

NCIS – SABB “Mini-Manual”
for
NCIS Special Agent Training Program



**Homeland
Security**

This "Mini-Manual" contains excerpts from the Manual for Courