *Escape.* Escape from the enemy is authorized by custom. An escape or escape attempt which results in closer confinement or other measures against fellow prisoners still in the hands of the enemy is not an offense under this article.

(4) *Maltreating prisoners while in a position of authority.*

(a) *Authority.* The source of authority is not

material. It may arise from the military rank of the accused or—despite service regulations or customs to the contrary—designation by the captor authorities, or voluntary election or selection by other prisoners for their self-government.

(b) *Maltreatment.* The maltreatment must be real, although not necessarily physical, and it must be without justifiable cause. Abuse of an inferior by inflammatory and derogatory words may, through mental anguish, constitute this offense.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Any punishment other than death that a court-martial may direct. See R.C.M. 1003.

f. *Sample specifications.*

(1) *Acting without authority to the detriment of another for the purpose of securing favorable treatment.*

In that \_\_\_\_\_ (personal jurisdiction data), while in the hands of the enemy, did, (at/on board—location) on or about \_\_\_\_\_ 20 \_\_\_\_\_, a time of war, without proper authority and for the purpose of securing favorable treatment by his/her captors, (report to the commander of Camp \_\_\_\_\_ the preparations by \_\_\_\_\_, a prisoner at said camp, to escape, as a result of which report the said \_\_\_\_\_ was placed in solitary confinement) (\_\_\_\_\_).

(2) *Maltreating prisoner while in a position of authority.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, a time of war, while in the hands, of the enemy and in a position of authority over \_\_\_\_\_, a prisoner at \_\_\_\_\_, as (officer in charge of prisoners at \_\_\_\_\_) (\_\_\_\_\_), maltreat the said \_\_\_\_\_ by (depriving him/her of \_\_\_\_\_)(\_\_\_\_\_), without justifiable cause.

### 30. Article 106—Spies

a. *Text.*

"Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or

¶30.a.

any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.”

b. *Elements.*

(1) That the accused was found in, about, or in and about a certain place, vessel, or aircraft within the control or jurisdiction of an armed force of the United States, or a shipyard, manufacturing or industrial plant, or other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere;

(2) That the accused was lurking, acting clandestinely or under false pretenses;

(3) That the accused was collecting or attempting to collect certain information;

(4) That the accused did so with the intent to convey this information to the enemy; and

(5) That this was done in time of war.

c. *Explanation.*

(1) *In time of war.* See R.C.M. 103(19).

(2) *Enemy.* For a discussion of “enemy,” see paragraph 23c(1)(b).

(3) *Scope of offense.* The words “any person” bring within the jurisdiction of general courts-martial and military commissions all persons of whatever nationality or status who commit spying.

(4) *Nature of offense.* A person can be a spy only when, acting clandestinely or under false pretenses, that person obtains or seeks to obtain information with the intent to convey it to a hostile party. It is not essential that the accused obtain the information sought or that it be communicated. The offense is complete with lurking or acting clandestinely or under false pretenses with intent to accomplish these objects.

(5) *Intent.* It is necessary to prove an intent to convey information to the enemy. This intent may be inferred from evidence of a deceptive insinuation of the accused among our forces, but evidence that the person had come within the lines for a comparatively innocent purpose, as to visit family or to reach friendly lines by assuming a disguise, is admissible to rebut this inference.

(6) *Persons not included under “spying”.*

(a) Members of a military organization not wearing a disguise, dispatch drivers, whether mem-

bers of a military organization or civilians, and persons in ships or aircraft who carry out their missions openly and who have penetrated enemy lines are not spies because, while they may have resorted to concealment, they have not acted under false pretenses.

(b) A spy who, after rejoining the armed forces to which the spy belongs, is later captured by the enemy incurs no responsibility for previous acts of espionage.

(c) A person living in occupied territory who, without lurking, or acting clandestinely or under false pretenses, merely reports what is seen or heard through agents to the enemy may be charged under Article 104 with giving intelligence to or communicating with the enemy, but may not be charged under this article as being a spy.

d. *Lesser included offenses.* None.

e. *Mandatory punishment.* Death

f. *Sample specification.* In that \_\_\_\_\_ (personal jurisdiction data), was, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, a time of war, found (lurking) (acting) as a spy (in) (about) (in and about)\_\_\_\_\_, (a (fortification) (port) (base) (vessel) (aircraft) (\_\_\_\_\_) within the (control)(jurisdiction) (control and jurisdiction) of an armed force of the United States, to wit: \_\_\_\_\_) (a (shipyard) (manufacturing plant) (industrial plant) (\_\_\_\_\_) engaged in work in aid of the prosecution of the war by the United States) (\_\_\_\_\_), for the purpose of (collecting) (attempting to collect) information in regard to the ((numbers) (resources) (operations) (\_\_\_\_\_) of the armed forces of the United States) ((military production) (\_\_\_\_\_) of the United States) (\_\_\_\_\_), with intent to impart the same to the enemy.

**30a. Article 106a—Espionage**

a. *Text.*

(a)(1) Any person subject to this chapter who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any entity described in paragraph (2), either directly or indirectly, anything described in paragraph (3) shall be punished as a court-martial may

direct, except that if the accused is found guilty of an offense that directly concerns (A) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (B) war plans, (C) communications intelligence or cryptolineart information, or (D) any other major weapons system or major element of defense strategy, the accused shall be punished by death or such other punishment as a court-martial may direct.

(2) An entity referred to in paragraph (1) is—

(A) a foreign government;

(B) a faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States; or

(C) a representative, officer, agent, employee, subject, or citizen of such a government, faction, party, or force.

(3) A thing referred to in paragraph (1) is a document, writing, code book, signal book, sketch, photograph, photolineart negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense.

(b)(1) No person may be sentenced by court-martial to suffer death for an offense under this section (article) unless—

(A) the members of the court-martial unanimously find at least one of the aggravating factors set out in subsection (c); and

(B) the members unanimously determine that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances, including the aggravating factors set out under subsection (c).

(2) Findings under this subsection may be based on—

(A) evidence introduced on the issue of guilt or innocence;

(B) evidence introduced during the sentencing proceeding; or

(C) all such evidence.

(3) The accused shall be given broad latitude to present matters in extenuation and mitigation.

(c) A sentence of death may be adjudged by a court-martial for an offense under this section (article) only if the members unanimously find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute.

(2) In the commission of the offense, the accused knowingly created a grave risk of substantial damage to the national security.

(3) In the commission of the offense, the accused knowingly created a grave risk of death to another person.

(4) Any other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36).”

b. *Elements.*

(1) *Espionage.*

(a) That the accused communicated, delivered, or transmitted any document, writing, code book, signal book, sketch, photograph, photolineart negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense;

(b) That this matter was communicated, delivered, or transmitted to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject or citizen thereof, either directly or indirectly; and

(c) That the accused did so with intent or reason to believe that such matter would be used to the injury of the United States or to the advantage of a foreign nation.

(2) *Attempted espionage.*

(a) That the accused did a certain overt act;

(b) That the act was done with the intent to commit the offense of espionage;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to bring about the offense of espionage.

(3) *Espionage as a capital offense.*

(a) That the accused committed espionage or attempted espionage; and

(b) That the offense directly concerned (1) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (2) war plans, (3) communications intelligence or cryptolineart in-

¶30a.b.(3)(b)

formation, or (4) any other major weapons system or major element of defense strategy.

c. *Explanation.*

(1) *Intent.* “Intent or reason to believe” that the information “is to be used to the injury of the United States or to the advantage of a foreign nation” means that the accused acted in bad faith and without lawful authority with respect to information that is not lawfully accessible to the public.

(2) *National defense information.* “Instrument, appliance, or information relating to the national defense” includes the full range of modern technology and matter that may be developed in the future, including chemical or biological agents, computer technology, and other matter related to the national defense.

(3) *Espionage as a capital offense.* Capital punishment is authorized if the government alleges and proves that the offense directly concerned (1) nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large scale attack, (2) war plans, (3) communications intelligence or cryptolinear information, or (4) any other major weapons system or major element of defense strategy. See R.C.M. 1004 concerning sentencing proceedings in capital cases.

d. *Lesser included offense.* Although no lesser included offenses are set forth in the Code, federal civilian offenses on this matter may be incorporated through the third clause of Article 134.

e. *Maximum punishment.*

(1) *Espionage as a capital offense.* Death or such other punishment as a court-martial may direct. See R.C.M. 1003.

(2) *Espionage or attempted espionage.* Any punishment, other than death, that a court-martial may direct. See R.C.M. 1003.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, with intent or reason to believe it would be used to the injury of the United States or to the advantage of \_\_\_\_\_, a foreign nation, (attempt to) (communicate) (deliver) (transmit) \_\_\_\_\_ (description of item), (a document) (a writing) (a code book) (a sketch) (a photograph) (a photolinear negative) (a blueprint) (a plan) (a map) (a model) (a note) (an instrument) (an appliance) (information)

relating to the national defense, ((which directly concerned (nuclear weaponry) (military spacecraft) (military satellites) (early warning systems) (\_\_\_\_\_, a means of defense or retaliation against a large scale attack) (war plans) (communications intelligence) (cryptolinear information) (\_\_\_\_\_, a major weapons system) (\_\_\_\_\_, a major element of defense strategy)) to \_\_\_\_\_ ((a representative of) (an officer of) (an agent of) (an employee of) (a subject of) (a citizen of)) ((a foreign government) (a faction within a foreign country) (a party within a foreign country) (a military force within a foreign country) (a naval force within a foreign country)) (indirectly by \_\_\_\_\_).

**31. Article 107—False official statements**

a. *Text.*

“Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused signed a certain official document or made a certain official statement;

(2) That the document or statement was false in certain particulars;

(3) That the accused knew it to be false at the time of signing it or making it; and

(4) That the false document or statement was made with the intent to deceive.

c. *Explanation.*

(1) *Official documents and statements.* Official documents and official statements include all documents and statements made in the line of duty.

(2) *Status of victim of the deception.* The rank of any person intended to be deceived is immaterial if that person was authorized in the execution of a particular duty to require or receive the statement or document from the accused. The government may be the victim of this offense.

(3) *Intent to deceive.* The false representation must be made with the intent to deceive. It is not necessary that the false statement be material to the issue inquiry. If, however, the falsity is in respect to a material matter, it may be considered as some evidence of the intent to deceive, while im-

materiality may tend to show an absence of this intent.

(4) *Material gain.* The expectation of material gain is not an element of this offense. Such expectation or lack of it, however, is circumstantial evidence bearing on the element of intent to deceive.

(5) *Knowledge that the document or statement was false.* The false representation must be one which the accused actually knew was false. Actual knowledge may be proved by circumstantial evidence. An honest, although erroneous, belief that a statement made is true, is a defense.

d. *Lesser included offense.* Article 80—attempts

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

f. *Sample specification.* In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, with intent to deceive, (sign an official (record) (return) (\_\_\_\_\_)), to wit: \_\_\_\_\_) (make to \_\_\_\_\_, an official statement, to wit: \_\_\_\_\_), which (record) (return) (statement) (\_\_\_\_\_)) was (totally false) (false in that \_\_\_\_\_), and was then known by the said \_\_\_\_\_ to be so false.

**32. Article 108—Military property of the United States—sale, loss, damage, destruction, or wrongful disposition**

a. *Text.*

“Any person subject to this chapter who, without proper authority—

- (1) sells or otherwise disposes of;
- (2) willfully or through neglect damages, destroys, or loses; or
- (3) willfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of, any military property of the United States, shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Selling or otherwise disposing of military property.*

(a) That the accused sold or otherwise disposed of certain property (which was a firearm or explosive);

(b) That the sale or disposition was without proper authority;

(c) That the property was military property of the United States; and

(d) That the property was of a certain value.

(2) *Damaging, destroying, or losing military property.*

(a) That the accused, without proper authority, damaged or destroyed certain property in a certain way, or lost certain property;

(b) That the property was military property of the United States;

(c) That the damage, destruction, or loss was willfully caused by the accused or was the result of neglect by the accused; and

(d) That the property was of a certain value or the damage was of a certain amount.

(3) *Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.*

(a) That certain property (which was a firearm or explosive) was lost, damaged, destroyed, sold, or wrongfully disposed of;

(b) That the property was military property of the United States;

(c) That the loss, damage, destruction, sale, or wrongful disposition was suffered by the accused, without proper authority, through a certain omission of duty by the accused;

(d) That the omission was willful or negligent; and

(e) That the property was of a certain value or the damage was of a certain amount.

c. *Explanation.*

(1) *Military property.* Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States. If is immaterial whether the property sold, disposed, destroyed, lost, or damaged had been issued to the accused, to someone else, or even issued at all. If it is proved by either direct or circumstantial evidence that items of individual issue were issued to the accused, it may be inferred, depending on all the evidence, that the damage, destruction, or loss proved was due to the neglect of the accused. Retail merchandise of service exchange stores is not military property under this article.

(2) *Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.*

¶32.c.(2)

“To suffer” means to allow or permit. The willful or negligent sufferance specified by this article includes: deliberate violation or intentional disregard of some specific law, regulation, or order; reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; or loaning it to a person, known to be irresponsible, by whom it is damaged.

(3) *Value and damage.* In the case of loss, destruction, sale, or wrongful disposition, the value of the property controls the maximum punishment which may be adjudged. In the case of damage, the amount of damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by the government agency normally employed in such work, or the cost of replacement, as shown by government price lists or otherwise, whichever is less.

d. *Lesser included offenses.*

(1) *Sale or disposition of military property.*

(a) Article 80—attempts

(b) Article 134—sale or disposition of non-military government property

(2) *Willfully damaging military property.*

(a) Article 108—damaging military property through neglect

(b) Article 109—willfully damaging non-military property

(c) Article 80—attempts

(3) *Willfully suffering military property to be damaged.*

(a) Article 108—through neglect suffering military property to be damaged

(b) Article 80—attempts

(4) *Willfully destroying military property.*

(a) Article 108—through neglect destroying military property

(b) Article 109—willfully destroying non-military property

(c) Article 108—willfully damaging military property

(d) Article 109—willfully damaging non-military property

(e) Article 108—through neglect damaging military property

(f) Article 80—attempts

(5) *Willfully suffering military property to be destroyed.*

(a) Article 108—through neglect suffering military property to be destroyed

(b) Article 108—willfully suffering military property to be damaged

(c) Article 108—through neglect suffering military property to be damaged

(d) Article 80—attempts

(6) *Willfully losing military property.*

(a) Article 108—through neglect, losing military property

(b) Article 80—attempts

(7) *Willfully suffering military property to be lost.*

(a) Article 108—through neglect, suffering military property to be lost

(b) Article 80—attempts

(8) *Willfully suffering military property to be sold.*

(a) Article 108—through neglect, suffering military property to be sold

(b) Article 80—attempts

(9) *Willfully suffering military property to be wrongfully disposed of.*

(a) Article 108—through neglect, suffering military property to be wrongfully disposed of in the manner alleged

(b) Article 80—attempts

e. *Maximum punishment.*

(1) *Selling or otherwise disposing of military property.*

(a) *Of a value of \$500.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowance, and confinement for 1 year.

(b) *Of a value of more than \$500.00 or any firearm or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Through neglect damaging, destroying, or losing, or through neglect suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property.*

(a) *Of a value or damage of \$500.00 or less.* Confinement for 6 months, and forfeiture of two-thirds pay per month for 6 months.

(b) *Of a value or damage of more than*

\$500.00. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) *Willfully damaging, destroying, or losing, or willfully suffering to be lost, damaged, destroyed, sold, or wrongfully disposed of, military property.*

(a) *Of a value or damage of \$500.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Of a value or damage of more than \$500.00, or of any firearm or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. *Sample specifications.*

(1) *Selling or disposing of military property.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, without proper authority, (sell to \_\_\_\_\_) (dispose of by \_\_\_\_\_) \_\_\_\_\_, ((a firearm) (an explosive)) of a value of (about) \$\_\_\_\_\_, military property of the United States.

(2) *Damaging, destroying, or losing military property.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, without proper authority, ((willfully) (through neglect)) ((damage by \_\_\_\_\_) (destroy by \_\_\_\_\_)) (lose) \_\_\_\_\_ (of a value of (about) \$\_\_\_\_\_,) military property of the United States (the amount of said damage being in the sum of (about) \$\_\_\_\_\_).

(3) *Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, without proper authority, (willfully) (through neglect) suffer \_\_\_\_\_, ((a firearm) (an explosive)) (of a value of (about) \$\_\_\_\_\_) military property of the United States, to be (lost) (damaged by \_\_\_\_\_) (destroyed by \_\_\_\_\_) (sold to \_\_\_\_\_) (wrongfully disposed of by \_\_\_\_\_) (the

amount of said damage being in the sum of (about \$\_\_\_\_\_).

**33. Article 109—Property other than military property of the United States—waste, spoilage, or destruction**

a. *Text.*

“Any person subject to this chapter who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Wasting or spoiling of non-military property.*

(a) That the accused willfully or recklessly wasted or spoiled certain real property in a certain manner;

(b) That the property was that of another person; and

(c) That the property was of a certain value.

(2) *Destroying or damaging non-military property.*

(a) That the accused willfully and wrongfully destroyed or damaged certain personal property in a certain manner;

(b) That the property was that of another person; and

(c) That the property was of a certain value or the damage was of a certain amount.

c. *Explanation.*

(1) *Wasting or spoiling non-military property.* This portion of Article 109 proscribes willful or reckless waste or spoliation of the real property of another. The terms “wastes” and “spoils” as used in this article refer to such wrongful acts of voluntary destruction of or permanent damage to real property as burning down buildings, burning piers, tearing down fences, or cutting down trees. This destruction is punishable whether done willfully, that is intentionally, or recklessly, that is through a culpable disregard of the foreseeable consequences of some voluntary act.

(2) *Destroying or damaging non-military property.* This portion of Article 109 proscribes the willful and wrongful destruction or damage of the personal property of another. To be destroyed, the property need not be completely demolished or annihilated, but must be sufficiently injured to be useless for its

¶33.c.(2)

intended purpose. Damage consists of any physical injury to the property. To constitute an offense under this section, the destruction or damage of the property must have been willful and wrongful. As used in this section “willfully” means intentionally and “wrongfully” means contrary to law, regulation, lawful order, or custom. Willfulness may be proved by circumstantial evidence, such as the manner in which the acts were done.

(3) *Value and damage.* In the case of destruction, the value of the property destroyed controls the maximum punishment which may be adjudged. In the case of damage, the amount of the damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by artisans employed in this work who are available to the community wherein the owner resides, or the replacement cost, whichever is less. See also paragraph 46c(1)(g).

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Wasting, spoiling, destroying, or damaging any property other than military property of the United States of a value or damage.

(1) *Of \$500.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Of more than \$500.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, ((willfully) recklessly) waste) ((willfully) (recklessly) spoil) (willfully and wrongfully (destroy) (damage) by \_\_\_\_\_), (of a value of (about) \$ \_\_\_\_\_) (the amount of said damage being in the sum of (about \$ \_\_\_\_\_), the property of \_\_\_\_\_.

**34. Article 110—Improper hazarding of vessel**

a. *Text.*

“(a) Any person subject to this chapter who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer

death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who negligently hazards or suffers to be hazarded any vessel of the armed forces shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That a vessel of the armed forces was hazarded in a certain manner; and

(2) That the accused by certain acts or omissions, willfully and wrongfully, or negligently, caused or suffered the vessel to be hazarded.

c. *Explanation.*

(1) *Hazard.* “Hazard” means to put in danger of loss or injury. Actual damage to, or loss of, a vessel of the armed forces by collision, stranding, running upon a shoal or a rock, or by any other cause, is conclusive evidence that the vessel was hazarded but not of the fact of culpability on the part of any particular person. “Stranded” means run aground so that the vessel is fast for a time. If the vessel “touches and goes,” she is not stranded; if she “touches and sticks,” she is. A shoal is a sand, mud, or gravel bank or bar that makes the water shallow.

(2) *Willfully and wrongfully.* As used in this article, “willfully” means intentionally and “wrongfully” means contrary to law, regulation, lawful order, or custom.

(3) *Negligence.* “Negligence” as used in this article means the failure to exercise the care, prudence, or attention to duties, which the interests of the government require a prudent and reasonable person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something which such a person would not have done under the circumstances. No person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person’s grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or order. However, a mere error in judgment that a reasonably able person might have committed under the same circumstances does not constitute an offense under this article.

(4) *Suffer.* “To suffer” means to allow or permit. A ship is willfully suffered to be hazarded by one

who, although not in direct control of the vessel, knows a danger to be imminent but takes no steps to prevent it, as by a plotting officer of a ship under way who fails to report to the officer of the deck a radar target which is observed to be on a collision course with, and dangerously close to, the ship. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a foreseeable danger.

d. *Lesser included offenses.*

(1) *Willfully and wrongfully hazarding a vessel.*

(a) Article 110—negligently hazarding a vessel

(b) Article 80—attempts

(2) *Willfully and wrongfully suffering a vessel to be hazarded.*

(a) Article 110—negligently suffering a vessel to be hazarded

(b) Article 80—attempts

e. *Maximum punishment.* Hazarding or suffering to be hazarded any vessel of the armed forces:

(1) *Willfully and wrongfully.* Death or such other punishment as a court-martial may direct.

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

f. *Sample specifications.*

(1) *Hazarding or suffering to be hazarded any vessel, willfully and wrongfully.*

In that \_\_\_\_\_ (personal jurisdiction data), did, on \_\_\_\_\_ 20 \_\_\_\_\_, while serving as \_\_\_\_\_ aboard the \_\_\_\_\_ in the vicinity of \_\_\_\_\_, willfully and wrongfully (hazard the said vessel) (suffer the said vessel to be hazarded) by (causing the said vessel to collide with \_\_\_\_\_) (allowing the said vessel to run aground) (\_\_\_\_\_).

(2) *Hazarding of vessel, negligently.*

(a) *Example 1.*

In that \_\_\_\_\_ (personal jurisdiction data), on \_\_\_\_\_ 20 \_\_\_\_\_, while serving in command of the \_\_\_\_\_, making entrance to (Boston Harbor), did negligently hazard the said vessel by failing and neglecting to maintain or cause to be maintained an accurate running plot of the true position of said vessel while making said approach, as a result of which neglect t h e s a i d \_\_\_\_\_, a t o r

about \_\_\_\_\_, hours on the day aforesaid, became stranded in the vicinity of (Channel Buoy Number Three).

(b) *Example 2.*

In that \_\_\_\_\_ (personal jurisdiction data), on \_\_\_\_\_ 20 \_\_\_\_\_, while serving as navigator of the \_\_\_\_\_, cruising on special service in the \_\_\_\_\_ Ocean off the coast of \_\_\_\_\_, notwithstanding the fact that at about midnight, \_\_\_\_\_ 20 \_\_\_\_\_, the northeast point of \_\_\_\_\_ Island bore abeam and was about six miles distant, the said ship being then under way and making a speed of about ten knots, and well knowing the position of the said ship at the time stated, and that the charts of the locality were unreliable and the currents thereabouts uncertain, did then and there negligently hazard the said vessel by failing and neglecting to exercise proper care and attention in navigating said ship while approaching \_\_\_\_\_ Island, in that he/she neglected and failed to lay a course that would carry said ship clear of the last aforesaid island, and to change the course in due time to avoid disaster; and the said ship, as a result of said negligence on the part of said \_\_\_\_\_, ran upon a rock off the southwest coast of \_\_\_\_\_ Island, at about \_\_\_\_\_ hours, \_\_\_\_\_, 20 \_\_\_\_\_, in consequence of which the said \_\_\_\_\_ was lost.

(c) *Example 3.*

In that \_\_\_\_\_ (personal jurisdiction data), on \_\_\_\_\_ 20 \_\_\_\_\_, while serving as navigator of the \_\_\_\_\_ and well knowing that at about sunset of said day the said ship had nearly run her estimated distance from the \_\_\_\_\_ position, obtained and plotted by him/her, to the position of \_\_\_\_\_, and well knowing the difficulty of sighting \_\_\_\_\_, from a safe distance after sunset, did then and there negligently hazard the said vessel by failing and neglecting to advise his/her commanding officer to lay a safe course for said ship to the northward before continuing on a westerly course, as it was the duty of said \_\_\_\_\_ to do; in consequence of which the said ship was, at about \_\_\_\_\_ hours on the day above mentioned, run upon \_\_\_\_\_ bank in the \_\_\_\_\_ Sea, about latitude \_\_\_\_\_ degrees,

¶34.f.(2)(c)

\_\_\_\_\_ minutes, north, and longitude \_\_\_\_\_ degrees, \_\_\_\_\_ minutes, west, and seriously injured.

(3) *Suffering a vessel to be hazarded, negligently.*

In that \_\_\_\_\_ (personal jurisdiction data), while serving as combat intelligence center officer on board the \_\_\_\_\_, making passage from Boston to Philadelphia, and having, between \_\_\_\_\_ and \_\_\_\_\_ hours on \_\_\_\_\_, 20\_\_\_\_\_, been duly informed of decreasing radar ranges and constant radar bearing indicating that the said \_\_\_\_\_ was upon a collision course approaching a radar target, did then and there negligently suffer the said vessel to be hazarded by failing and neglecting to report said collision course with said radar target to the officer of the deck, as it was his/her duty to do, and he/she, the said \_\_\_\_\_, through negligence, did cause the said \_\_\_\_\_ to collide with the \_\_\_\_\_ at or about \_\_\_\_\_ hours on said date, with resultant damage to both vessels.

**35. Article 111—Drunken or reckless operation of vehicle, aircraft, or vessel**

a. *Text.*

(a) “Any person subject to this chapter who—

(1) operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section 912a(b) of this title (Article 112a(b)), or

(2) operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person’s blood or breath is equal to or exceeds the applicable limit under subsection (b), shall be punished as a court—martial may direct.

(b)(1) For purposes of subsection (a), the applicable limit on the alcohol concentration in a person’s blood or breath is as follows:

(A) In the case of the operation or control of a vehicle, aircraft, or vessel in the United States, such limit is the lesser of—

(i) the blood alcohol content limit under the law of the State in which the conduct occurred, except as may be provided under paragraph (2) for conduct on a military installation that is in more than one State; or

(ii) the blood alcohol content limit specified in paragraph (3).

(B) In the case of the operation or control of a vehicle, aircraft, or vessel outside the United States, the applicable blood alcohol content limit is the blood alcohol content limit specified in paragraph (3) or such lower limit as the Secretary of Defense may by regulation prescribe.

(2) In the case of a military installation that is in more than one State, if those States have different blood alcohol content limits under their respective State laws, the Secretary may select one such blood alcohol content limit to apply uniformly on that installation.

(3) For purposes of paragraph (1), the blood alcohol content limit with respect to alcohol concentration in a person’s blood is 0.10 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person’s breath is 0.10 grams of alcohol per 210 liters of breath, as shown by chemical analysis.

(4) In this subsection:

(A) The term “blood alcohol content limit” means the amount of alcohol concentration in a person’s blood or breath at which operation or control of a vehicle, aircraft, or vessel is prohibited.

(B) The term “United States” includes the District of Columbia, the commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and the term “State” includes each of those jurisdictions.

b. *Elements.*

(1) That the accused was operating or in physical control of a vehicle, aircraft, or vessel; and

(2) That while operating or in physical control of a vehicle, aircraft, or vessel, the accused:

(a) did so in a wanton or reckless manner, or

(b) was drunk or impaired, or

(c) the alcohol concentration in the accused’s blood or breath equaled to or exceeded the applicable limit under subsection (b).

[Note: If injury resulted add the following element]

(3) That the accused thereby caused the vehicle, aircraft, or vessel to injure a person.

c. *Explanation.*

(1) *Vehicle.* See 1 U.S.C. § 4.

(2) *Vessel.* See 1 U.S.C. § 3.

(3) *Aircraft.* Any contrivance used or designed for transportation in the air.

(4) *Operates*. Operating a vehicle, aircraft, or vessel includes not only driving or guiding a vehicle, aircraft or vessel while it is in motion, either in person or through the agency of another, but also setting of its motive power in action or the manipulation of its controls so as to cause the particular vehicle, aircraft or vessel to move.

(5) *Physical control and actual physical control*. These terms as used in the statute are synonymous. They describe the present capability and power to dominate, direct or regulate the vehicle, vessel, or aircraft, either in person or through the agency of another, regardless of whether such vehicle, aircraft, or vessel is operated. For example, the intoxicated person seated behind the steering wheel of a vehicle with the keys of the vehicle in or near the ignition but with the engine not turned on could be deemed in actual physical control of that vehicle. However, the person asleep in the back seat with the keys in his or her pocket would not be deemed in actual physical control. Physical control necessarily encompasses operation.

(6) *Drunk or impaired*. “Drunk” and “impaired” mean any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties. The term drunk is used in relation to intoxication by alcohol. The term impaired is used in relation to intoxication by a substance described in Article 112(a), Uniform Code of Military Justice.

(7) *Reckless*. The operation or physical control of a vehicle, vessel, or aircraft is “reckless” when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant as bearing upon the ultimate question: whether, under all the circumstances, the accused’s manner of operation or physical control of the vehicle, vessel, or aircraft was of that heedless nature which made it actually or imminently dangerous to the occupants, or to the rights or safety of others. It is operating or physically controlling a vehicle, vessel, or aircraft with such a high degree of negligence that if death were caused, the accused would have committed involuntary manslaughter, at least. The nature of the conditions in which the vehicle, vessel, or aircraft is operated or controlled, the time of day or night, the proximity

and number of other vehicles, vessels, or aircraft and the condition of the vehicle, vessel, or aircraft, are often matters of importance in the proof of an offense charged under this article and, where they are of importance, may properly be alleged.

(8) *Wanton*. “Wanton” includes “reckless”, but in describing the operation or physical control of a vehicle, vessel, or aircraft “wanton” may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(9) *Causation*. The accused’s drunken or reckless driving must be a proximate cause of injury for the accused to be guilty of drunken or reckless driving resulting in personal injury. To be proximate, the accused’s actions need not be the sole cause of the injury, nor must they be the immediate cause of the injury, that is, the latest in time and space preceding the injury. A contributing cause is deemed proximate only if it plays a material role in the victim’s injury.

(10) *Separate offenses*. While the same course of conduct may constitute violations of both subsections (1) and (2) of the Article, e.g., both drunken and reckless operation or physical control, this article proscribes the conduct described in both subsections as separate offenses, which may be charged separately. However, as recklessness is a relative matter, evidence of all the surrounding circumstances that made the operation dangerous, whether alleged or not, may be admissible. Thus, on a charge of reckless driving, for example, evidence of drunkenness might be admissible as establishing one aspect of the recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, might be admissible as corroborating other evidence of the specific recklessness charged. Similarly, on a charge of drunken driving, relevant evidence of recklessness might have probative value as corroborating other proof of drunkenness.

d. *Lesser included offense*.

(1) Reckless or wanton or impaired operation or physical control of a vessel. Article 110—improper hazarding of a vessel.

(2) Drunken operation of a vehicle, vessel, or aircraft while drunk or with a blood or breath alcohol concentration in violation of the described per se standard.

¶35.d.(2)(a)

(a) Article 110—improper hazarding of a vessel

(b) Article 112—drunk on duty

(c) Article 134—drunk on station

e. *Maximum punishment.*

(1) *Resulting in personal injury.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(2) *No personal injury involved.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/onboard—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, (in the motor pool area) (near the Officer's Club) (at the intersection of \_\_\_\_\_ and \_\_\_\_\_) (while in the Gulf of Mexico) (while in flight over North America) physically control [a vehicle, to wit: (a truck) (a passenger car) (\_\_\_\_\_)] [an aircraft, to wit: (an AH-64 helicopter) (an F-14 A fighter)(a KC-135 tanker)(\_\_\_\_\_)] [a vessel, to wit: (the aircraft carrier USS) (the Coast Guard Cutter) (\_\_\_\_\_)], [while drunk] [while impaired by \_\_\_\_\_] [while the alcohol concentration in his (blood or breath equaled or exceeded the applicable limit under subsection (b)) as shown by chemical analysis] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (by ordering that the aircraft be flown below the authorized altitude)] [and did thereby cause said (vehicle) (aircraft) (vessel) to (strike and) (injure \_\_\_\_\_)].

### 36. Article 112—Drunk on duty

a. *Text.*

“Any person subject to this chapter other than sentinel or look-out, who is found drunk on duty, shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused was on a certain duty; and

(2) That the accused was found drunk while on this duty.

c. *Explanation.*

(1) *Drunk.* See paragraph 35c(6).

(2) *Duty.* “Duty” as used in this article means

military duty. Every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty. Within the meaning of this article, when in the actual exercise of command, the commander of a post, or of a command, or of a detachment in the field is constantly on duty, as is the commanding officer on board a ship. In the case of other officers or enlisted persons, “on duty” relates to duties or routine or detail, in garrison, at a station, or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and enlisted persons occupy the status of leisure known as “off duty” or “on liberty.” In a region of active hostilities, the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article. So also, an officer of the day and members of the guard, or of the watch, are on duty during their entire tour within the meaning of this article.

(3) *Nature of offense.* It is necessary that the accused be found drunk while actually on the duty alleged, and the fact the accused became drunk before going on duty, although material in extenuation, does not affect the question of guilt. If, however, the accused does not undertake the responsibility or enter upon the duty at all, the accused's conduct does not fall within the terms of this article, nor does that of a person who absents himself or herself from duty and is found drunk while so absent. Included within the article is drunkenness while on duty of an anticipatory nature such as that of an aircraft crew ordered to stand by for flight duty, or of an enlisted person ordered to stand by for guard duty.

(4) *Defenses.* If the accused is known by superior authorities to be drunk at the time a duty is assigned, and the accused is thereafter allowed to assume that duty anyway, or if the drunkenness results from an accidental over dosage administered for medicinal purposes, the accused will have a defense to this offense. *But see* paragraph 76 (incapacitation for duty).

d. *Lesser included offense.* Article 134—drunk on station

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), was, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, found drunk while on duty as \_\_\_\_\_.

**37. Article 112a—Wrongful use, possession, etc., of controlled substances**

a. *Text.*

“(a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

(b) The substances referred to in subsection (a) are the following:

(1) opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phenylcyclidine, barbituric acid, and marijuana, and any compound or derivative of any such substance.

(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.

(3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in Schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).”

b. *Elements.*

(1) *Wrongful possession of controlled substance.*

(a) That the accused possessed a certain amount of a controlled substance; and

(b) That the possession by the accused was wrongful.

(2) *Wrongful use of controlled substance.*

(a) That the accused used a controlled substance; and

(b) That the use by the accused was wrongful.

(3) *Wrongful distribution of controlled substance.*

(a) That the accused distributed a certain amount of a controlled substance; and

(b) That the distribution by the accused was wrongful.

(4) *Wrongful introduction of a controlled substance.*

(a) That the accused introduced onto a vessel, aircraft, vehicle, or installation used by the armed forces or under the control of the armed forces a certain amount of a controlled substance; and

(b) That the introduction was wrongful.

(5) *Wrongful manufacture of a controlled substance.*

(a) That the accused manufactured a certain amount of a controlled substance; and

(b) That the manufacture was wrongful.

(6) *Wrongful possession, manufacture, or introduction of a controlled substance with intent to distribute.*

(a) That the accused (possessed) (manufactured) (introduced) a certain amount of a controlled substance;

(b) That the (possession) (manufacture) (introduction) was wrongful; and

(c) That the (possession) (manufacture) (introduction) was with the intent to distribute.

(7) *Wrongful importation or exportation of a controlled substance.*

(a) That the accused (imported into the customs territory of) (exported from) the United States a certain amount of a controlled substance; and

(b) That the (importation) (exportation) was wrongful. [Note: When any of the aggravating circumstances listed in subparagraph e is alleged, it must be listed as an element.]

c. *Explanation.*

(1) *Controlled substance.* “Controlled substance” means amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phenylcyclidine, and barbituric acid, including phenobarbital and secobarbital. “Controlled substance” also means any substance which is included in Schedules I through V established by the Controlled Substances Act of 1970 (21 U.S.C. 812).

(2) *Possess.* “Possess” means to exercise control of something. Possession may be direct physical custody like holding an item in one’s hand, or it may be constructive, as in the case of a person who hides an item in a locker or car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possi-

ble, however, for more than one person to possess an item simultaneously, as when several people share control of an item. An accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused's control. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence.

(3) *Distribute*. "Distribute" means to deliver to the possession of another. "Deliver" means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship.

(4) *Manufacture*. "Manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of such substance or labeling or relabeling of its container. "Production," as used in this subparagraph, includes the planting, cultivating, growing, or harvesting of a drug or other substance.

(5) *Wrongfulness*. To be punishable under Article 112a, possession, use, distribution, introduction, or manufacture of a controlled substance must be wrongful. Possession, use, distribution, introduction, or manufacture of a controlled substance is wrongful if it is without legal justification or authorization. Possession, distribution, introduction, or manufacture of a controlled substance is not wrongful if such act or acts are: (A) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession); (B) done by authorized personnel in the performance of medical duties; or (C) without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that

the use, possession, distribution, manufacture, or introduction was wrongful.

(6) *Intent to distribute*. Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: possession of a quantity of substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the substance may tend to negate an inference of intent to distribute.

(7) *Certain amount*. When a specific amount of a controlled substance is believed to have been possessed, distributed, introduced, or manufactured by an accused, the specific amount should ordinarily be alleged in the specification. It is not necessary to allege a specific amount, however, and a specification is sufficient if it alleges that an accused possessed, distributed, introduced, or manufactured "some," "traces of," or "an unknown quantity of" a controlled substance.

(8) *Missile launch facility*. A "missile launch facility" includes the place from which missiles are fired and launch control facilities from which the launch of a missile is initiated or controlled after launch.

(9) *Customs territory of the United States*. "Customs territory of the United States" includes only the States, the District of Columbia, and Puerto Rico.

(10) *Use*. "Use" means to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance. Knowledge of the presence of the controlled substance is a required component of use. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge.

(11) *Deliberate ignorance*. An accused who consciously avoids knowledge of the presence of a controlled substance or the contraband nature of the substance is subject to the same criminal liability as one who has actual knowledge.

d. *Lesser included offenses*.

(1) *Wrongful possession of controlled substance.*  
Article 80—attempts

(2) *Wrongful use of controlled substance.*

(a) Article 112a—wrongful possession of controlled substance

(b) Article 80—attempts

(3) *Wrongful distribution of controlled substance.*  
Article 80—attempts

(4) *Wrongful manufacture of controlled substance.*

(a) Article 112a—wrongful possession of controlled substance

(b) Article 80—attempts

(5) *Wrongful introduction of controlled substance.*

(a) Article 112a—wrongful possession of controlled substance

(b) Article 80—attempts

(6) *Wrongful possession, manufacture, or introduction of a controlled substance with intent to distribute.*

(a) Article 112a—wrongful possession, manufacture, or introduction of controlled substance

(b) Article 80—attempts

(7) *Wrongful importation or exportation of a controlled substance.* Article 80—attempts

e. *Maximum punishments.*

(1) *Wrongful use, possession, manufacture, or introduction of controlled substance.*

(a) *Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, III controlled substances.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement 5 years.

(b) *Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Wrongful distribution, possession, manufacture, or introduction of controlled substance with intent to distribute, or wrongful importation or exportation of a controlled substance.*

(a) *Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine,*

*opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(b) *Phenobarbital and Schedule IV and V controlled substances.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

When any offense under paragraph 37 is committed; while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. § 310; in time of war; or in a confinement facility used by or under the control of the armed forces, the maximum period of confinement authorized for such offense shall be increased by 5 years.

f. *Sample specifications.*

(1) *Wrongful possession, manufacture, or distribution of controlled substance.*

In that \_\_\_\_\_ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_, 20 \_\_\_\_\_, wrongfully (possess) (distribute) (manufacture) \_\_\_\_\_ (grams) (ounces) (pounds)(\_\_\_\_\_) of \_\_\_\_\_ (a schedule

(\_\_\_\_\_) controlled substance), (with the intent to distribute the said controlled substance) (while on duty as a sentinel or lookout) (while (on board a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit:\_\_\_\_\_) (while receiving special pay under 37 U.S.C. § 310) (during time of war).

(2) *Wrongful use of controlled substance.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_, 20 \_\_\_\_\_, wrongfully use \_\_\_\_\_ (a Schedule \_\_\_\_\_ controlled substance) (while on duty as a sentinel or lookout) (while (on board a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit:\_\_\_\_\_) (while receiving special pay under 37 U.S.C. § 310) (during time of war).

¶37.f.(3)

(3) *Wrongful introduction of controlled substance.*

In that \_\_\_\_\_ (personal jurisdiction data) did, (at/on board—location) on or about \_\_\_\_\_, 20 \_\_\_\_\_, wrongfully introduce \_\_\_\_\_ (grams) (ounces) (pounds) ( \_\_\_\_\_ ) of \_\_\_\_\_ (a Schedule ( \_\_\_\_\_ ) controlled substance) onto a vessel, aircraft, vehicle, or installation used by the armed forces or under control of the armed forces, to wit: \_\_\_\_\_ (with the intent to distribute the said controlled substance) (while on duty as a sentinel or lookout) (while receiving special pay under 37 U.S.C. § 310) (during a time of war).

(4) *Wrongful importation or exportation of controlled substance.*

In that \_\_\_\_\_ (personal jurisdiction data) did, (at/on board—location) on or about \_\_\_\_\_, 20 \_\_\_\_\_, wrongfully (import) (export) \_\_\_\_\_ (grams) (ounces) (pounds) ( \_\_\_\_\_ ) of \_\_\_\_\_ (a Schedule ( \_\_\_\_\_ ) controlled substance) (into the customs territory of) (from) the United States (while on board a vessel/ aircraft used by the armed forces or under the control of the armed forces, to wit: \_\_\_\_\_ ) (during time of war).

### 38. Article 113—Misbehavior of sentinel or lookout

a. *Text.*

“Any sentinel or look-out who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct.”

b. *Elements.*

(1) That the accused was posted or on post as a sentinel or lookout;

(2) That the accused was found drunk while on post, was found sleeping while on post, or left post before being regularly relieved.

[Note: If the offense was committed in time of war or while the accused was receiving special pay under 37 U.S.C. § 310, add the following element]

(3) That the offense was committed (in time of war) (while the accused was receiving special pay under 37 U.S.C. § 310).

c. *Explanation.*

(1) *In general.* This article defines three kinds of misbehavior committed by sentinels or lookouts: being found drunk or sleeping upon post, or leaving it before being regularly relieved. This article does not include an officer or enlisted person of the guard, or of a ship’s watch, not posted or performing the duties of a sentinel or lookout, nor does it include a person whose duties as a watchman or attendant do not require constant alertness.

(2) *Post.* “Post” is the area where the sentinel or lookout is required to be for the performance of duties. It is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary for the proper performance of the duties for which the sentinel or lookout was posted. The offense of leaving post is not committed when a sentinel or lookout goes an immaterial distance from the post, unless it is such a distance that the ability to fully perform the duty for which posted is impaired.

(3) *On post.* A sentinel or lookout becomes “on post” after having been given a lawful order to go “on post” as a sentinel or lookout and being formally or informally posted. The fact that a sentinel or lookout is not posted in the regular way is not a defense. It is sufficient, for example, if the sentinel or lookout has taken the post in accordance with proper instruction, whether or not formally given. A sentinel or lookout is on post within the meaning of the article not only when at a post physically defined, as is ordinarily the case in garrison or aboard ship, but also, for example, when stationed in observation against the approach of an enemy, or detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

(4) *Sentinel or lookout.* A sentinel or a lookout is a person whose duties include the requirement to maintain constant alertness, be vigilant, and remain awake, in order to observe for the possible approach of the enemy, or to guard persons, property, or a place and to sound the alert, if necessary.

(5) *Drunk.* For an explanation of “drunk,” see paragraph 35c(3).

(6) *Sleeping*. As used in this article, “sleeping” is that condition of insentience which is sufficient sensibly to impair the full exercise of the mental and physical faculties of a sentinel or lookout. It is not necessary to show that the accused was in a wholly comatose condition. The fact that the accused’s sleeping resulted from a physical incapacity caused by disease or accident is an affirmative defense. See R.C.M. 916(i).

d. *Lesser included offenses*.

(1) *Drunk on post*.

- (a) Article 112—drunk on duty
- (b) Article 92—dereliction of duty
- (c) Article 134—drunk on station
- (d) Article 134—drunk in uniform in a public place

(2) *Sleeping on post*.

- (a) Article 92—dereliction of duty
- (b) Article 134—loitering or wrongfully sitting down on post

(3) *Leaving post*.

- (a) Article 92—dereliction of duty
- (b) Article 86—going from appointed place of duty

e. *Maximum punishment*.

(1) *In time of war*. Death or such other punishment as a court-martial may direct.

(2) *While receiving special pay under 37 U.S.C. § 310*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) *In all other places*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification*.

In that \_\_\_\_\_ (personal jurisdiction data), on or about \_\_\_\_\_ 20\_\_\_\_\_ (a time of war) (at/on board—location), (while receiving special pay under 37 U.S.C. § 310), being (posted) (on post) as a (sentinel) (lookout) at (warehouse no. 7) (post no. 11) (for radar observation) (\_\_\_\_\_) (was found (drunk) (sleeping) upon his/her post) (did leave his/her post before he/she was regularly relieved).

### 39. Article 114—Dueling

a. *Text*.

“Any person subject to this chapter who fights

or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct.”

b. *Elements*.

(1) *Dueling*.

- (a) That the accused fought another person with deadly weapons;
- (b) That the combat was for private reasons; and
- (c) That the combat was by prior agreement.

(2) *Promoting a duel*.

- (a) That the accused promoted a duel between certain persons; and
- (b) That the accused did so in a certain manner.

(3) *Conniving at fighting a duel*.

- (a) That certain persons intended to and were about to engage in a duel;
- (b) That the accused had knowledge of the planned duel; and
- (c) That the accused connived at the fighting of the duel in a certain manner.

(4) *Failure to report a duel*.

- (a) That a challenge to fight a duel had been sent or was about to be sent;
- (b) That the accused had knowledge of this challenge; and
- (c) That the accused failed to report this fact promptly to proper authority.

c. *Explanation*.

(1) *Duel*. A duel is combat between two persons for private reasons fought with deadly weapons by prior agreement.

(2) *Promoting a duel*. Urging or taunting another to challenge or to accept a challenge to duel, acting as a second or as carrier of a challenge or acceptance, or otherwise furthering or contributing to the fighting of a duel are examples of promoting a duel.

(3) *Conniving at fighting a duel*. Anyone who has knowledge that steps are being taken or have been taken toward arranging or fighting a duel and who fails to take reasonable preventive action thereby connives at the fighting of a duel.

d. *Lesser included offense*. Article 80—attempts

e. *Maximum punishment*. For all Article 114 of-

¶39.e.

fenses: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specifications.*

(1) *Dueling.*

In that \_\_\_\_\_ (personal jurisdiction data) (and \_\_\_\_\_), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, fight a duel (with \_\_\_\_\_), using as weapons therefor (pistols) (swords) (\_\_\_\_\_).

(2) *Promoting a duel.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, promote a duel between \_\_\_\_\_ and \_\_\_\_\_ by (telling said \_\_\_\_\_ he/she would be a coward if he/she failed to challenge said \_\_\_\_\_ to a duel) (knowingly carrying from said \_\_\_\_\_ to said \_\_\_\_\_ a challenge to fight a duel).

(3) *Conniving at fighting a duel.*

In that \_\_\_\_\_ (personal jurisdiction data), having knowledge that \_\_\_\_\_ and \_\_\_\_\_ were about to engage in a duel, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, connive at the fighting of said duel by (failing to take reasonable preventive action) (\_\_\_\_\_).

(4) *Failure to report a duel.*

In that \_\_\_\_\_ (personal jurisdiction data), having knowledge that a challenge to fight a duel (had been sent) (was about to be sent) by \_\_\_\_\_ to \_\_\_\_\_, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_ fail to report that fact promptly to the proper authority.

**40. Article 115—Malingering**

a. *Text.*

“Any person subject to this chapter who for the purpose of avoiding work, duty, or service ”—

(1) feigns illness, physical disablement, mental lapse or derangement; or

(2) intentionally inflicts self-injury; shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused was assigned to, or was aware of prospective assignment to, or availability for, the performance of work, duty, or service;

(2) That the accused feigned illness, physical disablement, mental lapse or derangement, or intentionally inflicted injury upon himself or herself; and

(3) That the accused's purpose or intent in doing so was to avoid the work, duty, or service.

[Note: If the offense was committed in time of war or in a hostile fire pay zone, add the following element]

(4) That the offense was committed (in time of war) (in a hostile fire pay zone).

c. *Explanation.*

(1) *Nature of offense.* The essence of this offense is the design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. Whether to avoid all duty, or only a particular job, it is the purpose to shirk which characterizes the offense. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilt, nor is the seriousness of a physical or mental disability which is a sham. Evidence of the extent of the self-inflicted injury or feigned disability may, however, be relevant as a factor indicating the presence or absence of the purpose.

(2) *How injury inflicted.* The injury may be inflicted by nonviolent as well as by violent means and may be accomplished by any act or omission which produces, prolongs, or aggravates any sickness or disability. Thus, voluntary starvation which results in debility is a self-inflicted injury and when done for the purpose of avoiding work, duty, or service constitutes a violation of this article.

d. *Lesser included offenses.*

(1) Article 134—self-injury without intent to avoid service

(2) Article 80—attempts

e. *Maximum punishment.*

(1) *Feigning illness, physical disablement, mental lapse, or derangement.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Feigning illness, physical disablement, mental*

*lapse, or derangement in a hostile fire pay zone or in time of war.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(3) *Intentional self-inflicted injury.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(4) *Intentional self-inflicted injury in a hostile fire pay zone or in time of war.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (in a hostile fire pay zone) (subject-matter jurisdiction data, if required) (on or about \_\_\_\_\_ 20 \_\_\_\_\_) (from about \_\_\_\_\_ 20 \_\_\_\_\_ to about \_\_\_\_\_ 20 \_\_\_\_\_), (a time of war) for the purpose of avoiding (his/her duty as officer of the day) (his/her duty as aircraft mechanic) (work in the mess hall) (service as an enlisted person) (\_\_\_\_\_) (feign (a headache) (a sore back) (illness) (mental lapse) (mental derangement) (\_\_\_\_\_) (intentionally injure himself/herself by \_\_\_\_\_).

**41. Article 116—Riot or breach of peace**

a. *Text.*

“Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Riot.*

(a) That the accused was a member of an assembly of three or more persons;

(b) That the accused and at least two other members of this group mutually intended to assist one another against anyone who might oppose them in doing an act for some private purpose;

(c) That the group or some of its members, in furtherance of such purpose, unlawfully committed a tumultuous disturbance of the peace in a violent or turbulent manner; and

(d) That these acts terrorized the public in general in that they caused or were intended to cause public alarm or terror.

(2) *Breach of the peace.*

(a) That the accused caused or participated in a certain act of a violent or turbulent nature; and

(b) That the peace was thereby unlawfully disturbed.

c. *Explanation.*

(1) *Riot.* “Riot” is a tumultuous disturbance of the peace by three or more persons assembled together in furtherance of a common purpose to execute some enterprise of a private nature by concerted action against anyone who might oppose them, committed in such a violent and turbulent manner as to cause or be calculated to cause public terror. The gravamen of the offense of riot is terrorization of the public. It is immaterial whether the act intended was lawful. Furthermore, it is not necessary that the common purpose be determined before the assembly. It is sufficient if the assembly begins to execute in a tumultuous manner a common purpose formed after it assembled.

(2) *Breach of the peace.* A “breach of the peace” is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. The acts or conduct contemplated by this article are those which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled. Engaging in an affray and unlawful discharge of firearms in a public street are examples of conduct which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace by the speaker. A speaker may also be guilty of causing a breach of the peace if the speaker uses language which can reasonably be expected to produce a violent or turbulent response and a breach of the peace results. The fact that the words are true or used under provocation is not a defense, nor is tumultuous conduct excusable because incited by others.

(3) *Community and public.* “Community” and “public” include a military organization, post, camp, ship, aircraft, or station.

d. *Lesser included offenses.*

(1) *Riot.*

- (a) Article 116—breach of the peace
- (b) Article 134—disorderly conduct
- (c) Article 80—attempts

(2) *Breach of the peace.*

- (a) Article 134—disorderly conduct
- (b) Article 80—attempts

¶41.e.

e. *Maximum punishment.*

(1) *Riot.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Breach of the peace.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

f. *Sample specifications.*

(1) *Riot.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (cause) (participate in) a riot by unlawfully assembling with \_\_\_\_\_ (and \_\_\_\_\_) (and \_\_\_\_\_) (others to the number of about \_\_\_\_\_ whose names are unknown) for the purpose of (resisting the police of \_\_\_\_\_) (assaulting passers-by) (\_\_\_\_\_), and in furtherance of said purpose did (fight with said police) (assault certain persons, to wit: \_\_\_\_\_) (\_\_\_\_\_), to the terror and disturbance of \_\_\_\_\_.

(2) *Breach of the peace.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (cause) (participate in) a breach of the peace by (wrongfully engaging in a fist fight in the dayroom with \_\_\_\_\_) (using the following provoking language (toward \_\_\_\_\_), to wit: “\_\_\_\_\_,” or words to that effect) (wrongfully shouting and singing in a public place, to wit: \_\_\_\_\_) (\_\_\_\_\_).

**42. Article 117—Provoking speeches or gestures**

a. *Text.*

“Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused wrongfully used words or gestures toward a certain person;

(2) That the words or gestures used were provoking or reproachful; and

(3) That the person toward whom the words or gestures were used was a person subject to the code.

c. *Explanation.*

(1) *In general.* As used in this article, “provoking” and “reproachful” describe those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances. These words and gestures do not include reprimands, censures, reproofs and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces.

(2) *Knowledge.* It is not necessary that the accused have knowledge that the person toward whom the words or gestures are directed is a person subject to the code.

d. *Lesser included offenses.* Article 80—attempts

e. *Maximum punishment.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully use (provoking) (reproachful) (words, to wit: “\_\_\_\_\_.” or words to that effect) (and \_\_\_\_\_) (gestures, to wit: \_\_\_\_\_) towards (Sergeant \_\_\_\_\_, U.S. Air Force) (\_\_\_\_\_).

**43. Article 118—Murder**

a. *Text.*

“Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—”

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he

shall suffer death or imprisonment for life as a court-martial may direct.

b. *Elements.*

(1) *Premeditated murder.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had a premeditated design to kill.

(2) *Intent to kill or inflict great bodily harm.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.

(3) *Act inherently dangerous to another.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the intentional act of the accused;

(c) That this act was inherently dangerous to another and showed a wanton disregard for human life;

(d) That the accused knew that death or great bodily harm was a probable consequence of the act; and

(e) That the killing was unlawful.

(4) *During certain offenses.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused was engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.

c. *Explanation.*

(1) *In general.* Killing a human being is unlawful when done without justification or excuse. See R.C.M. 916. Whether an unlawful killing constitutes

murder or a lesser offense depends upon the circumstances. The offense is committed at the place of the act or omission although the victim may have died elsewhere. Whether death occurs at the time of the accused's act or omission, or at some time thereafter, it must have followed from an injury received by the victim which resulted from the act or omission.

(2) *Premeditated murder.*

(a) *Premeditation.* A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances.

(b) *Transferred premeditation.* When an accused with a premeditated design attempted to unlawfully kill a certain person, but, by mistake or inadvertence, killed another person, the accused is still criminally responsible for a premeditated murder, because the premeditated design to kill is transferred from the intended victim to the actual victim.

(c) *Intoxication.* Voluntary intoxication (*see* R.C.M. 916(1)(2)) not amounting to legal insanity may reduce premeditated murder (Article 118(1)) to unpremeditated murder (Article 118(2) or (3)) but it does not reduce either premeditated murder or unpremeditated murder to manslaughter (Article 119) or any other lesser offense.

(3) *Intent to kill or inflict great bodily harm.*

(a) *Intent.* An unlawful killing without premeditation is also murder when the accused had either an intent to kill or inflict great bodily harm. It may be inferred that a person intends the natural and probable consequences of an act purposely done. Hence, if a person does an intentional act likely to result in death or great bodily injury, it may be inferred that death or great bodily injury was intended. The intent need not be directed toward the person killed, or exist for any particular time before commission of the act, or have previously existed at all. It is sufficient that it existed at the time of the act or omission (except if death is inflicted in the

¶43.c.(3)(a)

heat of a sudden passion caused by adequate provocation— see paragraph 44). For example, a person committing housebreaking who strikes and kills the householder attempting to prevent flight can be guilty of murder even if the householder was not seen until the moment before striking the fatal blow.

(b) *Great bodily harm.* “Great bodily harm” means serious injury; it does not include minor injuries such as a black eye or a bloody nose, but it does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries. It is synonymous with the term “grievous bodily harm.”

(c) *Intoxication.* Voluntary intoxication not amounting to legal insanity does not reduce unpremeditated murder to manslaughter (Article 119) or any other lesser offense.

(4) *Act inherently dangerous to others.*

(a) *Wanton disregard of human life.* Intentionally engaging in an act inherently dangerous to another—although without an intent to cause the death of or great bodily harm to any particular person, or even with a wish that death will not be caused—may also constitute murder if the act shows wanton disregard of human life. Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm. Examples include throwing a live grenade toward another in jest or flying an aircraft very low over one or more persons to cause alarm.

(b) *Knowledge.* The accused must know that death or great bodily harm was a probable consequence of the inherently dangerous act. Such knowledge may be proved by circumstantial evidence.

(5) *During certain offenses.*

(a) *In general.* The commission or attempted commission of any of the offenses listed in Article 118(4) is likely to result in homicide, and when an unlawful killing occurs as a consequence of the perpetration or attempted perpetration of one of these offenses, the killing is murder. Under these circumstances it is not a defense that the killing was unintended or accidental.

(b) *Separate offenses.* The perpetration or attempted perpetration of the burglary, sodomy, rape, robbery, or aggravated arson may be charged separately from the homicide.

d. *Lesser included offenses.*

(1) *Premeditated murder and murder during certain offenses.* Article 118(2) and (3)—murder

(2) *All murders under Article 118.*

(a) Article 119—involuntary manslaughter

(b) Article 128—assault; assault consummated by a battery; aggravated assault

(c) Article 134—negligent homicide

(3) *Murder as defined in Article 118(1), (2), and (4).*

(a) Article 80—attempts

(b) Article 119—voluntary manslaughter

(c) Article 134—assault with intent to commit murder

(d) Article 134—assault with intent to commit voluntary manslaughter

e. *Maximum punishment.*

(1) Article 118(1) or (4)—death. Mandatory minimum—imprisonment for life with eligibility for parole.

(2) Article 118(2) or (3)—such punishment other than death as a court-martial may direct.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (with premeditation) (while (perpetrating) (attempting to p e r p e t r a t e ) \_\_\_\_\_) m u r d e r \_\_\_\_\_ by means of (shooting him/her with a rifle) (\_\_\_\_\_).

#### 44. Article 119—Manslaughter

a. *Text.*

“(a) Any person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.”

(b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being—

(1) by culpable negligence; or

(2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person; is guilty of involuntary man-

slaughter and shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Voluntary manslaughter.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon the person killed.

(2) *Involuntary manslaughter.*

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That this act or omission of the accused constituted culpable negligence, or occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, sodomy, rape, robbery, or aggravated arson.

c. *Explanation.*

(1) *Voluntary manslaughter.*

(a) *Nature of offense.* An unlawful killing, although done with an intent to kill or inflict great bodily harm, is not murder but voluntary manslaughter if committed in the heat of sudden passion caused by adequate provocation. Heat of passion may result from fear or rage. A person may be provoked to such an extent that in the heat of sudden passion caused by the provocation, although not in necessary defense of life or to prevent bodily harm, a fatal blow may be struck before self-control has returned. Although adequate provocation does not excuse the homicide, it does preclude conviction of murder.

(b) *Nature of provocation.* The provocation must be adequate to excite uncontrollable passion in a reasonable person, and the act of killing must be committed under and because of the passion. However, the provocation must not be sought or induced as an excuse for killing or doing harm. If, judged by the standard of a reasonable person, sufficient cooling time elapses between the provocation and the killing, the offense is murder, even if the accused's

passion persists. Examples of acts which may, depending on the circumstances, constitute adequate provocation are the unlawful infliction of great bodily harm, unlawful imprisonment, and the sight by one spouse of an act of adultery committed by the other spouse. Insulting or abusive words or gestures, a slight blow with the hand or fist, and trespass or other injury to property are not, standing alone, adequate provocation.

(2) *Involuntary manslaughter.*

(a) *Culpable negligence.*

(i) *Nature of culpable negligence.* Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not necessarily be a natural and probable consequence of the act or omission. Acts which may amount to culpable negligence include negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; and carelessly leaving poisons or dangerous drugs where they may endanger life.

(ii) *Legal duty required.* When there is no legal duty to act there can be no neglect. Thus, when a stranger makes no effort to save a drowning person, or a person allows a beggar to freeze or starve to death, no crime is committed.

(b) *Offense directly affecting the person.* An "offense directly affecting the person" means one affecting some particular person as distinguished from an offense affecting society in general. Among offenses directly affecting the person are the various types of assault, battery, false imprisonment, voluntary engagement in an affray, and maiming.

d. *Lesser included offenses.*

(1) *Voluntary manslaughter.*

(a) Article 119—involuntary manslaughter

(b) Article 128—assault; assault consummated by a battery; aggravated assault

(c) Article 134—assault with intent to commit voluntary manslaughter

¶44.d.(1)(d)

(d) Article 134—negligent homicide

(e) Article 80—attempts

(2) *Involuntary manslaughter.*

(a) Article 128—assault; assault consummated by a battery

(b) Article 134—negligent homicide

e. *Maximum punishment.*

(1) *Voluntary manslaughter.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) *Involuntary manslaughter.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. *Sample specifications.*

(1) *Voluntary manslaughter.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, willfully and unlawfully kill \_\_\_\_\_ by \_\_\_\_\_ him / her ( i n ) ( o n ) the \_\_\_\_\_ with a \_\_\_\_\_.

(2) *Involuntary manslaughter.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (by culpable negligence) (while (perpetrating) (attempting to perpetrate) an offense directly affecting the person of \_\_\_\_\_, to wit: (maiming) (a battery) ( \_\_\_\_\_ )) unlawfully kill \_\_\_\_\_ by \_\_\_\_\_ him/her ( i n ) ( o n ) t h e \_\_\_\_\_ w i t h a \_\_\_\_\_.

**44a. Article 119a.--Death or injury of an unborn child**

a. *Text.*

(a)(1) Any person subject to this chapter who engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365 of title 18) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section and shall, upon conviction, be punished by such punishment, other than death, as a court-martial may direct, which shall be consistent with the punishments prescribed by the President for

IV-66

that conduct had that injury or death occurred to the unborn child's mother.

(2) An offense under this section does not require proof that—

(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(ii) the accused intended to cause the death of, or bodily injury to, the unborn child.

(3) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall, instead of being punished under paragraph (1), be punished as provided under sections 880, 918, and 919(a) of this title (articles 80, 118, and 119(a)) for intentionally killing or attempting to kill a human being.

(4) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

(b) The provisions referred to in subsection (a) are sections 918, 919(a), 919(b)(2), 920(a), 922, 924, 926, and 928 of this title (articles 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128).

(c) Nothing in this section shall be construed to permit the prosecution—

(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

(3) of any woman with respect to her unborn child.

(d) In this section, the term “unborn child” means a child in utero, and the term “child in utero” or “child, who is in utero” means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

**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 and without consent, 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 and without consent.

(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)(1) That at the time of the sexual intercourse the person was under the age of 12; or

(2) 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 and without consent of the victim. It may be committed on a victim of any age. Any penetration, however slight, is sufficient to complete the offense.

(b) *Force and lack of consent.* Force and lack of consent are necessary to the offense. Thus, if the victim consents to the act, it is not rape. The lack of consent required, however, is more than mere lack

of acquiescence. If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the victim is of unsound mind or unconscious to an extent rendering him or her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that he or she is incapable of understanding the nature of the act is not consent.

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

(2) *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 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.

d. *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

(2) *Carnal knowledge.*

¶45.d.(2)(a)

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

(b) Article 80—attempts

e. *Maximum punishment.*

(1) *Rape.* Death or such other punishment as a court-martial may direct.

(2) *Carnal knowledge with a child who, at the time of the offense, has attained the age of 12 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *Carnal knowledge with a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

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) (a person who had attained the age of 12 but was under the age of 16).

(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 under the age of 12) (a person who attained the age of 12 but was under the age of 16).

**46. Article 121—Larceny and wrongful appropriation**

a. *Text.*

“(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—”

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of prop-

erty or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Larceny.*

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

[Note: If the property is alleged to be military property, as defined in paragraph 32c(1), add the following element]

(e) That the property was military property.

(2) *Wrongful appropriation.*

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent temporarily to deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.

c. *Explanation.*

(1) *Larceny.*

(a) *In general.* A wrongful taking with intent permanently to deprive includes the common law offense of larceny; a wrongful obtaining with intent permanently to defraud includes the offense formerly known as obtaining by false pretense; and a wrongful withholding with intent permanently to appropriate includes the offense formerly known as

embezzlement. Any of the various types of larceny under Article 121 may be charged and proved under a specification alleging that the accused “did steal” the property in question.

(b) *Taking, obtaining, or withholding.* There must be a taking, obtaining, or withholding of the property by the thief. For instance, there is no taking if the property is connected to a building by a chain and the property has not been disconnected from the building; property is not “obtained” by merely acquiring title thereto without exercising some possessory control over it. As a general rule, however, any movement of the property or any exercise of dominion over it is sufficient if accompanied by the requisite intent. Thus, if an accused enticed another’s horse into the accused’s stable without touching the animal, or procured a railroad company to deliver another’s trunk by changing the check on it, or obtained the delivery of another’s goods to a person or place designated by the accused, or had the funds of another transferred to the accused’s bank account, the accused is guilty of larceny if the other elements of the offense have been proved. A person may “obtain” the property of another by acquiring possession without title, and one who already has possession of the property of another may “obtain” it by later acquiring title to it. A “withholding” may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property, or it may arise as a result of devoting property to a use not authorized by its owner. Generally, this is so whether the person withholding the property acquired it lawfully or unlawfully. *See* subparagraph c(1)(f) below. However, acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property or of being an accessory after the fact are not included within the meaning of “withholds.” Therefore, neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on that basis alone. The taking, obtaining, or withholding must be of specific property. A debtor does not withhold specific property from the possession of a creditor by failing or refusing to pay a debt, for the relationship of debtor and creditor does not give the creditor a possessory right in any specific money or other property of the debtor.

(c) *Ownership of the property.*

(i) *In general.* Article 121 requires that the

taking, obtaining, or withholding be from the possession of the owner or of any other person. Care, custody, management, and control are among the definitions of possession.

(ii) *Owner.* “Owner” refers to the person who, at the time of the taking, obtaining, or withholding, had the superior right to possession of the property in the light of all conflicting interests therein which may be involved in the particular case. For instance, an organization is the true owner of its funds as against the custodian of the funds charged with the larceny thereof.

(iii) *Any other person.* “Any other person” means any person—even a person who has stolen the property—who has possession or a greater right to possession than the accused. In pleading a violation of this article, the ownership of the property may be alleged to have been in any person, other than the accused, who at the time of the theft was a general owner or a special owner thereof. A general owner of property is a person who has title to it, whether or not that person has possession of it; a special owner, such as a borrower or hirer, is one who does not have title but who does have possession, or the right of possession, of the property.

(iv) *Person.* “Person,” as used in referring to one from whose possession property has been taken, obtained, or withheld, and to any owner of property, includes (in addition to a natural person) a government, a corporation, an association, an organization, and an estate. Such a person need not be a legal entity.

(d) *Wrongfulness of the taking, obtaining, or withholding.* The taking, obtaining, or withholding of the property must be wrongful. As a general rule, a taking or withholding of property from the possession of another is wrongful if done without the consent of the other, and an obtaining of property from the possession of another is wrongful if the obtaining is by false pretense. However, such an act is not wrongful if it is authorized by law or apparently lawful superior orders, or, generally, if done by a person who has a right to the possession of the property either equal to or greater than the right of one from whose possession the property is taken, obtained, or withheld. An owner of property who takes or withholds it from the possession of another, without the consent of the other, or who obtains it therefrom by false pretense, does so wrongfully if the other has a superior right—such as a lien—to

¶46.c.(1)(d)

possession of the property. A person who takes, obtains, or withholds property as the agent of another has the same rights and liabilities as does the principal, but may not be charged with a guilty knowledge or intent of the principal which that person does not share.

(e) *False pretense.* With respect to obtaining property by false pretense, the false pretense may be made by means of any act, word, symbol, or token. The pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in its truth. A false pretense is a false representation of past or existing fact. In addition to other kinds of facts, the fact falsely represented by a person may be that person's or another's power, authority, or intention. Thus, a false representation by a person that person presently intends to perform a certain act in the future is a false representation of an existing fact—the intention—and thus a false pretense. Although the pretense need not be the sole cause inducing the owner to part with the property, it must be an effective and intentional cause of the obtaining. A false representation made after the property was obtained will not result in a violation of Article 121. A larceny is committed when a person obtains the property of another by false pretense and with intent to steal, even though the owner neither intended nor was requested to part with title to the property. Thus, a person who gets another's watch by pretending that it will be borrowed briefly and then returned, but who really intends to sell it, is guilty of larceny.

(f) *Intent.*

(i) *In general.* The offense of larceny requires that the taking, obtaining, or withholding by the thief be accompanied by an intent permanently to deprive or defraud another of the use and benefit of property or permanently to appropriate the property to the thief's own use or the use of any person other than the owner. These intents are collectively called an intent to steal. Although a person gets property by a taking or obtaining which was not wrongful or which was without a concurrent intent to steal, a larceny is nevertheless committed if an intent to steal is formed after the taking or obtaining and the property is wrongfully withheld with that intent. For example, if a person rents another's vehicle, later decides to keep it permanently, and then either fails to return it at the appointed time or uses

it for a purpose not authorized by the terms of the rental, larceny has been committed, even though at the time the vehicle was rented, the person intended to return it after using it according to the agreement.

(ii) *Inference of intent.* An intent to steal may be proved by circumstantial evidence. Thus, if a person secretly takes property, hides it, and denies knowing anything about it, an intent to steal may be inferred; if the property was taken openly and returned, this would tend to negate such an intent. Proof of sale of the property may show an intent to steal, and therefore, evidence of such a sale may be introduced to support a charge of larceny. An intent to steal may be inferred from a wrongful and intentional dealing with the property of another in a manner likely to cause that person to suffer a permanent loss thereof.

(iii) *Special situations.*

(A) *Motive does not negate intent.* The accused's purpose in taking an item ordinarily is irrelevant to the accused's guilt as long as the accused had the intent required under subparagraph c(1)(f)(i) above. For example, if the accused wrongfully took property as a "joke" or "to teach the owner a lesson" this would not be a defense, although if the accused intended to return the property, the accused would be guilty of wrongful appropriation, not larceny. When a person takes property intending only to return it to its lawful owner, as when stolen property is taken from a thief in order to return it to its owner, larceny or wrongful appropriation is not committed.

(B) *Intent to pay for or replace property not a defense.* An intent to pay for or replace the stolen property is not a defense, even if that intent existed at the time of the theft. If, however, the accused takes money or a negotiable instrument having no special value above its face value, with the intent to return an equivalent amount of money, the offense of larceny is not committed although wrongful appropriation may be.

(C) *Return of property not a defense.* Once a larceny is committed, a return of the property or payment for it is no defense. See subparagraph c(2) below when the taking, obtaining, or withholding is with the intent to return.

(g) *Value.*

(i) *In general.* Value is a question of fact to

be determined on the basis of all of the evidence admitted.

(ii) *Government property.* When the stolen property is an item issued or procured from Government sources, the price listed in an official publication for that property at the time of the theft is admissible as evidence of its value. *See* Mil. R. Evid. 803(17). However, the stolen item must be shown to have been, at the time of the theft, in the condition upon which the value indicated in the official price list is based. The price listed in the official publication is not conclusive as to the value of the item, and other evidence may be admitted on the question of its condition and value.

(iii) *Other property.* As a general rule, the value of other stolen property is its legitimate market value at the time and place of the theft. If this property, because of its character or the place where it was stolen, had no legitimate market value at the time and place of the theft or if that value cannot readily be ascertained, its value may be determined by its legitimate market value in the United States at the time of the theft, or by its replacement cost at that time, whichever is less. Market value may be established by proof of the recent purchase price paid for the article in the legitimate market involved or by testimony or other admissible evidence from any person who is familiar through training or experience with the market value in question. The owner of the property may testify as to its market value if familiar with its quality and condition. The fact that the owner is not an expert of the market value of the property goes only to the weight to be given that testimony, and not to its admissibility. *See* Mil. R. Evid. 701. When the character of the property clearly appears in evidence—for instance, when it is exhibited to the court-martial—the court-martial, from its own experience, may infer that it has some value. If as a matter of common knowledge the property is obviously of a value substantially in excess of \$500.00, the court-martial may find a value of more than \$500.00. Writings representing value may be considered to have the value—even though contingent—which they represented at the time of the theft.

(iv) *Limited interest in property.* If an owner of property or someone acting in the owner's behalf steals it from a person who has a superior, but limited, interest in the property, such as a lien, the value

for punishment purposes shall be that of the limited interest.

(h) *Miscellaneous considerations.*

(i) *Lost property.* A taking or withholding of lost property by the finder is larceny if accompanied by an intent to steal and if a clue to the identity of the general or special owner, or through which such identity may be traced, is furnished by the character, location, or marketing of the property, or by other circumstances.

(ii) *Multiple article larceny.* When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several persons or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.

(iii) *Special kinds of property which may also be the subject of larceny.* Included in property which may be the subject of larceny is property which is taken, obtained, or withheld by severing it from real estate and writings which represent value such as commercial paper.

(iv) *Services.* Theft of services may not be charged under this paragraph, but *see* paragraph 78.

(vi) *Credit, Debit, and Electronic Transactions.* Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money is an obtaining-type larceny by false pretense. Such use to obtain goods is usually a larceny of those goods from the merchant offering them. Such use to obtain money or a negotiable instrument (e.g., withdrawing cash from an automated teller or a cash advance from a bank) is usually a larceny of money from the entity presenting the money or a negotiable instrument. For the purpose of this section, the term *credit, debit, or electronic transaction* includes the use of an instrument or device, whether known as a credit card, debit card, automated teller machine (ATM) card or by any other name, including access devices such as code, account number, electronic serial number or personal identification number, issued for the use in obtaining money, goods, or anything else of value.

(2) *Wrongful appropriation.*

(a) *In general.* Wrongful appropriation requires an intent to temporarily—as opposed to per-

¶46.c.(2)(a)

manently—deprive the owner of the use and benefit of, or appropriate to the use of another, the property wrongfully taken, withheld, or obtained. In all other respects wrongful appropriation and larceny are identical.

(b) *Examples.* Wrongful appropriation includes: taking another's automobile without permission or lawful authority with intent to drive it a short distance and then return it or cause it to be returned to the owner; obtaining a service weapon by falsely pretending to be about to go on guard duty with intent to use it on a hunting trip and later return it; and while driving a government vehicle on a mission to deliver supplies, withholding the vehicle from government service by deviating from the assigned route without authority, to visit a friend in a nearby town and later restore the vehicle to its lawful use. An inadvertent exercise of control over the property of another will not result in wrongful appropriation. For example, a person who fails to return a borrowed boat at the time agreed upon because the boat inadvertently went aground is not guilty of this offense.

d. *Lesser included offenses.*

(1) *Larceny.*

- (a) Article 121—wrongful appropriation
- (b) Article 80—attempts

(2) *Larceny of military property.*

- (a) Article 121—wrongful appropriation
- (b) Article 121—larceny of property other than military property
- (c) Article 80—attempts

(3) *Wrongful appropriation.* Article 80—attempts

e. *Maximum punishment.*

(1) *Larceny.*

(a) *Military property of a value of \$500 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Property other than military property of a value of \$500 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(c) *Military property of a value of more than \$500 or of any military motor vehicle, aircraft, vessel, firearm, or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(d) *Property other than military property of a*

*value of more than \$500 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in subparagraph e(1)(c).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(2) *Wrongful appropriation.*

(a) *Of a value of \$500.00 or less.* Confinement for 3 months, and forfeiture of two-thirds pay per month for 3 months.

(b) *Of a value of more than \$500.00.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(c) *Of any motor vehicle, aircraft, vessel, firearm, or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. *Sample specifications.*

(1) *Larceny.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, steal \_\_\_\_\_, (military property), of a value of (about) \$ \_\_\_\_\_, the property of \_\_\_\_\_.

(2) *Wrongful appropriation.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, wrongfully appropriate \_\_\_\_\_, of a value of (about) \$ \_\_\_\_\_, the property of \_\_\_\_\_.

**47. Article 122—Robbery**

a. *Text.*

“Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;

(2) That the taking was against the will of that person;

(3) That the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the property of a relative, family member, or anyone accompanying the person at the time of the robbery;

(4) That the property belonged to a person named or described;

(5) That the property was of a certain or of some value; and

(6) That the taking of the property by the accused was with the intent permanently to deprive the person robbed of the use and benefit of the property. [Note: If the robbery was committed with a firearm, add the following element]

(7) That the means of force or violence or of putting the person in fear was a firearm.

c. *Explanation.*

(1) *Taking in the presence of the victim.* It is not necessary that the property taken be located within any certain distance of the victim. If persons enter a house and force the owner by threats to disclose the hiding place of valuables in an adjoining room, and, leaving the owner tied, go into that room and steal the valuables, they have committed robbery.

(2) *Force or violence.* For a robbery to be committed by force or violence, there must be actual force or violence to the person, preceding or accompanying the taking against the person's will, and it is immaterial that there is no fear engendered in the victim. Any amount of force is enough to constitute robbery if the force overcomes the actual resistance of the person robbed, puts the person in such a position that no resistance is made, or suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. The offense is not robbery if an article is merely snatched from the hand of another or a pocket is picked by stealth, no other force is used, and the owner is not put in fear. But if resistance is overcome in snatching the article, there is sufficient violence, as when an earring is torn from a person's ear. There is sufficient violence when a person's attention is diverted by being jostled by a confederate of a pickpocket, who is thus enabled to steal the

person's watch, even though the person had no knowledge of the act; or when a person is knocked insensible and that person's pockets rifled; or when a guard steals property from the person of a prisoner in the guard's charge after handcuffing the prisoner on the pretext of preventing escape.

(3) *Fear.* For a robbery to be committed by putting the victim in fear, there need be no actual force or violence, but there must be a demonstration of force or menace by which the victim is placed in such fear that the victim is warranted in making no resistance. The fear must be a reasonable apprehension of present or future injury, and the taking must occur while the apprehension exists. The injury apprehended may be death or bodily injury to the person or to a relative or family member, or to anyone in the person's company at the time, or it may be the destruction of the person's habitation or other property or that of a relative or family member or anyone in the person's company at the time of sufficient gravity to warrant giving up the property demanded by the assailant.

(4) *Larceny by taking.* Robbery includes "taking with intent to steal"; hence, a larceny by taking is an integral part of a charge of robbery and must be proved at the trial. See paragraph 46c(1).

(5) *Multiple-victim robberies.* Robberies of different persons at the same time and place are separate offenses and each such robbery should be alleged in a separate specification.

d. *Lesser included offenses.*

(1) Article 121—larceny

(2) Article 121—wrongful appropriation

(3) Article 128—assault; assault consummated by a battery

(4) Article 128—assault with a dangerous weapon

(5) Article 128—assault intentionally inflicting grievous bodily harm

(6) Article 134—assault with intent to rob

(7) Article 80—attempts

[Note: More than one lesser included offense may be found in an appropriate case because robbery is a compound offense. For example, a person may be found not guilty of robbery but guilty of wrongful appropriation and assault.]

e. *Maximum punishment.*

(1) *When committed with a firearm.* Dishonorable

¶47.e.(1)

discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. *Sample specifications.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, by means of (force) (violence) (force and violence) (and) (putting him/her in fear) (with a firearm) steal from the (person) (presence) of \_\_\_\_\_, against his/her will, (a watch) (\_\_\_\_\_ ) of value of (about) \$ \_\_\_\_\_, the property of \_\_\_\_\_.

**48. Article 123—Forgery**

a. *Text.*

“Any person subject to this chapter who, with intent to defraud—”

“(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or”

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered; is guilty of forgery and shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Forgery—making or altering.*

(a) That the accused falsely made or altered a certain signature or writing;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another’s legal rights or liabilities to that person’s prejudice; and

(c) That the false making or altering was with the intent to defraud.

(2) *Forgery—uttering.*

(a) That a certain signature or writing was falsely made or altered;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another’s legal rights or liabilities to that person’s prejudice;

(c) That the accused uttered, offered, issued, or transferred the signature or writing;

(d) That at such time the accused knew that the signature or writing had been falsely made or altered; and

(e) That the uttering, offering, issuing or transferring was with the intent to defraud.

c. *Explanation.*

(1) *In general.* Forgery may be committed either by falsely making a writing or by knowingly uttering a falsely made writing. There are three elements common to both aspects of forgery: a writing falsely made or altered; and apparent capability of the writing as falsely made or altered to impose a legal liability on another or to change another’s legal rights or liabilities to that person’s prejudice; and an intent to defraud.

(2) *False.* “False” refers not to the contents of the writing or to the facts stated therein but to the making or altering of it. Hence, forgery is not committed by the genuine making of a false instrument even when made with intent to defraud. A person who, with intent to defraud, signs that person’s own signature as the maker of a check drawn on a bank in which that person does not have money or credit does not commit forgery. Although the check falsely represents the existence of the account, it is what it purports to be, a check drawn by the actual maker, and therefore it is not falsely made. *See*, however, paragraph 49. Likewise, if a person makes a false signature of another to an instrument, but adds the word “by” with that person’s own signature thus indicating authority to sign, the offense is not forgery even if no such authority exists. False recitals of fact in a genuine document, as an aircraft flight report which is “padded” by the one preparing it, do not make the writing a forgery. *But see* paragraph 31 concerning false official statements.

(3) *Signatures.* Signing the name of another to an instrument having apparent legal efficacy without authority and with intent to defraud is forgery as the signature is falsely made. The distinction is that in this case the falsely made signature purports to be the act of one other than the actual signer. Likewise, a forgery may be committed by a person signing that person’s own name to an instrument. For example, when a check payable to the order of a certain person comes into the hands of another of the same name, forgery is committed if, knowing the check to be another’s, that person indorses it with that per-

son's own name intending to defraud. Forgery may also be committed by signing a fictitious name, as when Roe makes a check payable to Roe and signs it with a fictitious name—Doe—as drawer.

(4) *Nature of writing.* The writing must be one which would, if genuine, apparently impose a legal liability on another, as a check or promissory note, or change that person's legal rights or liabilities to that person's prejudice, as a receipt. Some other instruments which may be the subject of forgery are orders for the delivery of money or goods, railroad tickets, and military orders directing travel. A writing falsely "made" includes an instrument that may be partially or entirely printed, engraved, written with a pencil, or made by photography or other device. A writing may be falsely "made" by materially altering an existing writing, by filling in a paper signed in blank, or by signing an instrument already written. With respect to the apparent legal efficacy of the writing falsely made or altered, the writing must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability the prejudice of another. If under all the circumstances the instrument has neither real nor apparent legal efficacy, there is no forgery. Thus, the false making with intent to defraud of an instrument affirmatively invalid on its face is not forgery nor is the false making or altering, with intent to defraud, of a writing which could not impose a legal liability, as a mere letter of introduction. However, the false making of another's signature on an instrument with intent to defraud is forgery, even if there is no resemblance to the genuine signature and the name is misspelled.

(5) *Intent to defraud.* See paragraph 49c(14). The intent to defraud need not be directed toward anyone in particular nor be for the advantage of the offender. It is immaterial that nobody was actually defrauded, or that no further step was made toward carrying out the intent to defraud other than the false making or altering of a writing.

(6) *Alteration.* The alteration must effect a material change in the legal tenor of the writing. Thus, an alteration which apparently increases, diminishes, or discharges any obligation is material. Examples of material alterations in the case of a promissory note are changing the date, amount, or place of payment. If a genuine writing has been delivered to the accused and while in the accused's possession is later

found to be altered, it may be inferred that the writing was altered by the accused.

(7) *Uttering.* See paragraph 49c(4).

d. *Lesser included offense.* Article 80—attempts

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

f. *Sample specifications.*

(1) *Forgery—making or altering.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, with intent to defraud, falsely[make (in its entirety) (the signature of \_\_\_\_\_ as an indorsement to) (the signature of \_\_\_\_\_ to) (\_\_\_\_\_) a certain (check) (writing) (\_\_\_\_\_) in the following words and figures, to wit: \_\_\_\_\_] [alter a certain (check) (writing) (\_\_\_\_\_) in the following words and figures, to wit: \_\_\_\_\_, by (adding thereto \_\_\_\_\_) (\_\_\_\_\_)], which said (check) (writing) (\_\_\_\_\_) would, if genuine, apparently operate to the legal harm of another[\*and which \_\_\_\_\_ (could be) (was) used to the legal harm of \_\_\_\_\_, in that \_\_\_\_\_].

[\*Note: This allegation should be used when the document specified is not one which by its nature would clearly operate to the legal prejudice of another—for example, an insurance application. The manner in which the document could be or was used to prejudice the legal rights of another should be alleged in the last blank.]

(2) *Forgery—uttering.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, with intent to defraud, (utter) (offer) (issue) (transfer) a certain (check) (writing) (\_\_\_\_\_) in the following words and figures, to wit: \_\_\_\_\_, a writing which would, if genuine, apparently operate to the legal harm of another, (which said (check) (writing) (\_\_\_\_\_) (the signature to which said (check) (writing) (\_\_\_\_\_) (\_\_\_\_\_) was, as he/she, the said \_\_\_\_\_, then well knew, falsely (made) (altered) (\*and which \_\_\_\_\_

¶48.f.(2)

(could be) (was) used to the legal harm of \_\_\_\_\_, in that \_\_\_\_\_ ).

[\*Note: See the note following (1), above]

**49. Article 123a—Making, drawing, or uttering check, draft, or order without sufficient funds**

a. *Text.*

“Any person subject to this chapter who—”

(1) “for the procurement of any article or thing of value, with intent to defraud; or”

(2) “for the payment of any past due obligation, or for any other purpose, with intent to deceive; makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. The making, drawing, uttering, or delivering by a maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee’s possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment. In this section, the word “credit” means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order.”

b. *Elements.*

(1) *For the procurement of any article or thing of value, with intent to defraud.*

(a) That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;

(b) That the accused did so for the purpose of procuring an article or thing of value;

(c) That the act was committed with intent to defraud; and

(d) That at the time of making, drawing, uttering, or delivery of the instrument the accused knew that the accused or the maker or drawer had not or

would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

(2) *For the payment of any past due obligation, or for any other purpose, with intent to deceive.*

(a) That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;

(b) That the accused did so for the purpose or purported purpose of effecting the payment of a past due obligation or for some other purpose;

(c) That the act was committed with intent to deceive; and

(d) That at the time of making, drawing, uttering, or delivering of the instrument, the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

c. *Explanation.*

(1) *Written instruments.* The written instruments covered by this article include any check, draft (including share drafts), or order for the payment of money drawn upon any bank or other depository, whether or not the drawer bank or depository is actually in existence. It may be inferred that every check, draft, or order carries with it a representation that the instrument will be paid in full by the bank or other depository upon presentment by a holder when due.

(2) *Bank or other depository.* “Bank or other depository” includes any business regularly but not necessarily exclusively engaged in public banking activities.

(3) *Making or drawing.* “Making” and “drawing” are synonymous and refer to the act of writing and signing the instrument.

(4) *Uttering or delivering.* “Uttering” and “delivering” have similar meanings. Both mean transferring the instrument to another, but “uttering” has the additional meaning of offering to transfer. A person need not personally be the maker or drawer of an instrument in order to violate this article if that person utters or delivers it. For example, if a person holds a check which that person knows is worthless, and utters or delivers the check to another, that person may be guilty of an offense under this article despite the fact that the person did not personally draw the check.

(5) *For the procurement.* “For the procurement” means for the purpose of obtaining any article or thing of value. It is not necessary that an article or thing of value actually be obtained, and the purpose of the obtaining may be for the accused’s own use or benefit or for the use or benefit of another.

(6) *For the payment.* “For the payment” means for the purpose or purported purpose of satisfying in whole or in part any past due obligation. Payment need not be legally effected.

(7) *For any other purpose.* “For any other purpose” includes all purposes other than the payment of a past due obligation or the procurement of any article or thing of value. For example, it includes paying or purporting to pay an obligation which is not yet past due. The check, draft, or order, whether made or negotiated for the procurement of an article or thing of value or for the payment of a past due obligation or for some other purpose, need not be intended or represented as payable immediately. For example, the making of a postdated check, delivered at the time of entering into an installment purchase contract and intended as payment for a future installment, would, if made with the requisite intent and knowledge, be a violation of this article.

(8) *Article or thing of value.* “Article or thing of value” extends to every kind of right or interest in property, or derived from contract, including interests and rights which are intangible or contingent or which mature in the future.

(9) *Past due obligation.* A “past due obligation” is an obligation to pay money, which obligation has legally matured before making, drawing, uttering, or delivering the instrument.

(10) *Knowledge.* The accused must have knowledge, at the time the accused makes, draws, utters, or delivers the instrument, that the maker or drawer, whether the accused or another, has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of the instrument in full upon its presentment. Such knowledge may be proved by circumstantial evidence.

(11) *Sufficient funds.* “Sufficient funds” refers to a condition in which the account balance of the maker or drawer in the bank or other depository at the time of the presentment of the instrument for payment is not less than the face amount of the instrument and has not been rendered unavailable for

payment by garnishment, attachment, or other legal procedures.

(12) *Credit.* “Credit” means an arrangement or understanding, express or implied, with the bank or other depository for the payment of the check, draft, or order. An absence of credit includes those situations in which an accused writes a check on a non-existent bank or on a bank in which the accused has no account.

(13) *Upon its presentment.* “Upon its presentment” refers to the time the demand for payment is made upon presentation of the instrument to the bank or other depository on which it was drawn.

(14) *Intent to defraud.* “Intent to defraud” means an intent to obtain, through a misrepresentation, an article or thing of value and to apply it to one’s own use and benefit or to the use and benefit of another, either permanently or temporarily.

(15) *Intent to deceive.* “Intent to deceive” means an intent to mislead, cheat, or trick another by means of a misrepresentation made for the purpose of gaining an advantage for oneself or for a third person, or of bringing about a disadvantage to the interests of the person to whom the representation was made or to interests represented by that person.

(16) *The relationship of time and intent.* Under this article, two times are involved: (a) when the accused makes, draws, utters, or delivers the instrument; and (b) when the instrument is presented to the bank or other depository for payment. With respect to (a), the accused must possess the requisite intent and must know that the maker or drawer does not have or will not have sufficient funds in, or credit with, the bank or the depository for payment of the instrument in full upon its presentment when due. With respect to (b), if it can otherwise be shown that the accused possessed the requisite intent and knowledge at the time the accused made, drew, uttered, or delivered the instrument, neither proof of presentment nor refusal of payment is necessary, as when the instrument is one drawn on a nonexistent bank.

(17) *Statutory rule of evidence.* The provision of this article with respect to establishing prima facie evidence of knowledge and intent by proof of notice and nonpayment within 5 days is a statutory rule of evidence. The failure of an accused who is a maker or drawer to pay the holder the amount due within 5 days after receiving either oral or written notice

from the holder of a check, draft, or order, or from any other person having knowledge that such check, draft, or order was returned unpaid because of insufficient funds, is prima facie evidence (a) that the accused had the intent to defraud or deceive as alleged; and (b) that the accused knew at the time the accused made, drew, uttered, or delivered the check, draft, or order that the accused did not have or would not have sufficient funds in, or credit with, the bank or other depository for the payment of such check, draft, or order upon its presentment for payment. Prima facie evidence is that evidence from which the accused's intent to defraud or deceive and the accused's knowledge of insufficient funds in or credit with the bank or other depository may be inferred, depending on all the circumstances. The failure to give notice referred to in the article, or payment by the accused, maker, or drawer to the holder of the amount due within 5 days after such notice has been given, precludes the prosecution from using the statutory rule of evidence but does not preclude conviction of this offense if all the elements are otherwise proved.

(18) *Affirmative defense.* Honest mistake is an affirmative defense to offenses under this article. See R.C.M. 916(j).

d. *Lesser included offenses.*

(1) Article 134—making, drawing, uttering or delivering a check, draft, or order, and thereafter wrongfully and dishonorably failing to maintain sufficient funds

(2) Article 80—attempts

e. *Maximum punishment.*

(1) *For the procurement of any article or thing of value, with intent to defraud, in the face amount of:*

(a) *\$500.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *More than \$500.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *For the payment of any past due obligation, or for any other purpose, with intent to deceive.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specifications.*

(1) *For the procurement of any article or thing of value, with intent to defraud.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, with intent to defraud and for the procurement of (lawful currency) (and) (\_\_\_\_\_ (an article) (a thing) of value), wrongfully and unlawfully ((make (draw)) (utter) (deliver) to \_\_\_\_\_,) a certain (check) (draft) (money order) upon the (\_\_\_\_\_ Bank) (\_\_\_\_\_ depository) in words and figures as follows, to wit: \_\_\_\_\_, then knowing that (he/she) (\_\_\_\_\_), the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentment.

(2) *For the payment of any past due obligation, or for any other purpose, with intent to deceive.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, with intent to deceive and for the payment of a past due obligation, to wit: \_\_\_\_\_ (for the purpose of \_\_\_\_\_) wrongfully and unlawfully ((make) (draw)) (utter) (deliver) to \_\_\_\_\_, a certain (check) (draft) (money order) for the payment of money upon (\_\_\_\_\_ Bank) (\_\_\_\_\_ depository), in words and figures as follows, to wit: \_\_\_\_\_, then knowing that (he/she) (\_\_\_\_\_), the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentment.

**50. Article 124—Maiming**

a. *Text.*

“Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which—”

(1) “seriously disfigures his person by any mutilation thereof;”

(2) “destroys or disables any member or organ of his body; or”

(3) “seriously diminishes his physical vigor by

the injury of any member or organ; is guilty of maiming and shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused inflicted a certain injury upon a certain person;

(2) That this injury seriously disfigured the person’s body, destroyed or disabled an organ or member, or seriously diminished the person’s physical vigor by the injury to an organ or member; and

(3) That the accused inflicted this injury with an intent to cause some injury to a person.

c. *Explanation.*

(1) *Nature of offense.* It is maiming to put out a person’s eye, to cut off a hand, foot, or finger, or to knock out a tooth, as these injuries destroy or disable those members or organs. It is also maiming to injure an internal organ so as to seriously diminish the physical vigor of a person. Likewise, it is maiming to cut off an ear or to scar a face with acid, as these injuries seriously disfigure a person. A disfigurement need not mutilate any entire member to come within the article, or be of any particular type, but must be such as to impair perceptibly and materially the victim’s comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. However, the offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery.

(2) *Means of inflicting injury.* To prove the offense it is not necessary to prove the specific means by which the injury was inflicted. However, such evidence may be considered on the question of intent.

(3) *Intent.* Maiming requires a specific intent to injure generally but not a specific intent to maim. Thus, one commits the offense who intends only a slight injury, if in fact there is infliction of an injury of the type specified in this article. Infliction of the type of injuries specified in this article upon the person of another may support an inference of the intent to injure, disfigure, or disable.

(4) *Defenses.* If the injury is done under circumstances which would justify or excuse homicide, the offense of maiming is not committed. See R.C.M. 916.

d. *Lesser included offenses.*

(1) Article 128—assault; assault consummated by a battery

(2) Article 128—assault with a dangerous weapon

(3) Article 128—assault intentionally inflicting grievous bodily harm

(4) Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about \_\_\_\_\_ 20 \_\_\_\_\_, maim \_\_\_\_\_ by (crushing his/her foot with a sledge hammer) (\_\_\_\_\_).

## 51. Article 125—Sodomy

a. *Text.*

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

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

b. *Elements.*

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

(Note: Add any of the following as applicable)

(2) That the act was done with a child under the age of 12.

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

(4) That the act was done by force and without the consent of the other person.

c. *Explanation.* It is unnatural carnal copulation for a person to take into that person’s mouth or anus the sexual organ of another person or of an animal; or to place that person’s sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.

d. *Lesser included offenses.*

¶51.d.(1)

(1) *With a child under the age of 16.*

(a) Article 125—forcible sodomy (and offenses included therein; *see* subparagraph (2) below)

(b) Article 134—indecent acts with a child under 16

(c) Article 80—attempts

(2) *Forcible sodomy.*

(a) Article 125—sodomy (and offenses included therein; *see* subparagraph (3) below)

(b) Article 134—assault with intent to commit sodomy

(c) Article 134—indecent assault

(d) Article 80—attempts.

(3) *Sodomy.*

(a) Article 134—indecent acts with another

(b) Article 80—attempts

e. *Maximum punishment.*

(1) *By force and without consent.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *With a child who, at the time of the offense, has attained the age of 12 but is under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *With a child under the age of 12 years at the time of the offense.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(4) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, c o m m i t s o d o m y with \_\_\_\_\_, (a child under the age of 12) (a child who had attained the age of 12 but was under the age of 16) (by force and without the consent of the said \_\_\_\_\_).

## 52. Article 126—Arson

a. *Text.*

“(a) Any person subject to this chapter who willfully and maliciously burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of the of-

fender there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who willfully and maliciously burns or sets fire to the property of another, except as provided in subsection (a), is guilty of simple arson and shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Aggravated arson.*

(a) *Inhabited dwelling.*

(i) That the accused burned or set on fire an inhabited dwelling;

(ii) That this dwelling belonged to a certain person and was of a certain value; and

(iii) That the act was willful and malicious.

(b) *Structure.*

(i) That the accused burned or set on fire a certain structure;

(ii) That the act was willful and malicious;

(iii) That there was a human being in the structure at the time;

(iv) That the accused knew that there was a human being in the structure at the time; and

(v) That this structure belonged to a certain person and was of a certain value.

(2) *Simple arson.*

(a) That the accused burned or set fire to certain property of another;

(b) That the property was of a certain value; and

(c) That the act was willful and malicious.

c. *Explanation.*

(1) *In general.* In aggravated arson, danger to human life is the essential element; in simple arson, it is injury to the property of another. In either case, it is immaterial that no one is, in fact, injured. It must be shown that the accused set the fire willfully and maliciously, that is, not merely by negligence or accident.

(2) *Aggravated arson.*

(a) *Inhabited dwelling.* An inhabited dwelling includes the outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not an inhabited dwelling unless occupied as such, nor is a house that has never been occupied or which has been temporarily abandoned. A person

may be guilty of aggravated arson of the person's dwelling, whether as owner or tenant.

(b) *Structure*. Aggravated arson may also be committed by burning or setting on fire any other structure, movable or immovable, such as a theater, church, boat, trailer, tent, auditorium, or any other sort of shelter or edifice, whether public or private, when the offender knows that there is a human being inside at the time. It may be that the offender had this knowledge when the nature of the structure—as a department store or theater during hours of business, or other circumstances—are shown to have been such that a reasonable person would have known that a human being was inside at the time.

(c) *Damage to property*. It is not necessary that the dwelling or structure be consumed or materially injured; it is enough if fire is actually communicated to any part thereof. Any actual burning or charring is sufficient, but a mere scorching or discoloration by heat is not.

(d) *Value and ownership of property*. For the offense of aggravated arson, the value and ownership of the dwelling or other structure are immaterial, but should ordinarily be alleged and proved to permit the finding in an appropriate case of the included offense of simple arson.

(3) *Simple arson*. "Simple arson" is the willful and malicious burning or setting fire to the property of another under circumstances not amounting to aggravated arson. The offense includes burning or setting fire to real or personal property of someone other than the offender. *See also* paragraph 67 (Burning with intent to defraud).

d. *Lesser included offenses*.

(1) *Aggravated arson*.

(a) Article 126—simple arson

(b) Article 80—attempts

(2) *Simple arson*. Article 80—attempts

e. *Maximum punishment*.

(1) *Aggravated arson*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(2) *Simple arson, where the property is—*

(a) *Of a value of \$500.00 or less*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Of a value of more than \$500.00*. Dishonor-

able discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications*.

(1) *Aggravated arson*.

(a) *Inhabited dwelling*.

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, willfully and maliciously (burn) (set on fire) an inhabited dwelling, to wit: ( t h e r e s i d e n c e o f \_\_\_\_\_ ) ( \_\_\_\_\_ ) , ( t h e p r o p e r t y o f \_\_\_\_\_ ) o f a v a l u e o f ( a b o u t ) \$ \_\_\_\_\_.

(b) *Structure*.

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or \_\_\_\_\_ 20\_\_\_\_\_, willfully and maliciously (burn) (set on fire), knowing that a human being was therein at the time, (the Post Theater) ( \_\_\_\_\_ , the property of \_\_\_\_\_ ), of a value of (about) \$ \_\_\_\_\_.

(2) *Simple arson*.

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board— location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, willfully and maliciously ( b u r n ) ( s e t f i r e t o ) ( a n a u t o m o b i l e ) ( \_\_\_\_\_ ) , t h e p r o p e r t y o f \_\_\_\_\_ , o f a v a l u e o f ( a b o u t ) \$ \_\_\_\_\_.

**53. Article 127—Extortion**

a. *Text*.

"Any person subject to this chapter who communicates threats to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and shall be punished as a court-martial may direct."

b. *Elements*.

(1) That the accused communicated a certain threat to another; and

(2) That the accused intended to unlawfully obtain something of value, or any acquittance, advantage, or immunity.

c. *Explanation*.

(1) *In general*. Extortion is complete upon com-

¶53.c.(1)

munication of the threat with the requisite intent. The actual or probable success of the extortion need not be proved.

(2) *Threat.* A threat may be communicated by any means but must be received by the intended victim. The threat may be: a threat to do any unlawful injury to the person or property of the person threatened or to any member of that person's family or any other person held dear to that person; a threat to accuse the person threatened, or any member of that person's family or any other person held dear to that person, of any crime; a threat to expose or impute any deformity or disgrace to the person threatened or to any member of that person's family or any other person held dear to that person; a threat to expose any secret affecting the person threatened or any member of that person's family or any other person held dear to that person; or a threat to do any other harm.

(3) *Acquittance.* An "acquittance" is a release or discharge from an obligation.

(4) *Advantage or immunity.* Unless it is clear from the circumstances, the advantage or immunity sought should be described in the specification. An intent to make a person do an act against that person's will is not, by itself, sufficient to constitute extortion.

d. *Lesser included offenses.*

(1) Article 134—communicating a threat

(2) Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, with intent unlawfully to obtain (something of value) (an acquittance) (an advantage, to wit \_\_\_\_\_) (an immunity, to wit \_\_\_\_\_), c o m m u n i c a t e to \_\_\_\_\_ a threat to (here describe the threat).

**54. Article 128—Assault**

a. *Text.*

“(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to

do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who—

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon; is guilty of aggravated assault and shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Simple assault.*

(a) That the accused attempted or offered to do bodily harm to a certain person; and

(b) That the attempt or offer was done with unlawful force or violence.

(2) *Assault consummated by a battery.*

(a) That the accused did bodily harm to a certain person; and

(b) That the bodily harm was done with unlawful force or violence.

(3) *Assaults permitting increased punishment based on status of victim.*

(a) *Assault upon a commissioned, warrant, noncommissioned, or petty officer.*

(i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;

(ii) That the attempt, offer, or bodily harm was done with unlawful force or violence;

(iii) That the person was a commissioned, warrant, noncommissioned, or petty officer; and

(iv) That the accused then knew that the person was a commissioned, warrant, noncommissioned, or petty officer.

(b) *Assault upon a sentinel or lookout in the execution of duty, or upon a person in the execution of law enforcement duties.*

(i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;

(ii) That the attempt, offer, or bodily harm was done with unlawful force or violence;

(iii) That the person was a sentinel or lookout in the execution of duty or was a person who then had and was in the execution of security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties; and

(iv) That the accused then knew that the person was a sentinel or lookout in the execution of duty or was a person who then had and was in the execution of security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties.

(c) *Assault consummated by a battery upon a child under 16 years.*

(i) That the accused did bodily harm to a certain person;

(ii) That the bodily harm was done with unlawful force or violence; and

(iii) That the person was then a child under the age of 16 years.

(4) *Aggravated assault.*

(a) *Assault with a dangerous weapon or other means of force likely to produce death or grievous bodily harm.*

(i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;

(ii) That the accused did so with a certain weapon, means, or force;

(iii) That the attempt, offer, or bodily harm was done with unlawful force or violence; and

(iv) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

(Note: When a loaded firearm was used, add the following element)

(v) That the weapon was a loaded firearm.

(b) *Assault in which grievous bodily harm is intentionally inflicted.*

(i) That the accused assaulted a certain person;

(ii) That grievous bodily harm was thereby inflicted upon such person;

(iii) That the grievous bodily harm was done with unlawful force or violence; and

(iv) That the accused, at the time, had the specific intent to inflict grievous bodily harm.

(Note: When a loaded firearm was used, add the following element)

(v) That the injury was inflicted with a loaded firearm.

c. *Explanation.*

(1) *Simple assault.*

(a) *Definition of assault.* An “assault” is an at-

tempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. It must be done without legal justification or excuse and without the lawful consent of the person affected. “Bodily harm” means any offensive touching of another, however slight.

(b) *Difference between “attempt” and “offer” type assaults.*

(i) *Attempt type assault.* An “attempt” type assault requires a specific intent to inflict bodily harm, and an overt act—that is, an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. An attempt type assault may be committed even though the victim had no knowledge of the incident at the time.

(ii) *Offer type assault.* An “offer” type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required.

(iii) *Examples.*

(A) If Doe swings a fist at Roe’s head intending to hit Roe but misses, Doe has committed an attempt type assault, whether or not Roe is aware of the attempt.

(B) If Doe swings a fist in the direct of Roe’s head either intentionally or as a result of culpable negligence, and Roe sees the blow coming and is thereby put in apprehension of being struck, Doe has committed an offer type assault whether or not Doe intended to hit Roe.

(C) If Doe swings at Roe’s head, intending to hit it, and Roe sees the blow coming and is thereby put in apprehension of being struck, Doe has committed both on offer and an attempt type assault.

(D) If Doe swings at Roe’s head simply to frighten Roe, not intending to hit Roe, and Roe does not see the blow and is not placed in fear, then no assault of any type has been committed.

(c) *Situations not amounting to assault.*

(i) *Mere preparation.* Preparation not amounting to an overt act, such as picking up a stone without any attempt or offer to throw it, does not constitute an assault.

(ii) *Threatening words.* The use of threatening words alone does not constitute an assault. However, if the threatening words are accompanied by a

¶54.c.(1)(c)(ii)

menacing act or gesture, there may be an assault, since the combination constitutes a demonstration of violence.

(iii) *Circumstances negating intent to harm.*

If the circumstances known to the person menaced clearly negate an intent to do bodily harm there is no assault. Thus, if a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of an intention not to strike, there is no assault. For example, if Doe raises a stick and shakes it at Roe within striking distance saying, "If you weren't an old man, I would knock you down," Doe has committed no assault. However, an offer to inflict bodily injury upon another instantly if that person does not comply with a demand which the assailant has no lawful right to make is an assault. Thus, if Doe points a pistol at Roe and says, "If you don't hand over your watch, I will shoot you," Doe has committed an assault upon Roe. *See also* paragraph 47 (robbery) of this part.

(d) *Situations not constituting defenses to assault.*

(i) *Assault attempt fails.* It is not a defense to a charge of assault that for some reason unknown to the assailant, an assault attempt was bound to fail. Thus, if a person loads a rifle with what is believed to be a good cartridge and, pointing it at another, pulls the trigger, that person may be guilty of assault although the cartridge was defective and did not fire. Likewise, if a person in a house shoots through the roof at a place where a policeman is believed to be, that person may be guilty of assault even though the policeman is at another place on the roof.

(ii) *Retreating victim.* An assault is complete if there is a demonstration of violence and an apparent ability to inflict bodily injury causing the person at whom it was directed to reasonably apprehend that unless the person retreats bodily harm will be inflicted. This is true even though the victim retreated and was never within actual striking distance of the assailant. There must, however, be an apparent present ability to inflict the injury. Thus, to aim a pistol at a person at such a distance that it clearly could not injure would not be an assault.

(2) *Battery.*

(a) *In general.* A "battery" is an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm.

(b) *Application of force.* The force applied in a

battery may have been directly or indirectly applied. Thus, a battery can be committed by inflicting bodily injury on a person through striking the horse on which the person is mounted causing the horse to throw the person, as well as by striking the person directly.

(c) *Examples of battery.* It may be a battery to spit on another, push a third person against another, set a dog at another which bites the person, cut another's clothes while the person is wearing them though without touching or intending to touch the person, shoot a person, cause a person to take poison, or drive an automobile into a person. A person who, although excused in using force, uses more force than is required, commits a battery. Throwing an object into a crowd may be a battery on anyone whom the object hits.

(d) *Situations not constituting battery.* If bodily harm is inflicted unintentionally and without culpable negligence, there is no battery. It is also not a battery to touch another to attract the other's attention or to prevent injury.

(3) *Assaults permitting increased punishment based on status of victims.*

(a) *Assault upon a commissioned, warrant, noncommissioned, or petty officer.* The maximum punishment is increased when assault is committed upon a commissioned officer of the armed forces of the United States, or of a friendly foreign power, or upon a warrant, noncommissioned, or petty officer of the armed forces of the United States. Knowledge of the status of the victim is an essential element of the offense and may be proved by circumstantial evidence. It is not necessary that the victim be superior in rank or command to the accused, that the victim be in the same armed force, or that the victim be in the execution of office at the time of the assault.

(b) *Assault upon a sentinel or lookout in the execution of duty, or upon a person in the execution of law enforcement duties.* The maximum punishment is increased when assault is committed upon a sentinel or lookout in the execution of duty or upon a person who was then performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties. Knowledge of the status of the victim is an essential element of this offense and may be proved by circumstantial evidence. *See* paragraph 38c(4) for the definition of "sentinel or lookout."

(c) *Assault consummated by a battery upon a child under 16 years of age.* The maximum punishment is increased when assault consummated by a battery is committed upon a child under 16 years of age. Knowledge that the person assaulted was under 16 years of age is not an element of this offense.

(4) *Aggravated assault.*

(a) *Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.*

(i) *Dangerous weapon.* A weapon is dangerous when used in a manner likely to produce death or grievous bodily harm.

(ii) *Other means or force.* The phrase “other means or force” may include any means or instrumentality not normally considered a weapon. When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be inferred that the means or force is “likely” to produce that result. The use to which a certain kind of instrument is ordinarily put is irrelevant to the question of its method of employment in a particular case. Thus, a bottle, beer glass, a rock, a bunk adaptor, a piece of pipe, a piece of wood, boiling water, drugs, or a rifle butt may be used in a manner likely to inflict death or grievous bodily harm. On the other hand, an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means of force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded.

(iii) *Grievous bodily harm.* “Grievous bodily harm” means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

(iv) *Death or injury not required.* It is not necessary that death or grievous bodily harm be actually inflicted to prove assault with a dangerous weapon or means likely to produce grievous bodily harm.

(b) *Assault in which grievous bodily harm is intentionally inflicted.*

(i) *In general.* It must be proved that the accused specifically intended to and did inflict grievous bodily harm. Culpable negligence will not suffice.

(ii) *Proving intent.* Specific intent may be proved by circumstantial evidence. When grievous bodily harm has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended. On the other hand, that inference might not be drawn if a person struck another with a fist in a sidewalk fight even if the victim fell so that the victim’s head hit the curbstone and a skull fracture resulted. It is possible, however, to commit this kind of aggravated assault with the fists, as when the victim is held by one of several assailants while the others beat the victim with their fists and break a nose, jaw, or rib.

(iii) *Grievous bodily harm.* See subparagraph (4)(a)(iii).

d. *Lesser included offenses.*

(1) *Simple assault.* None

(2) *Assault consummated by a battery.* Article 128—simple assault

(3) *Assault upon a commissioned, warrant, non-commissioned, or petty officer.* Article 128—simple assault; assault consummated by a battery

(4) *Assault upon a sentinel or lookout in the execution of duty, or upon a person in the execution of police duties.* Article 128—simple assault; assault consummated by a battery

(5) *Assault consummated by a battery upon a child under 16 years.* Article 128—simple assault; assault consummated by a battery

(6) *Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.* Article 128—simple assault; assault consummated by a battery

(7) *Assault in which grievous bodily harm is intentionally inflicted.* Article 128—assault with a dangerous weapon; simple assault; assault consummated by a battery

e. *Maximum punishment.*

(1) *Simple assault.*

(A) *Generally.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(B) *When committed with an unloaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) *Assault consummated by a battery.* Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

¶54.e.(3)

(3) *Assault upon a commissioned officer of the armed forces of the United States or of a friendly foreign power, not in the execution of office.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(4) *Assault upon a warrant officer, not in the execution of office.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(5) *Assault upon a noncommissioned or petty officer, not in the execution of office.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(6) *Assault upon a sentinel or lookout in the execution of duty, or upon any person who, in the execution of office, is performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(7) *Assault consummated by a battery upon a child under 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(8) *Assault with a dangerous weapon or other means of force to produce death or grievous bodily harm.*

(a) *When committed with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

(b) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(9) *Assault in which grievous bodily harm is intentionally inflicted.*

(a) *When the injury is inflicted with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(b) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *Simple assault.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, assault \_\_\_\_\_ by

(striking at him/her with a \_\_\_\_\_) (\_\_\_\_\_).

(2) *Assault consummated by a battery.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, unlawfully (strike) (\_\_\_\_\_ ) \_\_\_\_\_ (on) (in) the \_\_\_\_\_ with \_\_\_\_\_.

(3) *Assault upon a commissioned officer.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, assault \_\_\_\_\_, who then was and was then known by the accused to be a commissioned officer of ( \_\_\_\_\_, a friendly foreign power) (the United States(Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)) by \_\_\_\_\_.

(4) *Assault upon a warrant, noncommissioned, or petty officer.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, assault \_\_\_\_\_, who then was and was then known by the accused to be a (warrant) (noncommissioned) (petty) officer of the United States (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard), by \_\_\_\_\_.

(5) *Assault upon a sentinel or lookout.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, assault \_\_\_\_\_, who then was and was then known by the accused to be a (sentinel) (lookout) in the execution of his/her duty, ((in) (on) the \_\_\_\_\_) by \_\_\_\_\_.

(6) *Assault upon a person in the execution of law enforcement duties.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, assault \_\_\_\_\_, who then was and was then known by the accused to be a person then having and in the execution of (Air Force security police) (military police) (shore patrol) (master at arms) ((military) (civilian) law enforcement)) duties, by \_\_\_\_\_.

(7) *Assault consummated by a battery upon a child under 16 years.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, unlawfully (strike) (\_\_\_\_\_ ) \_\_\_\_\_ a child under the age of 16 years, (in) (on) the \_\_\_\_\_ with \_\_\_\_\_.

(8) *Assault, aggravated—with a dangerous weapon, means, or force.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, commit an assault upon \_\_\_\_\_ by (shooting) (pointing) (striking) (cutting) (\_\_\_\_\_ ) (at him/her) (him/her) (in) (on) (the \_\_\_\_\_ ) with (a dangerous weapon) (a \_\_\_\_\_ ) (means) (force) likely to produce death or grievous bodily harm), to wit: a (loaded firearm) (pickax) (bayonet) (club) (\_\_\_\_\_ ).

(9) *Assault, aggravated—inflicting grievous bodily harm.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, commit an assault upon \_\_\_\_\_ by (shooting) (striking) (cutting) (\_\_\_\_\_ ) (him/her) (on) the \_\_\_\_\_ with a (loaded firearm) (club) (rock) (brick) (\_\_\_\_\_ ) and did thereby intentionally inflict grievous bodily harm upon him/her, to wit: a (broken leg) (deep cut) (fractured skull) (\_\_\_\_\_ ).

## 55. Article 129—Burglary

### a. Text.

“Any person subject to this chapter who, with intent to commit an offense punishable under sections 918-928 of this title (articles 118-128), breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct.”

### b. Elements.

(1) That the accused unlawfully broke and entered the dwelling house of another;

(2) That both the breaking and entering were done in the nighttime; and

(3) That the breaking and entering were done with the intent to commit an offense punishable under Article 118 through 128, except Article 123a.

### c. Explanation.

(1) *In general.* “Burglary” is the breaking and entering in the nighttime of the dwelling house of another, with intent to commit an offense punishable under Articles 118 through 128, except 123a. In addition, an intent to commit an offense which, although not covered by Article 118 through 128, necessarily includes an offense within one of these articles, satisfies the intent element of this article. This includes, for example, assaults punishable under Article 134 which necessarily include simple assault under Article 128.

(2) *Breaking.* There must be a breaking, actual or constructive. Merely to enter through a hole left in the wall or roof or through an open window or door will not constitute a breaking; but if a person moves any obstruction to entry of the house without which movement the person could not have entered, the person has committed a “breaking.” Opening a closed door or window or other similar fixture, opening wider a door or window already partly open but insufficient for the entry, or cutting out the glass of a window or the netting of a screen is a sufficient breaking. The breaking of an inner door by one who has entered the house without breaking, or by a person lawfully within the house who has no authority to enter the particular room, is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with the requisite intent, burglary is not committed. There is a constructive breaking when the entry is gained by a trick, such as concealing oneself in a box; under false pretense, such as impersonating a gas or telephone inspector; by intimidating the occupants through violence or threats into opening the door; through collusion with a confederate, an occupant of the house; or by descending a chimney, even if only a partial descent is made and no room is entered.

(3) *Entry.* An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient. Insertion into the house of a tool or other instrument is also a sufficient entry, unless the insertion is solely to facilitate the breaking or entry.

(4) *Nighttime.* Both the breaking and entry must be in the nighttime. “Nighttime” is the period be-

¶55.c.(4)

tween sunset and sunrise when there is not sufficient daylight to discern a person's face.

(5) *Dwelling house of another.* To constitute burglary the house must be the dwelling house of another. "Dwelling house" includes outbuildings within the common inclosure, farmyard, or cluster of buildings used as a residence. Such an area is the "curtilage." A store is not a dwelling house unless part of, or also used as, a dwelling house, as when the occupant uses another part of the same building as a dwelling, or when the store is habitually slept in by family members or employees. The house must be used as a dwelling at the time of the breaking and entering. It is not necessary that anyone actually be in it at the time of the breaking and entering, but if the house has never been occupied at all or has been left without any intention of returning, it is not a dwelling house. Separate dwellings within the same building, such as a barracks room, apartment, or a room in a hotel, are subjects of burglary by other residents or guests, and in general by the owner of the building. A tent is not a subject of burglary.

(6) *Intent to commit offense.* Both the breaking and entry must be done with the intent to commit in the house an offense punishable under Articles 118 through 128, except 123a. If, after the breaking and entering, the accused commits one or more of these offenses, it may be inferred that the accused intended to commit the offense or offenses at the time of the breaking and entering. If the evidence warrants, the intended offense may be separately charged. It is immaterial whether the offense intended is committed or even attempted. If the offense is intended, it is no defense that its commission was impossible.

(7) *Separate offense.* If the evidence warrants, the intended offense in the burglary specification may be separately charged.

d. *Lesser included offenses.*

- (1) Article 130—housebreaking
- (2) Article 134—unlawful entry
- (3) Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, at \_\_\_\_\_, (subject-matter jurisdiction

data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, in the nighttime, unlawfully break and enter the (dwelling house) (\_\_\_\_\_ within the curtilage) of \_\_\_\_\_, with intent to commit (murder) (larceny) (\_\_\_\_\_) therein.

**56. Article 130—Housebreaking**

a. *Text.*

"Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct."

b. *Elements.*

(1) That the accused unlawfully entered a certain building or structure of a certain other person; and

(2) That the unlawful entry was made with the intent to commit a criminal offense therein.

c. *Explanation.*

(1) *Scope of offense.* The offense of housebreaking is broader than burglary in that the place entered is not required to be a dwelling house; it is not necessary that the place be occupied; it is not essential that there be a breaking; the entry may be either in the night or in the daytime; and the intent need not be to commit one of the offenses made punishable under Articles 118 through 128.

(2) *Intent.* The intent to commit some criminal offense is an essential element of housebreaking and must be alleged and proved to support a conviction of this offense. If, after the entry the accused committed a criminal offense inside the building or structure, it may be inferred that the accused intended to commit that offense at the time of the entry.

(3) *Criminal offense.* Any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense, is a "criminal offense."

(4) *Building, structure.* "Building" includes a room, shop, store, office, or apartment in a building. "Structure" refers only to those structures which are in the nature of a building or dwelling. Examples of these structures are a stateroom, hold, or other compartment of a vessel, an inhabitable trailer, an inclosed truck or freight car, a tent, and a houseboat. It is not necessary that the building or structure be in use at the time of the entry.

(5) *Entry.* See paragraph 55c(3).

(6) *Separate offense.* If the evidence warrants, the intended offense in the housebreaking specification may be separately charged.

d. *Lesser included offenses.*

(1) Article 134—unlawful entry

(2) Article 80—attempts

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

f. *Sample specification.*

In that \_\_\_\_\_, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, unlawfully enter a (dwelling) (room) (bank) (store) (warehouse) (shop) (tent) (stateroom) (\_\_\_\_\_), the property of \_\_\_\_\_, with intent to commit a criminal offense, to wit: \_\_\_\_\_, therein.

## 57. Article 131—Perjury

a. *Text.*

“Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly—

(1) upon a lawful oath or in any form allowed by law to be substituted for an oath, gives any false testimony material to the issue or matter of inquiry; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, subscribes any false statement material to the issue or matter of inquiry; is guilty of perjury and shall be punished as a court-martial may direct.”

b. *Elements.*

(1) *Giving false testimony.*

(a) That the accused took an oath or affirmation in a certain judicial proceeding or course of justice;

(b) That the oath or affirmation was administered to the accused in a matter in which an oath or affirmation was required or authorized by law;

(c) That the oath or affirmation was administered by a person having authority to do so;

(d) That upon the oath or affirmation that accused willfully gave certain testimony;

(e) That the testimony was material;

(f) That the testimony was false; and

(g) That the accused did not then believe the testimony to be true.

(2) *Subscribing false statement.*

(a) That the accused subscribed a certain statement in a judicial proceeding or course of justice;

(b) That in the declaration, certification, verification, or statement under penalty of perjury, the accused declared, certified, verified, or stated the truth of that certain statement;

(c) That the accused willfully subscribed the statement;

(d) That the statement was material;

(e) That the statement was false; and

(f) That the accused did not then believe the statement to be true.

c. *Explanation.*

(1) *In general.* “Judicial proceeding” includes a trial by court-martial and “course of justice” includes an investigation conducted under Article 32. If the accused is charged with having committed perjury before a court-martial, it must be shown that the court-martial was duly constituted.

(2) *Giving false testimony.*

(a) *Nature.* The testimony must be false and must be willfully and corruptly given; that is, it must be proved that the accused gave the false testimony willfully and did not believe it to be true. A witness may commit perjury by testifying to the truth of a matter when in fact the witness knows nothing about it at all or is not sure about it, whether the thing is true or false in fact. A witness may also commit perjury in testifying falsely as to a belief, remembrance, or impression, or as to a judgment or opinion. It is no defense that the witness voluntarily appeared, that the witness was incompetent as a witness, or that the testimony was given in response to questions that the witness could have declined to answer.

(b) *Material matter.* The false testimony must be with respect to a material matter, but that matter need not be the main issue in the case. Thus, perjury may be committed by giving false testimony with respect to the credibility of a material witness or in an affidavit in support of a request for a continuance, as well as by giving false testimony with respect to a fact from which a legitimate inference

¶57.c.(2)(b)

may be drawn as to the existence or nonexistence of a fact in issue.

(c) *Proof.* The falsity of the allegedly perjured statement cannot be proved by circumstantial evidence alone, except with respect to matters which by their nature are not susceptible of direct proof. The falsity of the statement cannot be proved by the testimony of a single witness unless that testimony directly contradicts the statement and is corroborated by other evidence either direct or circumstantial, tending to prove the falsity of the statement. However, documentary evidence directly disproving the truth of the statement charged to have been perjured need not be corroborated if: the document is an official record shown to have been well known to the accused at the time the oath was taken; or the documentary evidence originated from the accused—or had in any manner been recognized by the accused as containing the truth—before the allegedly perjured statement was made.

(d) *Oath.* The oath must be one recognized or authorized by law and must be duly administered by one authorized to administer it. When a form of oath has been prescribed, a literal following of that form is not essential; it is sufficient if the oath administered conforms in substance to the prescribed form. “Oath” includes an affirmation when the latter is authorized in lieu of an oath.

(e) *Belief of accused.* The fact that the accused did not believe the statement to be true may be proved by testimony of one witness without corroboration or by circumstantial evidence.

(3) *Subscribing false statement.* See subparagraphs (1) and (2), above, as applicable. Section 1746 of title 28, United States Code, provides for subscribing to the truth of a document by signing it expressly subject to the penalty for perjury. The signing must take place in a judicial proceeding or course of justice—for example, if a witness signs under penalty of perjury summarized testimony given at an Article 32 investigation. It is not required that the document be sworn before a third party. Section 1746 does not change the requirement that a deposition be given under oath or alter the situation where an oath is required to be taken before a specific person.

d. *Lesser included offense.* Article 80—attempts.

e. *Maximum punishment.* Dishonorable discharge,

IV-90

forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *Giving false testimony.*

In that \_\_\_\_\_ (personal jurisdiction data), having taken a lawful (oath) (affirmation) in a (trial by \_\_\_\_\_ court - martial of \_\_\_\_\_) (trial by a court of competent jurisdiction, to wit: \_\_\_\_\_ of \_\_\_\_\_) (deposition for use in a trial by \_\_\_\_\_ of \_\_\_\_\_) (\_\_\_\_\_ ) that he/she would (testify) (depose) truly, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, willfully, corruptly, and contrary to such (oath) (affirmation), (testify) (depose) falsely in substance that \_\_\_\_\_, which (testimony) (deposition) was upon a material matter and which he/she did not then believe to be true.

(2) *Subscribing false statement.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, in a (judicial proceeding) (course of justice), and in a (declaration) (certification) (verification) (statement) under penalty of perjury pursuant to section 1746 of title 28, United States Code, willfully and corruptly subscribed a false statement material to the (issue) (matter of inquiry), to wit: \_\_\_\_\_, which statement was false in that \_\_\_\_\_, and which statement he/she did not then believe to be true.

**58. Article 132—Frauds against the United States**

a. *Text.*

“Any person subject to this chapter—”

(1) “who, knowing it to be false or fraudulent—”

(a) “makes any claim against the United States or any officer thereof; or”

(b) “presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof;”

(2) “who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof—”

(a) “makes or uses any writing or other paper

knowing it to contain any false or fraudulent statements;”

(b) “makes any oath to any fact or to any writing or other paper knowing the oath to be false; or”

(c) “forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited;”

(3) “who, having charge, possession, custody, or control of any money, or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive it, any amount thereof less than that for which he receives a certificate or receipt; or”

(4) “who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; shall, upon conviction, be punished as a court-martial may direct.”

b. *Elements.*

(1) *Making a false or fraudulent claim.*

(a) That the accused made a certain claim against the United States or an officer thereof;

(b) That the claim was false or fraudulent in certain particulars; and

(c) That the accused then knew that the claim was false or fraudulent in these particulars.

(2) *Presenting for approval or payment a false or fraudulent claim.*

(a) That the accused presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States or an officer thereof;

(b) That the claim was false or fraudulent in certain particulars; and

(c) That the accused then knew that the claim was false or fraudulent in these particulars.

(3) *Making or using a false writing or other paper in connection with claims.*

(a) That the accused made or used a certain writing or other paper;

(b) That certain material statements in the writing or other paper were false or fraudulent;

(c) That the accused then knew the statements were false or fraudulent; and

(d) That the act of the accused was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

(4) *False oath in connection with claims.*

(a) That the accused made an oath to a certain fact or to a certain writing or other paper;

(b) That the oath was false in certain particulars;

(c) That the accused then knew it was false; and

(d) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

(5) *Forgery of signature in connection with claims.*

(a) That the accused forged or counterfeited the signature of a certain person on a certain writing or other paper; and

(b) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

(6) *Using forged signature in connection with claims.*

(a) That the accused used the forged or counterfeited signature of a certain person;

(b) That the accused then knew that the signature was forged or counterfeited; and

(c) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

(7) *Delivering less than amount called for by receipt.*

(a) That the accused had charge, possession, custody, or control of certain money or property of the United States furnished or intended for the armed forces thereof;

(b) That the accused obtained a certificate or receipt for a certain amount or quantity of that money or property;

(c) That for the certificate or receipt the accused knowingly delivered to a certain person having authority to receive it an amount or quantity of

¶58.b.(7)(c)

money or property less than the amount or quantity thereof specified in the certificate or receipt; and

(d) That the undelivered money or property was of a certain value.

(8) *Making or delivering receipt without having full knowledge that it is true.*

(a) That the accused was authorized to make or deliver a paper certifying the receipt from a certain person of certain property of the United States furnished or intended for the armed forces thereof;

(b) That the accused made or delivered to that person a certificate or receipt;

(c) That the accused made or delivered the certificate without having full knowledge of the truth of a certain material statement or statements therein;

(d) That the act was done with intent to defraud the United States; and

(e) That the property certified as being received was of a certain value.

c. *Explanation.*

(1) *Making a false or fraudulent claim.*

(a) *Claim.* A “claim” is a demand for a transfer of ownership of money or property and does not include requisitions for the mere use of property. This article applies only to claims against the United States or any officer thereof as such, and not to claims against an officer of the United States in that officer’s private capacity.

(b) *Making a claim.* Making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another. The mere writing of a paper in the form of a claim, without any further act to cause the paper to become a demand against the United States or an officer thereof, does not constitute making a claim. However, any act placing the claim in official channels constitutes making a claim, even if that act does not amount to presenting a claim. It is not necessary that the claim be allowed or paid or that it be made by the person to be benefited by the allowance or payment. *See* also subparagraph (2), below.

(c) *Knowledge.* The claim must be made with knowledge of its fictitious or dishonest character. This article does not proscribe claims, however groundless they may be, that the maker believes to be valid, or claims that are merely made negligently or without ordinary prudence.

(2) *Presenting for approval or payment a false or fraudulent claim.*

(a) *False and fraudulent.* False and fraudulent claims include not only those containing some material false statement, but also claims which the claimant knows to have been paid or for some other reason the claimant knows the claimant is not authorized to present or upon which the claimant knows the claimant has no right to collect.

(b) *Presenting a claim.* The claim must be presented, directly or indirectly, to some person having authority to pay it. The person to whom the claim is presented may be identified by position or authority to approve the claim, and need not be identified by name in the specification. A false claim may be tacitly presented, as when a person who knows that there is no entitlement to certain pay accepts it nevertheless without disclosing a disqualification, even though the person may not have made any representation of entitlement to the pay. For example, a person cashing a pay check which includes an amount for a dependency allowance, knowing at the time that the entitlement no longer exists because of a change in that dependency status, has tacitly presented a false claim. *See also* subparagraph (1), above.

(3) *Making or using a false writing or other paper in connection with claims.* The false or fraudulent statement must be material, that is, it must have a tendency to mislead governmental officials in their consideration or investigation of the claim. The offense of making a writing or other paper known to contain a false or fraudulent statement for the purpose of obtaining the approval, allowance, or payment of a claim is complete when the writing or paper is made for that purpose, whether or not any use of the paper has been attempted and whether or not the claim has been presented. *See also* the explanation in subparagraph (1) and (2), above.

(4) *False oath in connection with claims.* *See* subparagraphs (1) and (2), above.

(5) *Forgery of signature in connection with claims.* Any fraudulent making of the signature of another is forging or counterfeiting, whether or not an attempt is made to imitate the handwriting. *See* paragraph 48(c) and subparagraph (1) and (2), above.

(6) *Delivering less than amount called for by receipt.* It is immaterial by what means—whether

deceit, collusion, or otherwise—the accused effected the transaction, or what was the accused’s purpose.

(7) *Making or delivering receipt without having full knowledge that it is true.* When an officer or other person subject to military law is authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, and a receipt or other paper is presented for signature stating that a certain amount of supplies has been furnished by a certain contractor, it is that person’s duty before signing the paper to know that the full amount of supplies therein stated to have been furnished has in fact been furnished, and that the statements contained in the paper are true. If the person signs the paper with intent to defraud the United States and without that knowledge, that person is guilty of a violation of this section of the article. If the person signs the paper with knowledge that the full amount was not received, it may be inferred that the person intended to defraud the United States.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) Article 132(1) and (2). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) Article 132(3) and (4).

(a) *When amount is \$500.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *When amount is over \$500.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *Making false claim.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (by preparing (a voucher) (\_\_\_\_\_) for presentation for approval or payment) (\_\_\_\_\_), make a claim against the (United States) (finance officer at \_\_\_\_\_) (\_\_\_\_\_) in the amount of \$ \_\_\_\_\_ for (private property alleged to have been (lost) (destroyed) in the military service) (\_\_\_\_\_), which claim was (false) (fraudulent) (false and fraudulent) in the amount of \$ \_\_\_\_\_ in that \_\_\_\_\_ and was then known by the

said \_\_\_\_\_ to be (false) (fraudulent) (false and fraudulent).

(2) *Presenting false claim.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, by presenting (a voucher)(\_\_\_\_\_) to \_\_\_\_\_, an officer of the United States duly authorized to (approve) (pay) (approve and pay) such claim, present for (approval) (payment) (approval and payment) a claim against the (United States) (finance officer at \_\_\_\_\_) (\_\_\_\_\_) in the amount of \$ \_\_\_\_\_ for (services alleged to have been rendered to the United States by \_\_\_\_\_ during \_\_\_\_\_) (\_\_\_\_\_), which claim was (false) (fraudulent) (false and fraudulent) in the amount of \$ \_\_\_\_\_ in that \_\_\_\_\_, and was then known by the said \_\_\_\_\_ to be (false) (fraudulent) (false and fraudulent).

(3) *Making or using false writing.*

In that \_\_\_\_\_ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment), of a claim against the United States in the amount of \$ \_\_\_\_\_, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (make) (use) (make and use) a certain (writing) (paper), to wit: \_\_\_\_\_, which said (writing) (paper), as he/she, the said \_\_\_\_\_, then knew, contained a statement that \_\_\_\_\_, which statement was (false) (fraudulent) (false and fraudulent) in that \_\_\_\_\_, and was then known by the said \_\_\_\_\_ to be (false) (fraudulent) (false and fraudulent).

(4) *Making false oath.*

In that \_\_\_\_\_ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, make an oath (to the fact that \_\_\_\_\_) (to a certain (writing) (paper), to wit: \_\_\_\_\_, to the effect that \_\_\_\_\_), which said oath was false in

¶58.f.(4)

that \_\_\_\_\_, and was then known by the said \_\_\_\_\_ to be false.

(5) *Forging or counterfeiting signature.*

In that \_\_\_\_\_ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (forge) (counterfeit) (forge and counterfeit) the signature of \_\_\_\_\_ upon a \_\_\_\_\_ in words and figures as follows:\_\_\_\_\_.

(6) *Using forged signature.*

In that \_\_\_\_\_, for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, use the signature of \_\_\_\_\_ on a certain (writing) (paper), to wit:\_\_\_\_\_, then knowing such signature to be (forged) (counterfeited) (forged and counterfeited).

(7) *Paying amount less than called for by receipt.*

In that \_\_\_\_\_ (personal jurisdiction data), having (charge) (possession) (custody) (control) of (money) (\_\_\_\_\_) of the United States, (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, knowingly deliver to \_\_\_\_\_, the said \_\_\_\_\_ having authority to receive the same, (an amount) (\_\_\_\_\_), which, as he/she, \_\_\_\_\_, then knew, was (\$ \_\_\_\_\_) (\_\_\_\_\_) less than the (amount) (\_\_\_\_\_) for which he/she received a (certificate) (receipt) from the said \_\_\_\_\_.

(8) *Making receipt without knowledge of the facts.*

In that \_\_\_\_\_ (personal jurisdiction data), being authorized to (make) (deliver) (make and deliver) a paper certifying the receipt of property of the United States (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, without having full knowledge

of the statement therein contained and with intent to defraud the United States, (make) (deliver) (make and deliver) to \_\_\_\_\_, such a writing, in words and figures as follows:\_\_\_\_\_, the property therein certified as received being of a value of about \$\_\_\_\_\_.

**59. Article 133—Conduct unbecoming an officer and gentleman**

a. *Text.*

“Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.”

b. *Elements.*

(1) That the accused did or omitted to do certain acts; and

(2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

c. *Explanation.*

(1) *Gentleman.* As used in this article, “gentleman” includes both male and female commissioned officers, cadets, and midshipmen.

(2) *Nature of offense.* Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer’s character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person’s standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person’s standing as an officer, cadet, or midshipman or the person’s character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a

gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121. Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.

(3) *Examples of offenses.* Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year.

f. *Sample specifications.*

(1) *Copying or using examination paper.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, while undergoing a written examination on the subject of \_\_\_\_\_, wrongfully and dishonorably (receive) (request) unauthorized aid by ((using) (copying) the examination paper of \_\_\_\_\_)) (\_\_\_\_\_).

(2) *Drunk or disorderly.*

In that \_\_\_\_\_ (personal jurisdiction data), was, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, in a public place, to wit: \_\_\_\_\_, (drunk) (disorderly) (drunk and disorderly) while in uniform, to the disgrace of the armed forces.

## 60. Article 134—General article

a. *Text.*

“Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good

order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.”

b. *Elements.* The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital, the proof must establish every element of the crime or offense as required by the applicable law. If the conduct is punished as a disorder or neglect to the prejudice of good order and discipline in the armed forces, or of a nature to bring discredit upon the armed forces, then the following proof is required:

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

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

c. *Explanation.*

(1) *In general.* Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as “clauses 1, 2, and 3” of Article 134. Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law including law made applicable through the Federal Assimilative Crimes Act, *see* subsection (4) below. If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article. *See* subparagraph (5)(a) below. However, *see* paragraph 59 c for offenses committed by commissioned officers, cadets, and midshipmen.

(2) *Disorders and neglects to the prejudice of good order and discipline in the armed forces (clause 1).*

(a) *To the prejudice of good order and discipline.* “To the prejudice of good order and discipline” refers only to acts directly prejudicial to good order and discipline and not to acts which are preju-

¶60.c.(2)(a)

dicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, this article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable. An act in violation of a local civil law or of a foreign law may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the armed forces. However, *see* R.C.M. 203 concerning subject-matter jurisdiction.

(b) *Breach of custom of the service.* A breach of a custom of the service may result in a violation of clause 1 of Article 134. In its legal sense, “custom” means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned. Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear if the regulation is punitive. *See* paragraph 16c.

(3) *Conduct of a nature to bring discredit upon the armed forces (clause 2).* “Discredit” means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Acts in violation of a local civil law or a foreign law may be punished if they are of a nature to bring discredit upon the armed forces. However, *see* R.C.M. 203 concerning subject-matter jurisdiction.

(4) *Crimes and offenses not capital (clause 3).*

(a) *In general.* State and foreign laws are not included within the crimes and offenses not capital referred to in this clause of Article 134 and violations thereof may not be prosecuted as such except when State law becomes Federal law of local application under section 13 of title 18 of the United States Code (Federal Assimilative Crimes Act— *see* subparagraph (4)(c) below). For the purpose of court-martial jurisdiction, the laws which may be

applied under clause 3 of Article 134 are divided into two groups: crimes and offenses of unlimited application (crimes which are punishable regardless where they may be committed), and crimes and offenses of local application (crimes which are punishable only if committed in areas of federal jurisdiction).

(b) *Crimes and offenses of unlimited application.* Certain noncapital crimes and offenses prohibited by the United States Code are made applicable under clause 3 of Article 134 to all persons subject to the code regardless where the wrongful act or omission occurred. Examples include: counterfeiting (18 U.S.C. § 471), and various frauds against the Government not covered by Article 132.

(c) *Crimes and offenses of local application.*

(i) *In general.* A person subject to the code may not be punished under clause 3 of Article 134 for an offense that occurred in a place where the law in question did not apply. For example, a person may not be punished under clause 3 of Article 134 when the act occurred in a foreign country merely because that act would have been an offense under the United States Code had the act occurred in the United States. Regardless where committed, such an act might be punishable under clauses 1 or 2 of Article 134. There are two types of congressional enactments of local application: specific federal statutes (defining particular crimes), and a general federal statute, the Federal Assimilative Crimes Act (which adopts certain state criminal laws).

(ii) *Federal Assimilative Crimes Act (18 U.S.C. § 13).* The Federal Assimilative Crimes Act is an adoption by Congress of state criminal laws for areas of exclusive or concurrent federal jurisdiction, provided federal criminal law, including the UCMJ, has not defined an applicable offense for the misconduct committed. The Act applies to state laws validly existing at the time of the offense without regard to when these laws were enacted, whether before or after passage of the Act, and whether before or after the acquisition of the land where the offense was committed. For example, if a person committed an act on a military installation in the United States at a certain location over which the United States had either exclusive or concurrent jurisdiction, and it was not an offense specifically defined by federal law (including the UCMJ), that person could be punished for that act by a court-martial if it was a violation of a noncapital offense

under the law of the State where the military installation was located. This is possible because the Act adopts the criminal law of the state wherein the military installation is located and applies it as though it were federal law. The text of the Act is as follows: Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(5) *Limitations on Article 134.*

(a) *Preemption doctrine.* The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking—for example, intent—there can be no larceny or larceny-type offense, either under Article 121 or, because of preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

(b) *Capital offense.* A capital offense may not be tried under Article 134.

(6) *Drafting specifications for Article 134 offenses.*

(a) *In general.* A specification alleging a violation of Article 134 need not expressly allege that the conduct was “a disorder or neglect,” that it was “of a nature to bring discredit upon the armed forces,” or that it constituted “a crime or offense not capital.” The same conduct may constitute a disorder or neglect to the prejudice of good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces.

(b) *Specifications under clause 3.* When alleging a clause 3 violation, each element of the federal or assimilated statute must be alleged expressly or by necessary implication. In addition, the federal or assimilated statute should be identified.

(c) *Specifications for clause 1 or 2 offenses not listed.* If conduct by an accused does not fall under any of the listed offenses for violations of Article

134 in this Manual (paragraphs 61 through 113 of this Part) a specification not listed in this Manual may be used to allege the offense.

**61. Article 134—(Abusing public animal)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused wrongfully abused a certain public animal; and

(2) 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.* A public animal is any animal owned or used by the United States; and animal owned or used by a local or State government in the United States, its territories or possessions; or any wild animal located on any public lands in the United States, its territories or possessions. This would include, for example, drug detector dogs used by the government.

d. *Lesser included offenses.* Article 80—attempts

e. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully (kick a public drug detector dog in the nose) (\_\_\_\_\_).

**62. Article 134—(Adultery)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused wrongfully had sexual intercourse with a certain person;

(2) That, at the time, the accused or the other person was married to someone else; and

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

c. *Explanation.*

(1) *Nature of offense.* Adultery is clearly unacceptable conduct, and it reflects adversely on the service record of the military member.

¶62.c.(2)

(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, the adulterous conduct must either be directly prejudicial to good order and discipline or service discrediting. Adulterous 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 servicemember. Adultery 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 adulterous 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 adulterous 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 adulterous acts are prejudicial to good order and discipline or are 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, and position, or relationship to the armed forces;
- (c) The military status of the accused's spouse or the spouse of co-actor, or their relationship to the armed forces;
- (d) The impact, if any, of the adulterous relationship 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 conduct;
- (f) Whether the conduct persisted despite counseling or orders to desist; the flagrancy of the conduct, such as whether any notoriety ensued; and whether the adulterous act 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; and

(i) Whether the adulterous misconduct involves an ongoing or recent relationship or is remote in time.

(3) *Marriage.* A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction.

(4) *Mistake of fact.* A defense of mistake of fact exists if the accused had an honest and reasonable belief either that the accused and the co-actor were both unmarried, or that they were lawfully married to each other. If this defense is raised by the evidence, then the burden of proof is upon the United States to establish that the accused's belief was unreasonable or not honest.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

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).

### 63. Article 134—(Assault—indecent)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;

(2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and

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

c. *Explanation.* See paragraph 54c for a discussion of assault. Specific intent is an element of this offense. For a definition of “indecent”, see paragraph 90 c.

d. *Lesser included offenses.*

(1) Article 128—assault consummated by a battery; assault

(2) Article 134—indecent acts

(3) Article 80—attempts

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

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, commit an indecent assault upon \_\_\_\_\_ a person not his/her wife/husband by \_\_\_\_\_, with intent to gratify his/her (lust) (sexual desires).

**64. Article 134—(Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused assaulted a certain person;

(2) That, at the time of the assault, the accused intended to kill (as required for murder or voluntary manslaughter) or intended to commit rape, robbery, sodomy, arson, burglary, or housebreaking; and

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

c. *Explanation.*

(1) *In general.* An assault with intent to commit any of the offenses mentioned above is not necessarily the equivalent of an attempt to commit the intended offense, for an assault can be committed with intent to commit an offense without achieving that proximity to consummation of an intended offense which is essential to an attempt. See paragraph 4.

(2) *Assault with intent to murder.* Assault with intent to commit murder is assault with specific intent to kill. Actual infliction of injury is not necessary. To constitute an assault with intent to murder with a firearm, it is not necessary that the weapon be discharged. When the intent to kill exists, the fact that for some unknown reason the actual consummation of the murder by the means employed is impos-

sible is not a defense if the means are apparently adapted to the end in view. The intent to kill need not be directed against the person assaulted if the assault is committed with intent to kill some person. For example, if a person, intending to kill Jones, shoots Smith, mistaking Smith for Jones, that person is guilty of assaulting Smith with intent to murder. If a person fires into a group with intent to kill anyone in the group, that person is guilty of an assault with intent to murder each member of the group.

(3) *Assault with intent to commit voluntary manslaughter.* Assault with intent to commit voluntary manslaughter is an assault committed with a specific intent to kill under such circumstances that, if death resulted therefrom, the offense of voluntary manslaughter would have been committed. There can be no assault with intent to commit involuntary manslaughter, for it is not a crime capable of being intentionally committed.

(4) *Assault with intent to commit rape.* In assault with intent to commit rape, the accused must have intended to overcome any resistance by force, and to complete the offense. Any lesser intent will not suffice. No actual touching is necessary, but indecent advances and importunities, however earnest, not accompanied by such an intent, do not constitute this offense, nor do mere preparations to rape not amounting to an assault. Once an assault with intent to commit rape is made, it is no defense that the accused voluntarily desisted.

(5) *Assault with intent to rob.* For assault with intent to rob, the fact that the accused intended to take money and that the person the accused intended to rob had none is not a defense.

(6) *Assault with intent to commit sodomy.* Assault with intent to commit sodomy is an assault against a human being and must be committed with a specific intent to commit sodomy. Any lesser intent, or different intent, will not suffice.

d. *Lesser included offenses.*

(1) *Assault with intent to murder.*

(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm

(b) Article 134—assault with intent to commit voluntary manslaughter; willful or careless discharge of a firearm

(2) *Assault with intent to commit voluntary manslaughter.*

¶64.d.(2)(a)

(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm

(b) Article 134—willful or careless discharge of a firearm

(3) *Assault with intent to commit rape or sodomy.*

(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon

(b) Article 134—indecent assault

(4) *Assault with intent to commit burglary.*

(a) Article 128—assault; assault consummated by a battery; assault with a dangerous weapon

(b) Article 134—assault with intent to commit housebreaking

(5) *Assault with intent to commit robbery, arson, or housebreaking.* Article 128—assault; assault consummated by a battery; assault with a dangerous weapon

e. *Maximum punishment.*

(1) *Assault with intent to commit murder or rape.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(2) *Assault with intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) *Assault with intent to commit housebreaking.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, with intent to commit (murder) (voluntary manslaughter) (rape) (robbery) (sodomy) (arson) (burglary) (housebreaking), commit an assault upon \_\_\_\_\_ by \_\_\_\_\_.

**65. Article 134—(Bigamy)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused had a living lawful spouse;

(2) That while having such spouse the accused wrongfully married another person; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and

discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* Bigamy is contracting another marriage by one who already has a living lawful spouse. If a prior marriage was void, it will have created no status of “lawful spouse.” However, if it was only voidable and has not been voided by a competent court, this is no defense. A belief that a prior marriage has been terminated by divorce, death of the other spouse, or otherwise, constitutes a defense only if the belief was reasonable. See R.C.M. 916(j)(1).

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, at \_\_\_\_\_, (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, w r o n g f u l l y m a r r y \_\_\_\_\_, having at the time of his/her said marriage to \_\_\_\_\_ a lawful wife/husband then living, to wit: \_\_\_\_\_.

**66. Article 134—(Bribery and graft)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Asking, accepting, or receiving.*

(a) That the accused wrongfully asked, accepted, or received a thing of value from a certain person or organization;

(b) That the accused then occupied a certain official position or had certain official duties;

(c) That the accused asked, accepted, or received this thing of value (with the intent to have the accused’s decision or action influenced with respect to a certain matter)\* (as compensation for or in recognition of services rendered, to be rendered, or both, by the accused in relation to a certain matter)\*\*;

(d) That this certain matter was an official matter in which the United States was and is interested; and

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

(\*Note: This element is required for bribery.)

(\*\*Note: This element is required for graft.)

(2) *Promising, offering, or giving.*

(a) That the accused wrongfully promised, offered, or gave a thing of value to a certain person;

(b) That this person then occupied a certain official position or had certain official duties;

(c) That this thing of value was promised, offered, or given (with the intent to influence the decision or action of this person)\* (as compensation for or in recognition of services rendered, to be rendered, or both, by this person in relation to a certain matter)\*\*;

(d) That this matter was an official matter in which the United States was and is interested; and

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

(\*Note: This element is required for bribery.)

(\*\*Note: This element is required for graft.)

c. *Explanation.* Bribery requires an intent to influence or be influenced in an official matter; graft does not. Graft involves compensation for services performed in an official matter when no compensation is due.

d. *Lesser included offenses.*

(1) *Bribery.* Article 134—graft

(2) *Bribery and graft.* Article 80—attempts

e. *Maximum punishment.*

(1) *Bribery.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Graft.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specifications.*

(1) *Asking, accepting, or receiving.*

In that \_\_\_\_\_ (personal jurisdiction data), being at the time (a contracting officer for \_\_\_\_\_) (the personnel officer of \_\_\_\_\_) (\_\_\_\_\_), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully (ask) (accept) (receive) from \_\_\_\_\_, (a contracting company) engaged in \_\_\_\_\_ (\_\_\_\_\_), (the sum of \$ \_\_\_\_\_) (\_\_\_\_\_, of a value of (about) \$ \_\_\_\_\_) (\_\_\_\_\_), (with intent

to have his/her (decision) (action) influenced with respect to\*) ((as compensation for) (in recognition of)) service (rendered) (to be rendered) (rendered and to be rendered) by him/her the said \_\_\_\_\_ in relation to\*\*) an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from \_\_\_\_\_) (the transfer of \_\_\_\_\_ to duty with (\_\_\_\_\_) (\_\_\_\_\_)).

(\*Note: This language should be used to allege bribery.) (\*\*Note: This language should be used to allege graft.)

(2) *Promising, offering, or giving.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully (promise) (offer) (give) to \_\_\_\_\_, (his/her commanding officer) (the claims officer of \_\_\_\_\_) (\_\_\_\_\_), (the sum of \$ \_\_\_\_\_) (\_\_\_\_\_, of a value of (about) \$ \_\_\_\_\_) (\_\_\_\_\_, (with intent to influence the (decision) (action) of the said \_\_\_\_\_ with respect to\*) ((as compensation for) (in recognition of)) services (rendered) (to be rendered) (rendered and to be rendered) by the said \_\_\_\_\_ in relation to\*\*) an official matter in which the United States was and is interested, to wit: (the granting of leave to \_\_\_\_\_) (the processing of a claim against the United States in favor of \_\_\_\_\_) (\_\_\_\_\_).

(\*Note: This language should be used to allege bribery.) (\*\*Note: This language should be used to allege graft.)

**67. Article 134—(Burning with intent to defraud)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused willfully and maliciously burned or set fire to certain property owned by a certain person or organization;

(2) That such burning or setting on fire was with the intent to defraud a certain person or organization; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and

¶67.b.(3)

discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* See paragraph 49c(14) for a discussion of “intent to defraud.”

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, willfully and maliciously (burn) (set fire to) (a dwelling) (a barn) (an automobile), the property of \_\_\_\_\_, with intent to defraud (the insurer thereof, to wit: \_\_\_\_\_) ( \_\_\_\_\_).

**68. Article 134—(Check, worthless, making and uttering—by dishonorably failing to maintain funds)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused made and uttered a certain check;

(2) That the check was made and uttered for the purchase of a certain thing, in payment of a debt, or for a certain purpose;

(3) That the accused subsequently failed to place or maintain sufficient funds in or credit with the drawee bank for payment of the check in full upon its presentment for payment;

(4) That this failure was dishonorable; and

(5) 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.* This offense differs from an Article 123a offense (paragraph 49) in that there need be no intent to defraud or deceive at the time of making, drawing, uttering, or delivery, and that the accused need not know at that time that the accused did not or would not have sufficient funds for payment. The gist of the offense lies in the conduct of the accused after uttering the instrument. Mere negligence in maintaining one’s bank balance is insufficient for this offense, for the accused’s conduct must reflect bad faith or gross indifference in this regard. As in

IV-102

the offense of dishonorable failure to pay debts (see paragraph 71), dishonorable conduct of the accused is necessary, and the other principles discussed in paragraph 71 also apply here.

d. *Lesser included offenses.* None.

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, make and utter to \_\_\_\_\_ a certain check, in words and figures as follows, to wit: \_\_\_\_\_, (for the purchase of \_\_\_\_\_) (in payment of a debt) (for the purpose of \_\_\_\_\_), and did thereafter dishonorably fail to (place) (maintain) sufficient funds in the \_\_\_\_\_ Bank for payment of such check in full upon its presentment for payment.

**69. Article 134—(Cohabitation, wrongful)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That, during a certain period of time, the accused and another person openly and publicly lived together as husband and wife, holding themselves out as such;

(2) That the other person was not the spouse of the accused;

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

c. *Explanation.* This offense differs from adultery (see paragraph 62) in that it is not necessary to prove that one of the partners was married or that sexual intercourse took place. Public knowledge of the wrongfulness of the relationship is not required, but the partners must behave in a manner, as exhibited by conduct or language, that leads others to believe that a marital relationship exists.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), from about \_\_\_\_\_ 20 \_\_\_\_\_, to about 20 \_\_\_\_\_, wrongfully cohabit with \_\_\_\_\_, (a woman not his wife) (a man not her husband).

**70. Article 134—(Correctional custody—offenses against)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Escape from correctional custody.*

(a) That the accused was placed in correctional custody by a person authorized to do so;

(b) That, while in such correctional custody, the accused was under physical restraint;

(c) That the accused freed himself or herself from the physical restraint of this correctional custody before being released therefrom by proper authority; 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) *Breach of correctional custody.*

(a) That the accused was placed in correctional custody by a person authorized to do so;

(b) That, while in correctional custody, a certain restraint was imposed upon the accused;

(c) That the accused went beyond the limits of the restraint imposed before having been released from the correctional custody or relieved of the restraint by proper authority; 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.*

(1) *Escape from correctional custody.* Escape from correctional custody is the act of a person undergoing the punishment of correctional custody pursuant to Article 15, who, before being set at liberty by proper authority, casts off any physical restraint imposed by the custodian or by the place or conditions of custody.

(2) *Breach of correctional custody.* Breach of restraint during correctional custody is the act of a

person undergoing the punishment who, in the absence of physical restraint imposed by a custodian or by the place or conditions of custody, breaches any form of restraint imposed during this period.

(3) *Authority to impose correctional custody.* See Part V concerning who may impose correctional custody. Whether the status of a person authorized that person to impose correctional custody is a question of law to be decided by the military judge. Whether the person who imposed correctional custody had such a status is a question of fact to be decided by the factfinder.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Escape from correctional custody.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Breach of correctional custody.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specifications.*

(1) *Escape from correctional custody.*

In that \_\_\_\_\_ (personal jurisdiction data), while undergoing the punishment of correctional custody imposed by a person authorized to do so, did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, escape from correctional custody.

(2) *Breach of correctional custody.*

In that \_\_\_\_\_ (personal jurisdiction data), while duly undergoing the punishment of correctional custody imposed by a person authorized to do so, did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, breach the restraint imposed thereunder by \_\_\_\_\_.

**71. Article 134—(Debt, dishonorably failing to pay)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused was indebted to a certain person or entity in a certain sum;

(2) That this debt became due and payable on or about a certain date;

(3) That while the debt was still due and payable the accused dishonorably failed to pay this debt; and

(4) That, under the circumstances, the conduct of

¶71.b.(4)

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.* More than negligence in nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations. For a debt to form the basis of this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to the accused's belief, at the time alleged. The offense should not be charged if there was a genuine dispute between the parties as to the facts or law relating to the debt which would affect the obligation of the accused to pay. The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment. The length of the period of nonpayment and any denial of indebtedness which the accused may have made may tend to prove that the accused's conduct was dishonorable, but the court-martial may convict only if it finds from all of the evidence that the conduct was in fact dishonorable.

d. *Lesser included offenses.* None.

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), being indebted to \_\_\_\_\_ in the sum of \$ \_\_\_\_\_ for \_\_\_\_\_, which amount became due and payable (on) (about) (on or about) \_\_\_\_\_ 20 \_\_\_\_\_, did (at/on board—location)(subject-matter jurisdiction data, if required), from \_\_\_\_\_ 20 \_\_\_\_\_, to \_\_\_\_\_ 20 \_\_\_\_\_, dishonorably fail to pay said debt.

**72. Article 134—(Disloyal statements)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused made a certain statement;

(2) That the statement was communicated to another person;

IV-104

(3) That the statement was disloyal to the United States;

(4) That the statement was made with the intent to promote disloyalty or disaffection toward the United States by any member of the armed forces or to interfere with or impair the loyalty to the United States or good order and discipline of any member of the armed forces; and

(5) 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.* Certain disloyal statements by military personnel may not constitute an offense under 18 U.S.C. §§ 2385, 2387, and 2388, but may, under the circumstances, be punishable under this article. Examples include praising the enemy, attacking the war aims of the United States, or denouncing our form of government with the intent to promote disloyalty or disaffection among members of the armed services. A declaration of personal belief can amount to a disloyal statement if it disavows allegiance owed to the United States by the declarant. The disloyalty involved for this offense must be to the United States as a political entity and not merely to a department or other agency that is a part of its administration.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, with intent to (promote (disloyalty) (disaffection) (disloyalty and disaffection)) ((interfere with) (impair) the (loyalty) (good order and discipline)) of any member of the armed forces of the United States communicate to \_\_\_\_\_, the following statement, to wit: " \_\_\_\_\_," or words to that effect, which statement was disloyal to the United States.

**73. Article 134—(Disorderly conduct, drunkenness)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused was drunk, disorderly, or

drunk and disorderly on board ship or in some other place; and

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

c. *Explanation.*

(1) *Drunkness.* See paragraph 35c(6) for a discussion of intoxication.

(2) *Disorderly.* Disorderly conduct is conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character.

(3) *Service discrediting.* Unlike most offenses under Article 134, “conduct of a nature to bring discredit upon the armed forces” must be included in the specification and proved in order to authorize the higher maximum punishment when the offense is service discrediting.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Disorderly conduct.*

(a) *Under such circumstances as to bring discredit upon the military service.* Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

(b) *Other cases.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(2) *Drunkness.*

(a) *Aboard ship or under such circumstances as to bring discredit upon the military service.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(b) *Other cases.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(3) *Drunk and disorderly.*

(a) *Aboard ship.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *Under such circumstances as to bring discredit upon the military service.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

(c) *Other cases.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (drunk) (disorderly) (drunk and disorderly) (which conduct was of a nature to bring discredit upon the armed forces).

#### **74. Article 134—(Drinking liquor with prisoner)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused was a sentinel or in another assignment in charge of a prisoner;

(2) That, while in such capacity, the accused unlawfully drank intoxicating liquor with a prisoner;

(3) That the prisoner was under the charge of the accused;

(4) That the accused knew that the prisoner was a prisoner under the accused’s charge; and

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

c. *Explanation.*

(1) *Prisoner.* A “prisoner” is a person who is in confinement or custody imposed under R.C.M. 302, 304, or 305, or under sentence of a court-martial who has not been set free by proper authority.

(2) *Liquor.* For the purposes of this offense, “liquor” includes any alcoholic beverage.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), a (sentinel) (\_\_\_\_\_) in charge of prisoners, did, (at/on board—location), on or about 20\_\_\_\_\_, unlawfully drink intoxicating liquor with \_\_\_\_\_, a prisoner under his/her charge.

**75. Article 134—(Drunk prisoner)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused was a prisoner;

(2) That while in such status the accused was found drunk; and

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

c. *Explanation.*

(1) *Prisoner.* See paragraph 74c(1).

(2) *Drunk.* See paragraph 35c(6) for a discussion of intoxication.

d. *Lesser included offenses.* None.

e. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), a prisoner, was (at/on board— location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, found drunk.

**76. Article 134—(Drunkenness—incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused had certain duties to perform;

(2) That the accused was incapacitated for the proper performance of such duties;

(3) That such incapacitation was the result of previous wrongful indulgence in intoxicating liquor or any drug; and

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

c. *Explanation.*

(1) *Liquor.* See paragraph 74c(2).

(2) *Incapacitated.* Incapacitated means unfit or unable to perform properly. A person is “unfit” to perform duties if at the time the duties are to com-

mence, the person is drunk, even though physically able to perform the duties. Illness resulting from previous overindulgence is an example of being “unable” to perform duties. For a discussion of “drunk” see paragraph 35c(6).

(3) *Affirmative defense.* The accused’s lack of knowledge of the duties assigned is an affirmative defense to this offense.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), was, (at/on board—location), on or about \_\_\_\_\_ 20 \_\_\_\_\_, as a result of wrongful previous overindulgence in intoxicating liquor or drugs incapacitated for the proper performance of his/her duties.

**77. Article 134—(False or unauthorized pass offenses)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Wrongful making, altering, counterfeiting, or tampering with a military or official pass, permit, discharge certificate, or identification card.*

(a) That the accused wrongfully and falsely made, altered, counterfeited, or tampered with a certain military or official pass, permit, discharge certificate, or identification card; and

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

(2) *Wrongful sale, gift, loan, or disposition of a military or official pass, permit, discharge certificate, or identification card.*

(a) That the accused wrongfully sold, gave, loaned, or disposed of a certain military or official pass, permit, discharge certificate, or identification card;

(b) That the pass, permit, discharge certificate, or identification card was false or unauthorized;

(c) That the accused then knew that the pass, permit, discharge certificate, or identification card was false or unauthorized; 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.

(3) *Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card.*

(a) That the accused wrongfully used or possessed a certain military or official pass, permit, discharge certificate, or identification card;

(b) That the pass, permit, discharge certificate, or identification card was false or unauthorized;

(c) That the accused then knew that the pass, permit, discharge certificate, or identification card was false or unauthorized; 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.

[Note: When there is intent to defraud or deceive, add the following element after (c) above: That the accused used or possessed the pass, permit, discharge certificate, or identification card with an intent to defraud or deceive.]

c. *Explanation.*

(1) *In general.* "Military or official pass, permit, discharge certificate, or identification card" includes, as well as the more usual forms of these documents, all documents issued by any governmental agency for the purpose of identification and copies thereof.

(2) *Intent to defraud or deceive.* See paragraph 49c(14) and (15).

d. *Lesser included offenses.*

(1) *Wrongful use or possession of false or unauthorized military or official pass, permit, discharge certificate, or identification card, with the intent to defraud or deceive.* Article 134—same offenses, except without the intent to defraud or deceive.

(2) *All false or unauthorized pass offenses.* Article 80—attempts

e. *Maximum punishment.*

(1) *Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) *All other cases.* Bad-conduct discharge, for-

feiture of all pay and allowances, and confinement for 6 months.

f. *Sample specifications.*

(1) *Wrongful making, altering, counterfeiting, or tampering with military or official pass, permit, discharge certificate, or identification card.* In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, wrongfully and falsely (make) (forge) (alter by \_\_\_\_\_) (counterfeit) (tamper with by \_\_\_\_\_) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) ( \_\_\_\_\_ ) in words and figures as follows: \_\_\_\_\_.

(2) *Wrongful sale, gift, loan, or disposition of a military or official pass, permit, discharge certificate, or identification card.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, wrongfully (sell to \_\_\_\_\_) (give to \_\_\_\_\_) (loan to \_\_\_\_\_) (dispose of by \_\_\_\_\_) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit)(discharge certificate) (identification card) ( \_\_\_\_\_ ) in words and figures as follows: \_\_\_\_\_, he/she, the said \_\_\_\_\_, then well knowing the same to be (false) (unauthorized).

(3) *Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, wrongfully (use) (possess) (with intent to (defraud) (deceive)) (a certain instrument purporting to be) (a) (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) ( \_\_\_\_\_ ) , h e / s h e , t h e said \_\_\_\_\_, then well knowing the same to be (false) (unauthorized).

**78. Article 134—(False pretenses, obtaining services under)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused wrongfully obtained certain services;

(2) That the obtaining was done by using false pretenses;

(3) That the accused then knew of the falsity of the pretenses;

(4) That the obtaining was with intent to defraud;

(5) That the services were of a certain value; and

(6) 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.* This offense is similar to the offenses of larceny and wrongful appropriation by false pretenses, except that the object of the obtaining is services (for example, telephone service) rather than money, personal property, or articles of value of any kind as under Article 121. See paragraph 46c. See paragraph 49c(14) for a definition of “intent to defraud.”

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Obtaining services under false pretenses.

(1) *Of a value of \$500.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) *Of a value of more than \$500.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, with intent to defraud, falsely pretend to \_\_\_\_\_ that \_\_\_\_\_, then knowing that the pretenses were false, and by means thereof did wrongfully obtain from \_\_\_\_\_ services, of a value of (about) \$ \_\_\_\_\_, to wit: \_\_\_\_\_.

**79. Article 134—(False swearing)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused took an oath or equivalent;

(2) That the oath or equivalent was administered to the accused in a matter in which such oath or equivalent was required or authorized by law;

(3) That the oath or equivalent was administered by a person having authority to do so;

(4) That upon this oath or equivalent the accused made or subscribed a certain statement;

(5) That the statement was false;

(6) That the accused did not then believe the statement to be true; and

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

c. *Explanation.*

(1) *Nature of offense.* False swearing is the making under a lawful oath or equivalent of any false statement, oral or written, not believing the statement to be true. It does not include such statements made in a judicial proceeding or course of justice, as these are under Article 131, perjury (see paragraph 57). Unlike a false official statement under Article 107 ( see paragraph 31) there is no requirement that the statement be made with an intent to deceive or that the statement be official. See paragraphs 57c(1), c(2)(c) and c(2) ( e) concerning “judicial proceeding or course of justice,” proof of the falsity, and the belief of the accused, respectively.

(2) *Oath.* See Article 136 and R.C.M. 807 as to the authority to administer oaths, and see Section IX of Part III (Military Rules of Evidence) concerning proof of the signatures of persons authorized to administer oaths. An oath includes an affirmation when authorized in lieu of an oath.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (in an affidavit) (in \_\_\_\_\_), wrongfully and unlawfully (make) (subscribe) under lawful (oath) (affirmation) a false statement in substance as

follows: \_\_\_\_\_, which statement he/she did not then believe to be true.

**80. Article 134—(Firearm, discharging—through negligence)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused discharged a firearm;

(2) That such discharge was caused by the negligence of the accused; and

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

c. *Explanation.* For a discussion of negligence, see paragraph 85c(2).

d. *Lesser included offenses.* None

e. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, through negligence, discharge a (service rifle) (\_\_\_\_\_) in the (squadron) (tent) (barracks) (\_\_\_\_\_) of \_\_\_\_\_.

**81. Article 134—(Firearm, discharging—willfully, under such circumstances as to endanger human life)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused discharged a firearm;

(2) That the discharge was willful and wrongful;

(3) That the discharge was under circumstances such as to endanger human life; and

(4) 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.* “Under circumstances such as to endanger human life” refers to a reasonable potentiality for harm to human beings in general. The test is not whether the life was in fact endangered but whether, considering the circumstances surrounding

the wrongful discharge of the weapon, the act was unsafe to human life in general.

d. *Lesser included offenses.*

(1) Article 134—firearm, discharging—through negligence

(2) Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully and willfully discharge a firearm, to wit: \_\_\_\_\_, (in the mess hall of \_\_\_\_\_) (\_\_\_\_\_), under circumstances such as to endanger human life.

**82. Article 134—(Fleeing scene of accident)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Driver.*

(a) That the accused was the driver of a vehicle;

(b) That while the accused was driving the vehicle was involved in an accident;

(c) That the accused knew that the vehicle had been in an accident;

(d) That the accused left the scene of the accident without (providing assistance to the victim who had been struck (and injured) by the said vehicle) or (providing identification);

(e) That such leaving was wrongful; and

(f) 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) *Senior passenger.*

(a) That the accused was a passenger in a vehicle which was involved in an accident;

(b) That the accused knew that said vehicle had been in an accident;

(c) That the accused was the superior commissioned or noncommissioned officer of the driver, or commander of the vehicle, and wrongfully and unlawfully ordered, caused, or permitted the driver to

¶82.b.(2)(c)

leave the scene of the accident without (providing assistance to the victim who had been struck (and injured) by the said vehicle) (or) (providing identification); 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.*

(1) *Nature of offense.* This offense covers “hit and run” situations where there is damage to property other than the driver’s vehicle or injury to someone other than the driver or a passenger in the driver’s vehicle. It also covers accidents caused by the accused, even if the accused’s vehicle does not contact other people, vehicles, or property.

(2) *Knowledge.* Actual knowledge that an accident has occurred is an essential element of this offense. Actual knowledge may be proved by circumstantial evidence.

(3) *Passenger.* A passenger other than a senior passenger may also be liable under this paragraph. See paragraph 1 of this Part.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), (the driver of) (a passenger in\*) (the senior officer/noncommissioned officer in) (\_\_\_\_\_ in) a vehicle at the time of an accident in which said vehicle was involved, and having knowledge of said accident, did, at \_\_\_\_\_ (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_ (wrongfully leave) (by \_\_\_\_\_, assist the driver of the said vehicle in wrongfully leaving\*) (wrongfully order, cause, or permit the driver to leave) the scene of the accident without (providing assistance to \_\_\_\_\_, who had been struck (and injured) by the said vehicle) (making his/her (the driver’s) identity known).

[Note: This language should be used when the accused was a passenger and is charged as a principal. See paragraph 1 of this part.]

IV-110

**83. Article 134—(Fraternization)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused was a commissioned or warrant officer;

(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

(3) That the accused then knew the person(s) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the accused’s service that officers shall not fraternize with enlisted members on terms of military equality; and

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

c. *Explanation.*

(1) *In general.* The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

(2) *Regulations.* Regulations, directives, and orders may also govern conduct between officer and enlisted personnel on both a service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under Article 92. See paragraph 16.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dismissal, forfeiture of all pay and allowances, and confinement for 2 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_, 20\_\_\_\_\_, knowingly fraternize with \_\_\_\_\_, an enlisted person, on terms of military equality, to wit: \_\_\_\_\_, in violation of the custom of (the Naval Service of the United States) (the United States Army) (the United States Air Force) (the United States Coast Guard) that officers shall not fraternize with enlisted persons on terms of military equality.

#### **84. Article 134—(Gambling with subordinate)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused gambled with a certain servicemember;

(2) That the accused was then a noncommissioned or petty officer;

(3) That the servicemember was not then a noncommissioned or petty officer and was subordinate to the accused;

(4) That the accused knew that the servicemember was not then a noncommissioned or petty officer and was subordinate to the accused; and

(5) 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.* This offense can only be committed by a noncommissioned or petty officer gambling with an enlisted person of less than noncommissioned or petty officer rank. Gambling by an officer with an enlisted person may be a violation of Article 133. See also paragraph 83.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, gamble with \_\_\_\_\_, then knowing that the said \_\_\_\_\_ was not a noncommissioned

or petty officer and was subordinate to the said \_\_\_\_\_.

#### **85. Article 134—(Homicide, negligent)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That a certain person is dead;

(2) That this death resulted from the act or failure to act of the accused;

(3) That the killing by the accused was unlawful;

(4) That the act or failure to act of the accused which caused the death amounted to simple negligence; and

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

c. *Explanation.*

(1) *Nature of offense.* Negligent homicide is any unlawful homicide which is the result of simple negligence. An intent to kill or injure is not required.

(2) *Simple negligence.* Simple negligence is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care of the safety of others which a reasonably careful person would have exercised under the same or similar circumstances. Simple negligence is a lesser degree of carelessness than culpable negligence. See paragraph 44c(2)(a).

d. *Lesser included offenses.* None

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, unlawfully kill \_\_\_\_\_, (by negligently \_\_\_\_\_ the said \_\_\_\_\_ (in) (on) the \_\_\_\_\_ with a \_\_\_\_\_) (by driving a (motor vehicle) ( \_\_\_\_\_) against the said \_\_\_\_\_ in a negligent manner) ( \_\_\_\_\_).

**86. Article 134—(Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused impersonated a commissioned, warrant, noncommissioned, or petty officer, or an agent of superior authority of one of the armed forces of the United States, or an official of a certain government, in a certain manner;

(2) That the impersonation was wrongful and willful; and

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

[Note 1: If intent to defraud is in issue, add the following additional element after (2), above: That the accused did so with the intent to defraud a certain person or organization in a certain manner;].

[Note 2: If the accused is charged with impersonating an official of a certain government without an intent to defraud, use the following additional element after (2) above: That the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have;].

c. *Explanation.*

(1) *Nature of offense.* Impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, although this is an aggravating factor.

(2) *Willfulness.* “Willful” means with the knowledge that one is falsely holding one’s self out as such.

(3) *Intent to defraud.* See paragraph 49c(14).

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official.

(1) *With intent to defraud.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) *All other cases.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter

jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, wrongfully and willfully impersonate (a (commissioned officer) (warrant officer) (noncommissioned officer) (petty officer) (agent of superior authority) of the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)) (an official of the Government of \_\_\_\_\_) by (publicly wearing the uniform and insignia of rank of a (lieutenant of the \_\_\_\_\_) ( \_\_\_\_\_)) (showing the credentials of \_\_\_\_\_) ( \_\_\_\_\_) (with intent to defraud \_\_\_\_\_ by \_\_\_\_\_ \*) (and (exercised) (asserted) the authority of \_\_\_\_\_ by \_\_\_\_\_ \*\*).

(\*See subsection b note 1.)

\*\*See subsection b note 2.)

**87. Article 134—(Indecent acts or liberties with a child)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Physical contact.*

(a) That the accused committed a certain act upon or with the body of a certain person;

(b) That the person was under 16 years of age and not the spouse of the accused;

(c) That the act of the accused was indecent;

(d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(e) 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) *No physical contact.*

(a) That the accused committed a certain act;

(b) That the act amounted to the taking of indecent liberties with a certain person;

(c) That the accused committed the act in the presence of this person;

(d) That this person was under 16 years of age and not the spouse of the accused;

(e) That the accused committed the act with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

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

c. *Explanation.*

(1) *Consent.* Lack of consent by the child to the act or conduct is not essential to this offense; consent is not a defense.

(2) *Indecent liberties.* When a person is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but physical contact is not required. Thus, one who with the requisite intent exposes one's private parts to a child under 16 years of age may be found guilty of this offense. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child.

(3) *Indecent.* See paragraph 89c and 90c.

d. *Lesser included offense.*

(1) Article 134—indecent acts with another

(2) Article 128—assault; assault consummated by a battery

(3) Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, (take (indecent) liberties with) (commit an indecent act (upon) (with) the body of) \_\_\_\_\_, a (female) (male) under 16 years of age, not the (wife) (husband) of the said \_\_\_\_\_, by (fondling (her) (him) and placing his/her hands upon (her) (his) leg and private parts) ( \_\_\_\_\_ ), with intent to (arouse) (appeal to) (gratify) the (lust) (passion) (sexual desires) of the said \_\_\_\_\_ (and \_\_\_\_\_).

**88. Article 134—(Indecent exposure)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;

(2) That the exposure was willful and wrongful; and

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

c. *Explanation.* "Willful" means an intentional exposure to public view. Negligent indecent exposure is not punishable as a violation of the code. See paragraph 90c concerning "indecent."

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, while (at a barracks window) ( \_\_\_\_\_ ) willfully and wrongfully expose in an indecent manner to public view his or her \_\_\_\_\_.

**89. Article 134—(Indecent language)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused orally or in writing communicated to another person certain language;

(2) That such language was indecent; and

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

[Note: In appropriate cases add the following element after element (1): That the person to whom the language was communicated was a child under the age of 16.]

c. *Explanation.* "Indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards. See paragraph 87 if the communication was made in the physical presence of a child.

d. *Lesser included offenses.*

(1) Article 117—provoking speeches

¶89.d.(2)

(2) Article 80—attempts

e. *Maximum punishment.* Indecent or insulting language.

(1) *Communicated to any child under the age of 16 years.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Other cases.* Bad-conduct discharge; forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, (orally) (in writing) communicate to \_\_\_\_\_, (a child under the age of 16 years), certain indecent language, to wit:\_\_\_\_\_.

**90. Article 134—(Indecent acts with another)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused committed a certain wrongful act with a certain person;

(2) That the act was indecent; and

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

c. *Explanation.* “Indecent” signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

d. *Lesser included offense.* Article 80—attempts

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

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully commit an indecent act with \_\_\_\_\_ by \_\_\_\_\_.

**91. Article 134—(Jumping from vessel into the water)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused jumped from a vessel in use by the armed forces into the water;

(2) That such act by the accused was wrongful and intentional; and

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

c. *Explanation.* “In use by” means any vessel operated by or under the control of the armed forces. This offense may be committed at sea, at anchor, or in port.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, on board \_\_\_\_\_, at (location), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully and intentionally jump from \_\_\_\_\_, a vessel in use by the armed forces, into the (sea) (lake) (river).

**92. Article 134—(Kidnapping)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused seized, confined, inveigled, decoyed, or carried away a certain person;

(2) That the accused then held such person against that person’s will;

(3) That the accused did so willfully and wrongfully; and

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

c. *Explanation.*

(1) *Inveigle, decoy.* “Inveigle” means to lure, lead astray, or entice by false representations or other deceitful means. For example, a person who entices another to ride in a car with a false promise to take the person to a certain destination has inveigled the

passenger into the car. “Decoy” means to entice or lure by means of some fraud, trick, or temptation. For example, one who lures a child into a trap with candy has decoyed the child.

(2) *Held*. “Held” means detained. The holding must be more than a momentary or incidental detention. For example, a robber who holds the victim at gunpoint while the victim hands over a wallet, or a rapist who throws his victim to the ground, does not, by such acts, commit kidnapping. On the other hand, if, before or after such robbery or rape, the victim is involuntarily transported some substantial distance, as from a housing area to a remote area of the base or post, this may be kidnapping, in addition to robbery or rape.

(3) *Against the will*. “Against that person’s will” means that the victim was held involuntarily. The involuntary nature of the detention may result from force, mental or physical coercion, or from other means, including false representations. If the victim is incapable of having a recognizable will, as in the case of a very young child or a mentally incompetent person, the holding must be against the will of the victim’s parents or legal guardian. Evidence of the availability or nonavailability to the victim of means of exit or escape is relevant to the voluntariness of the detention, as is evidence of threats or force, or lack thereof, by the accused to detain the victim.

(4) *Willfully*. The accused must have specifically intended to hold the victim against the victim’s will to be guilty of kidnapping. An accidental detention will not suffice. The holding need not have been for financial or personal gain or for any other particular purpose. It may be an aggravating circumstance that the kidnapping was for ransom, however. *See* R.C.M. 1001(b)(4).

(5) *Wrongfully*. “Wrongfully” means without justification or excuse. For example, a law enforcement official may justifiably apprehend and detain, by force if necessary ( *see* R.C.M. 302(d)(3)), a person reasonably believed to have committed an offense. An official who unlawfully uses the official’s authority to apprehend someone is not guilty of kidnapping, but may be guilty of unlawful detention. *See* paragraph 21. It is not wrongful under this paragraph and therefore not kidnapping for a parent or legal guardian to seize and hold that parent’s or legal guardian’s minor child.

d. *Lesser included offense*. Article 80—attempts

e. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

f. *Sample specification*.

In that \_\_\_\_\_, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, willfully and wrongfully (seize) (confine) (inveigle) (decoy) (carry away) and hold \_\_\_\_\_ (a minor whose parent or legal guardian the accused was not) (a person not a minor) against his/her will.

### 93. Article 134—(Mail: taking, opening, secreting, destroying, or stealing)

a. *Text*. *See* paragraph 60.

b. *Elements*.

(1) *Taking*.

(a) That the accused took certain mail matter;

(b) That such taking was wrongful;

(c) That the mail matter was taken by the accused before it was delivered to or received by the addressee;

(d) That such taking was with the intent to obstruct the correspondence or pry into the business or secrets of any person or organization; and

(e) 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) *Opening, secreting, destroying, or stealing*.

(a) That the accused opened, secreted, destroyed, or stole certain mail matter;

(b) That such opening, secreting, destroying, or stealing was wrongful;

(c) That the mail matter was opened, secreted, destroyed, or stolen by the accused before it was delivered to or received by the addressee; 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*. These offenses are intended to protect the mail and mail system. “Mail matter” means any matter deposited in a postal system of any government or any authorized depository thereof or in official mail channels of the United States or an

IV-115

¶93.c.

agency thereof including the armed forces. The value of the mail matter is not an element. See paragraph 46c(1) concerning “steal.”

d. *Lesser included offenses.*

- (1) Article 121—larceny; wrongful appropriation
- (2) Article 80—attempts

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

f. *Sample specifications.*

(1) *Taking.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, wrongfully take certain mail matter, to wit: (a) (letter(s)) (postal card(s)) (package(s)), addressed to \_\_\_\_\_, (out of the ( \_\_\_\_\_ Post Office \_\_\_\_\_) (orderly room of \_\_\_\_\_) (unit mail box of \_\_\_\_\_) ( \_\_\_\_\_) ( \_\_\_\_\_) ) (from \_\_\_\_\_) before (it) (they) (was) (were) (delivered) (actually received) (to) (by) the (addressee) with intent to (obstruct the correspondence) (pry into the (business) (secrets)) of \_\_\_\_\_.

(2) *Opening, secreting, destroying, or stealing.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, (wrongfully (open) (secret) (destroy)) (steal) certain mail matter, to wit: (a) (letter(s)) (postal card(s)) (package(s)) addressed to \_\_\_\_\_, which said (letter(s)) ( \_\_\_\_\_) (was) (were) then (in the ( \_\_\_\_\_ Post Office \_\_\_\_\_) (orderly room of \_\_\_\_\_) (unit mail box of \_\_\_\_\_) (custody of \_\_\_\_\_) ( \_\_\_\_\_) ) (had previously been committed to \_\_\_\_\_, (a representative of \_\_\_\_\_,) (an official agency for the transmission of communications)) before said (letter(s)) ( \_\_\_\_\_) (was) (were) (delivered) (actually received) (to) (by) the (addressee).

**94. Article 134—(Mails: depositing or causing to be deposited obscene matters in)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused deposited or caused to be deposited in the mails certain matter for mailing and delivery;

(2) That the act was done wrongfully and knowingly;

(3) That the matter was obscene; and

(4) 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.* Whether something is obscene is a question of fact. “Obscene” is synonymous with “indecent” as the latter is defined in paragraph 89c. The matter must violate community standards of decency or obscenity and must go beyond customary limits of expression. “Knowingly” means the accused deposited the material with knowledge of its nature.

d. *Lesser included offense.* Article 80—attempts

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

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, wrongfully and knowingly (deposit) (cause to be deposited) in the (United States) ( \_\_\_\_\_) mails, for mailing and delivery a (letter) (picture) ( \_\_\_\_\_) (containing) (portraying) (suggesting) ( \_\_\_\_\_) certain obscene matters, to wit: \_\_\_\_\_.

**95. Article 134—(Misprision of serious offense)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That a certain serious offense was committed by a certain person;

(2) That the accused knew that the said person had committed the serious offense;

(3) That, thereafter, the accused concealed the se-

rious offense and failed to make it known to civilian or military authorities as soon as possible;

(4) That the concealing was wrongful; and

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

c. *Explanation.*

(1) *In general.* Misprision of a serious offense is the offense of concealing a serious offense committed by another but without such previous concert with or subsequent assistance to the principal as would make the accused an accessory. *See* paragraph 3. An intent to benefit the principal is not necessary to this offense.

(2) *Serious offense.* For purposes of this paragraph, a “serious offense” is any offense punishable under the authority of the code by death or by confinement for a term exceeding 1 year.

(3) *Positive act of concealment.* A mere failure or refusal to disclose the serious offense without some positive act of concealment does not make one guilty of this offense. Making a false entry in an account book for the purpose of concealing a theft committed by another is an example of a positive act of concealment.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), having knowledge that \_\_\_\_\_ had actually committed a serious offense to wit: (the murder of \_\_\_\_\_) (\_\_\_\_\_), did, (at/on board—location) (subject-matter jurisdiction data, if required from about \_\_\_\_\_ 20 \_\_\_\_\_, to about \_\_\_\_\_ 20 \_\_\_\_\_, wrongfully conceal such serious offense by \_\_\_\_\_ and fail to make the same known to the civil or military authorities as soon as possible.

**96. Article 134—(Obstructing justice)**

a. *Text.* *See* paragraph 60.

b. *Elements.*

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a cer-

tain person against whom the accused had reason to believe there were or would be criminal proceedings pending;

(3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and

(4) 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.* This offense may be based on conduct that occurred before preferal of charges. Actual obstruction of justice is not an element of this offense. For purposes of this paragraph “criminal proceedings” includes nonjudicial punishment proceedings under Part V of this Manual. Examples of obstruction of justice include wrongfully influencing, intimidating, impeding, or injuring a witness, a person acting on charges under this chapter, an investigating officer under R.C.M. 406, or a party; and by means of bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to a violation of any criminal statute of the United States to a person authorized by a department, agency, or armed force of the United States to conduct or engage in investigations or prosecutions of such offenses; or endeavoring to do so. *See also* paragraph 22 and Article 37.

d. *Lesser included offenses.* None.

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

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, wrongfully (endeavor to) (impede (a trial by court-martial) (an investigation) (\_\_\_\_\_)) [influence the actions of \_\_\_\_\_, (a trial counsel of the court-martial) (a defense counsel of the court-martial) (an officer responsible for making a recommendation concerning disposition of charges) (\_\_\_\_\_)] [(influence) (alter) the testimony of \_\_\_\_\_ as a witness before a (court-martial) (an investigating officer) (\_\_\_\_\_)] in the case of \_\_\_\_\_ by [(promising) (offering) (giving) to the said \_\_\_\_\_, (the sum of

¶96.f.

\$ \_\_\_\_\_) ( \_\_\_\_\_, of a value of about \$ \_\_\_\_\_)] [communicating to the said \_\_\_\_\_ a threat to \_\_\_\_\_] [ \_\_\_\_\_], (if) (unless) he/she, the said \_\_\_\_\_, would [recommend dismissal of the charges against said \_\_\_\_\_] [(wrongfully refuse to testify) (testify falsely concerning \_\_\_\_\_) ( \_\_\_\_\_)] [(at such trial) (before such investigating officer)] [ \_\_\_\_\_ ].

**96a. Art 134 (Wrongful interference with an adverse administrative proceeding)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there was or would be an adverse administrative proceeding pending;

(3) That the act was done with the intent to influence, impede, or obstruct the conduct of such administrative proceeding, or otherwise obstruct the due administration of justice;

(4) 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.* For purposes of this paragraph “adverse administrative proceeding” includes any administrative proceeding or action, initiated against a servicemember, that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification. Examples of wrongful interference include wrongfully influencing, intimidating, impeding, or injuring a witness, an investigator, or other person acting on an adverse administrative action; by means of bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to such administrative proceeding; and, the wrongful destruction or concealment of information relevant to such adverse administrative proceeding.

d. *Lesser included offenses.* None.

e. *Maximum punishment.* Dishonorable discharge,

IV-118

forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, (wrongfully endeavor to) [impede (an adverse administrative proceeding) (an investigation) ( \_\_\_\_\_)] [influence the actions of \_\_\_\_\_, (an officer responsible for making a recommendation concerning the adverse administrative action)(an individual responsible for making a decision concerning an adverse administrative proceeding) (an individual responsible for processing an adverse administrative proceeding)( \_\_\_\_\_)] [(influence)(alter) the testimony of \_\_\_\_\_ a witness before (a board established to consider an administrative proceeding or elimination) (an investigating officer) ( \_\_\_\_\_) ] in the case of \_\_\_\_\_, by ](promising) (offering) (giving) to the said \_\_\_\_\_, (the sum of \$ \_\_\_\_\_) ( \_\_\_\_\_, of a value of about \$ \_\_\_\_\_)] [communicating to the said \_\_\_\_\_ a threat to \_\_\_\_\_] [ \_\_\_\_\_], (if) (unless) the said \_\_\_\_\_, would [recommend dismissal of the action against said \_\_\_\_\_] [(wrongfully refuse to testify) (testify falsely concerning \_\_\_\_\_) ( \_\_\_\_\_)] [(at such administrative proceeding) (before such investigating officer) (before such administrative board)] [ \_\_\_\_\_].

**97. Article 134—(Pandering and prostitution)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Prostitution.*

(a) That the accused had sexual intercourse with another person not the accused’s spouse;

(b) That the accused did so for the purpose of receiving 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 in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) *Pandering by compelling, inducing, enticing, or procuring act of prostitution.*

(a) That the accused compelled, induced, enticed, or procured a certain person to engage in an act of sexual intercourse for hire and reward with a person to be directed to said person by the accused;

(b) That this compelling, inducing, enticing, or procuring was wrongful; and

(c) 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.

(3) *Pandering by arranging or receiving consideration for arranging for sexual intercourse or sodomy.*

(a) That the accused arranged for, or received valuable consideration for arranging for, a certain person to engage in sexual intercourse or sodomy with another person;

(b) That the arranging (and receipt of consideration) was wrongful; and

(c) 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.* Prostitution may be committed by males or females. Sodomy for money or compensation is not included in subparagraph b(1). Sodomy may be charged under paragraph 51. Evidence that sodomy was for money or compensation may be a matter in aggravation. *See* R.C.M. 1001(b)(4).

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

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

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

f. *Sample specifications.*

(1) *Prostitution.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully engage in (an act) (acts) of sexual intercourse with \_\_\_\_\_, a person not his/her spouse,

for the purpose of receiving (money) (\_\_\_\_\_).

(2) *Compelling, inducing, enticing, or procuring act of prostitution.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully (compel) (induce) (entice) (procure) \_\_\_\_\_ to engage in (an act) (acts) of (sexual intercourse for hire and reward) with persons to be directed to him/her by the said \_\_\_\_\_.

(3) *Arranging, or receiving consideration for arranging for sexual intercourse or sodomy.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully (arrange for) (receive valuable consideration, to wit: \_\_\_\_\_ on account of arranging for) \_\_\_\_\_ to engage in (an act) (acts) of (sexual intercourse) (sodomy) with \_\_\_\_\_.

**97a. Article 134—(Parole, Violation of)**

a. *Text.* *See* paragraph 60.

b. *Elements.*

(1) That the accused was a prisoner as the result of a court-martial conviction or other criminal proceeding;

(2) That the accused was on parole;

(3) That there were certain conditions of parole that the parolee was bound to obey;

(4) That the accused violated the conditions of parole by doing an act or failing to do an act; and

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

c. *Explanation.*

(1) "Prisoner" refers only to those in confinement resulting from conviction at a court-martial or other criminal proceeding.

(2) 'Parole' is defined as "word of honor." A prisoner on parole, or parolee, has agreed to adhere to a parole plan and conditions of parole. A "parole plan" is a written or oral agreement made by the

prisoner prior to parole to do or refrain from doing certain acts or activities. A parole plan may include a residence requirement stating where and with whom a parolee will live, and a requirement that the prisoner have an offer of guaranteed employment. 'Conditions of parole' include the parole plan and other reasonable and appropriate conditions of parole, such as paying restitution, beginning or continuing treatment for alcohol or drug abuse, or paying a fine ordered executed as part of the prisoner's court-martial sentence. In return for giving his or her 'word of honor' to abide by a parole plan and conditions of parole, the prisoner is granted parole.

- d. *Lesser included offense.* Article 80—attempts
- e. *Maximum punishment.* Bad-conduct discharge, confinement for 6 months, and forfeiture of two-thirds pay per month for 6 months.
- f. *Sample specifications.*

In that \_\_\_\_\_ (personal jurisdiction data), a prisoner on parole, did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, violate the conditions of his/her parole by \_\_\_\_\_ .

**98. Article 134—(Perjury: subornation of)**

- a. *Text.* See paragraph 60.
- b. *Elements.*
  - (1) That the accused induced and procured a certain person to take an oath or its equivalent and to falsely testify, depose, or state upon such oath or its equivalent concerning a certain matter;
  - (2) That the oath or its equivalent was administered to said person in a matter in which an oath or its equivalent was required or authorized by law;
  - (3) That the oath or its equivalent was administered by a person having authority to do so;
  - (4) That upon the oath or its equivalent said person willfully made or subscribed a certain statement;
  - (5) That the statement was material;
  - (6) That the statement was false;
  - (7) That the accused and the said person did not then believe that the statement was true; and
  - (8) 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 57c for applicable

principles. "Induce and procure" means to influence, persuade, or cause.

- d. *Lesser included offense.* Article 80—attempts
- e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.
- f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, procure \_\_\_\_\_ to commit perjury by inducing him/her, the said \_\_\_\_\_, to take a lawful (oath) (affirmation) in a (trial by court-martial of \_\_\_\_\_) (trial by a court of competent jurisdiction, to wit: \_\_\_\_\_ of \_\_\_\_\_) (deposition for use in a trial by \_\_\_\_\_ of \_\_\_\_\_) ( \_\_\_\_\_ ) that he/she, the said \_\_\_\_\_, would (testify) (depose) ( \_\_\_\_\_ ) truly, and to (testify) (depose) ( \_\_\_\_\_ ) willfully, corruptly, and contrary to such (oath) (affirmation) in substance that \_\_\_\_\_, which (testimony) (deposition) ( \_\_\_\_\_ ) was upon a material matter and which the accused and the said \_\_\_\_\_ did not then believe to be true.

**99. Article 134—(Public record: altering, concealing, removing, mutilating, obliterating, or destroying)**

- a. *Text.* See paragraph 60.
- b. *Elements.*
  - (1) That the accused altered, concealed, removed, mutilated, obliterated, destroyed, or took with the intent to alter, conceal, remove, mutilate, obliterate, or destroy, a certain public record;
  - (2) That the act of the accused was willful and unlawful; and
  - (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
- c. *Explanation.* "Public records" include records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which

matters there was a duty to report. “Public records” includes classified matters.

- d. *Lesser included offense.* Article 80—attempts
- e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.
- f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, willfully and unlawfully ((alter) (conceal) (remove) (mutilate) (obliterate) (destroy)) (take with intent to (alter)(conceal) (remove) (mutilate) (obliterate) (destroy)) a public record, to wit:\_\_\_\_\_.

**100. Article 134—(Quarantine: medical, breaking)**

- a. *Text.* See paragraph 60.
- b. *Elements.*
  - (1) That a certain person ordered the accused into medical quarantine;
  - (2) That the person was authorized to order the accused into medical quarantine;
  - (3) That the accused knew of this medical quarantine and the limits thereof;
  - (4) That the accused went beyond the limits of the medical quarantine before being released therefrom by proper authority; and
  - (5) 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.* None.
- d. *Lesser included offenses.*
  - (1) Article 134—breaking restriction
  - (2) Article 80—attempts
- e. *Maximum punishment.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.
- f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data) having been placed in medical quarantine by a person authorized to order the accused into medical quarantine, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or

about \_\_\_\_\_ 20\_\_\_\_\_, break said medical quarantine.

**100a. Article 134—(Reckless endangerment)**

- a. *Text.* See paragraph 60.
- b. *Elements.*
  - (1) That the accused did engage in conduct;
  - (2) That the conduct was wrongful and reckless or wanton;
  - (3) That the conduct was likely to produce death or grievous bodily harm to another person; and
  - (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.
- c. *Explanation.*
  - (1) *In general.* This offense is intended to prohibit and therefore deter reckless or wanton conduct that wrongfully creates a substantial risk of death or grievous bodily harm to others.
  - (2) *Wrongfulness.* Conduct is wrongful when it is without legal justification or excuse.
  - (3) *Recklessness.* “Reckless” conduct is conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm or know that his conduct is substantially certain to cause that result. The ultimate question is whether, under all the circumstances, the accused’s conduct was of that heedless nature that made it actually or imminently dangerous to the rights or safety of others.
  - (4) *Wantonness.* “Wanton” includes “Reckless” but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.
  - (5) *Likely to produce.* When the natural or probable consequence of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is “likely” to produce that result. See paragraph 54c(4)(a)(ii).
  - (6) *Grievous bodily harm.* “Grievous bodily harm” means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

¶100a.c.(7)

(7) *Death or injury not required.* It is not necessary that death or grievous bodily harm be actually inflicted to prove reckless endangerment.

d. *Lesser included offenses.* None.

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully and (recklessly) (wantonly) engage in conduct, to wit: (describe conduct), conduct likely to cause death or grievous bodily harm to \_\_\_\_\_.

**101. Article 134—(Requesting commission of an offense)**

Paragraph 101 is deleted pursuant to Executive Order 12708.

**102. Article 134—(Restriction, breaking)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That a certain person ordered the accused to be restricted to certain limits;

(2) That said person was authorized to order said restriction;

(3) That the accused knew of the restriction and the limits thereof;

(4) That the accused went beyond the limits of the restriction before being released therefrom by proper authority; and

(5) 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.* Restriction is the moral restraint of a person imposed by an order directing a person to remain within certain specified limits. "Restriction" includes restriction under R.C.M. 304(a) (2), restriction resulting from imposition of either nonjudicial punishment (see Part V) or the sentence of a court-martial (see R.C.M. 1003( b) (6)), and administrative restriction in the interest of training, operations, security, or safety.

d. *Lesser included offenses.* Article 80—attempts

e. *Maximum punishment.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), having been restricted to the limits of \_\_\_\_\_, by a person authorized to do so, did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, break said restriction.

**103. Article 134—(Seizure: destruction, removal, or disposal of property to prevent)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That one or more persons authorized to make searches and seizures were seizing, about to seize, or endeavoring to seize certain property;

(2) That the accused destroyed, removed, or otherwise disposed of that property with intent to prevent the seizure thereof;

(3) That the accused then knew that person(s) authorized to make searches were seizing, about to seize, or endeavoring to seize the property; and

(4) 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 Mil. R. Evid. 316(e) concerning military personnel who may make seizures. It is not a defense that a search or seizure was technically defective.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, with intent to prevent its seizure, (destroy) (remove) (dispose of) \_\_\_\_\_, property which, as \_\_\_\_\_ then knew, (a) person(s) authorized to make searches and seizures were (seizing) (about to seize) (endeavoring to seize).

**103a. Article 134—(Self-injury without intent to avoid service)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused intentionally inflicted injury upon himself or herself;

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

[Note: If the offense was committed in time of war or in a hostile fire pay zone, add the following element]

(3) That the offense was committed (in time of war) (in a hostile fire pay zone).

c. *Explanation.*

(1) *Nature of offense.* This offense differs from malingering (see paragraph 40) in that for this offense, the accused need not have harbored a design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. This offense is characterized by intentional self-injury under such circumstances as prejudice good order and discipline or discredit the armed forces. It is not required that the accused be unable to perform duties, or that the accused actually be absent from his or her place of duty as a result of the injury. For example, the accused may inflict the injury while on leave or pass. The circumstances and extent of injury, however, are relevant to a determination that the accused's conduct was prejudicial to good order and discipline, or service-discrediting.

(2) *How injury inflicted.* The injury may be inflicted by nonviolent as well as by violent means and may be accomplished by any act or omission that produces, prolongs, or aggravates a sickness or disability. Thus, voluntary starvation that results in a debility is a self-inflicted injury. Similarly, the injury may be inflicted by another at the accused's request.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.*

(1) *Intentional self-inflicted injury.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Intentional self-inflicted injury in time of war or in a hostile fire pay zone.* Dishonorable dis-

charge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (in a hostile fire pay zone) on or about \_\_\_\_\_ 20\_\_\_\_\_, (a time of war,) intentionally injure himself/herself by \_\_\_\_\_ (nature and circumstances of injury).

**104. Article 134—(Sentinel or lookout: offenses against or by)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Disrespect to a sentinel or lookout.*

(a) That a certain person was a sentinel or lookout;

(b) That the accused knew that said person was a sentinel or lookout;

(c) That the accused used certain disrespectful language or behaved in a certain disrespectful manner;

(d) That such language or behavior was wrongful;

(e) That such language or behavior was directed toward and within the sight or hearing of the sentinel or lookout;

(f) That said person was at the time in the execution of duties as a sentinel or lookout; and

(g) 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) *Loitering or wrongfully sitting on post by a sentinel or lookout.*

(a) That the accused was posted as a sentinel or lookout;

(b) That while so posted, the accused loitered or wrongfully sat down on post; and

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

[Note: If the offense was committed in time of war or while the accused was receiving special pay under 37 U.S.C. § 310, add the following element after element (a): That the accused was so posted (in

¶104.b.(2)(c)

time of war) (while receiving special pay under 37 U.S.C. § 310).]

c. *Explanation.*

(1) *Disrespect.* For a discussion of “disrespect,” see paragraph 13c(3).

(2) *Loitering or wrongfully sitting on post.*

(a) *In general.* The discussion set forth in paragraph 38c applies to loitering or sitting down while posted as a sentinel or lookout as well.

(b) *Loiter.* “Loiter” means to stand around, to move about slowly, to linger, or to lag behind when that conduct is in violation of known instructions or accompanied by a failure to give complete attention to duty.

d. *Lesser included offenses.*

(1) *Disrespect to a sentinel or lookout.* Article 80—attempts

(2) *Loitering or wrongfully sitting on post by a sentinel or lookout.* Article 80—attempts

e. *Maximum punishment.*

(1) *Disrespect to a sentinel or lookout.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(2) *Loitering or wrongfully sitting on post by a sentinel or lookout.*

(a) *In time of war or while receiving special pay under 37 U.S.C. § 310.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(b) *Other cases.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specifications.*

(1) *Disrespect to a sentinel or lookout.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, then knowing that \_\_\_\_\_ was a sentinel or lookout, (wrongfully use the following disrespectful language “\_\_\_\_\_,” or words to that effect, to \_\_\_\_\_) (wrongfully behave in a disrespectful manner toward \_\_\_\_\_, by \_\_\_\_\_) a (sentinel) (lookout) in the execution of his/her duty.

(2) *Loitering or wrongfully sitting down on post by a sentinel or lookout.*

In that \_\_\_\_\_ (personal jurisdiction data), while posted as a (sentinel) (lookout),

did, (at/on board—location) (while receiving special pay under 37 U.S.C. § 310) on or about \_\_\_\_\_ 20\_\_\_\_\_, (a time of war) (loiter) (wrongfully sit down) on his/her post.

**105. Article 134—(Soliciting another to commit an offense)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused solicited or advised a certain person or persons to commit a certain offense under the code other than one of the four offenses named in Article 82;

(2) That the accused did so with the intent that the offense actually be committed; and

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

c. *Explanation.* See paragraph 6c. If the offense solicited was actually committed, see also paragraph 1.

d. *Lesser included offenses.* Article 80 —attempts.

e. *Maximum punishment.* Any person subject to the code who is found guilty of soliciting or advising another person to commit an offense which, if committed by one subject to the code, would be punishable under the code, shall be subject to the maximum punishment authorized for the offense solicited or advised, except that in no case shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 5 years. However, any person subject to the code who is found guilty of soliciting or advising another person to commit the offense of espionage (Article 106a) shall be subject to any punishment, other than death, that a court-martial may direct.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully (solicit) (advise) \_\_\_\_\_ (to disobey a general regulation, to wit: \_\_\_\_\_) (to steal \_\_\_\_\_, of a value of (about) \$ \_\_\_\_\_, the property of \_\_\_\_\_) (to \_\_\_\_\_), by \_\_\_\_\_.

**106. Article 134—(Stolen property: knowingly receiving, buying, concealing)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused wrongfully received, bought, or concealed certain property of some value;

(2) That the property belonged to another person;

(3) That the property had been stolen;

(4) That the accused then knew that the property had been stolen; and

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

c. *Explanation.*

(1) *In general.* The actual thief is not criminally liable for receiving the property stolen; however a principal to the larceny (see paragraph 1), when not the actual thief, may be found guilty of knowingly receiving the stolen property but may not be found guilty of both the larceny and receiving the property.

(2) *Knowledge.* Actual knowledge that the property was stolen is required. Knowledge may be proved by circumstantial evidence.

(3) *Wrongfulness.* Receiving stolen property is wrongful if it is without justification or excuse. For example, it would not be wrongful for a person to receive stolen property for the purpose of returning it to its rightful owner, or for a law enforcement officer to seize it as evidence.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Stolen property, knowingly receiving, buying, or concealing.

(1) *Of a value of \$500.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) *Of a value of more than \$500.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully (receive) (buy) (conceal) \_\_\_\_\_, of a value of (about) \$\_\_\_\_\_, the property

of \_\_\_\_\_, which property, as he/she, the said \_\_\_\_\_, then knew, had been stolen.

**107. Article 134—(Straggling)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused, while accompanying the accused's organization on a march, maneuvers, or similar exercise, straggled;

(2) That the straggling was wrongful; and

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

c. *Explanation.* "Straggle" means to wander away, to stray, to become separated from, or to lag or linger behind.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, at \_\_\_\_\_, on or about \_\_\_\_\_ 20\_\_\_\_\_, while accompanying his/her organization on (a march) (maneuvers) (\_\_\_\_\_), wrongfully straggle.

**108. Article 134—(Testify: wrongful refusal)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused was in the presence of a court-martial, board of officer(s), military commission, court of inquiry, an officer conducting an investigation under Article 32, or an officer taking a deposition, of or for the United States, at which a certain person was presiding;

(2) That the said person presiding directed the accused to qualify as a witness or, having so qualified, to answer a certain question;

(3) That the accused refused to qualify as a witness or answer said question;

(4) That the refusal was wrongful; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and

¶108.b.(5)

discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* To “qualify as a witness” means that the witness declares that the witness will testify truthfully. See R.C.M. 807; Mil. R. Evid. 603. A good faith but legally mistaken belief in the right to remain silent does not constitute a defense to a charge of wrongful to testify. See also Mil. R. Evid. 301 and Section V.

d. *Lesser included offenses.* None.

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

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), being in the presence of (a) (an) ((general) (special) (summary) court-martial) (board of officer(s)) (military commission) (court of inquiry) (officer conducting an investigation under Article 32, Uniform Code of Military Justice) (officer taking a deposition) (\_\_\_\_\_) (of) (for) the United States, of which \_\_\_\_\_ was (military judge) (president), (\_\_\_\_\_), (and having been directed by the said \_\_\_\_\_ to qualify as a witness) (and having qualified as a witness and having been directed by the said \_\_\_\_\_ to answer the following question(s) put to him/her as a witness, “\_\_\_\_\_”), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully refuse (to qualify as a witness) (to answer said question(s)).

**109. Article 134—(Threat or hoax: bomb)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Bomb threat.*

(a) That the accused communicated certain language;

(b) That the language communicated amounted to a threat;

(c) That the harm threatened was to be done by means of an explosive;

(d) That the communication was wrongful; and

(e) 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) *Bomb hoax.*

IV-126

(a) That the accused communicated or conveyed certain information;

(b) That the language or information concerned an attempt being made or to be made by means of an explosive to unlawfully kill, injure, or intimidate a person or to unlawfully damage or destroy certain property;

(c) That the information communicated by the accused was false and that the accused then knew it was false;

(d) That the communication of the information by the accused was malicious; and

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

c. *Explanation.*

(1) *Threat.* A “threat” is an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage, or destroy is not required. See also paragraph 110.

(2) *Malicious.* A communication is “malicious” if the accused believed that the information would probably interfere with the peaceful use of the building, vehicle, aircraft, or other property concerned, or would cause fear or concern to one or more persons.

(3) *Explosive.* See R.C.M. 103(11).

d. *Lesser included offenses.*

(1) *Bomb threat.*

(a) Article 134—communicating a threat

(b) Article 80—attempts

(2) *Bomb hoax.* Article 80—attempts

e. *Maximum punishment.* Bomb threat and bomb hoax: Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications.*

(1) *Bomb threat.*

In that \_\_\_\_\_ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully communicate certain language, to wit: \_\_\_\_\_, which language constituted a threat to harm a person or property by means of an explosive.

(2) *Bomb hoax.*

In that \_\_\_\_\_ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about \_\_\_\_\_ 20 \_\_\_\_\_, maliciously (communicate) (convey) certain information concerning an attempt being made or to be made to unlawfully ((kill) (injure) (intimidate) \_\_\_\_\_) ( ( d a m a g e ) (destroy) \_\_\_\_\_) by means of an explosive, to wit: \_\_\_\_\_, which information was false and which \_\_\_\_\_ then knew to be false.

#### **110. Article 134—(Threat, communicating)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future;

(2) That the communication was made known to that person or to a third person;

(3) That the communication was wrongful; and

(4) 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.* To establish the threat it is not necessary that the accused actually intended to do the injury threatened. However, a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another. See also paragraph 109 concerning bomb threat.

d. *Lesser included offenses.*

(1) Article 117—provoking speeches or gestures

(2) Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, wrong-

fully communicate to \_\_\_\_\_ a threat (injure \_\_\_\_\_ by \_\_\_\_\_) (accuse \_\_\_\_\_ of having committed the offense of \_\_\_\_\_) ( \_\_\_\_\_).

#### **111. Article 134—(Unlawful entry)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused entered the real property of another or certain personal property of another which amounts to a structure usually used for habitation or storage;

(2) That such entry was unlawful; and

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

c. *Explanation.* See paragraph 55 for a discussion of “entry.” An entry is “unlawful” if made without the consent of any person authorized to consent to entry or without other lawful authority. No specific intent or breaking is required for this offense. See paragraph 56 for a discussion of housebreaking. The property protected against unlawful entry includes real property and the sort of personal property which amounts to a structure usually used for habitation or storage. It would usually not include an aircraft, automobile, tracked vehicle, or a person’s locker, even though used for storage purposes. However, depending on the circumstances, an intrusion into such property may be prejudicial to good order and discipline.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20 \_\_\_\_\_, unlawfully enter the (dwelling house) (garage) (warehouse) (tent) (vegetable garden) (orchard) (stateroom) ( \_\_\_\_\_) of \_\_\_\_\_.

#### **112. Article 134—(Weapon: concealed, carrying)**

a. *Text.* See paragraph 60.

¶112.b.

b. *Elements.*

(1) That the accused carried a certain weapon concealed on or about the accused's person;

(2) That the carrying was unlawful;

(3) That the weapon was a dangerous weapon; and

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

c. *Explanation.*

(1) *Concealed weapon.* A weapon is concealed when it is carried by a person and intentionally covered or kept from sight.

(2) *Dangerous weapon.* For purposes of this paragraph, a weapon is dangerous if it was specifically designed for the purpose of doing grievous bodily harm, or it was used or intended to be used by the accused to do grievous bodily harm.

(3) *On or about.* "On or about" means the weapon was carried on the accused's person or was within the immediate reach of the accused.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 20\_\_\_\_\_, unlaw-

fully carry on or about his/her person a concealed weapon, to wit: a\_\_\_\_\_.

**113. Article 134—(Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button)**

a. *Text.* See paragraph 60.

b. *Elements.*

(1) That the accused wore a certain insignia, decoration, badge, ribbon, device, or lapel button upon the accused's uniform or civilian clothing;

(2) That the accused was not authorized to wear the item;

(3) That the wearing was wrongful; and

(4) 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.* None.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification.*

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_ 20\_\_\_\_\_, wrongfully and without authority wear upon his/her (uniform) (civilian clothing) (the insignia or grade of a (master sergeant of \_\_\_\_\_) (chief gunner's mate of \_\_\_\_\_)) (Combat Infantryman Badge) (the Distinguished Service Cross) (the ribbon representing the Silver Star) (the lapel button representing the Legion of Merit) (\_\_\_\_\_).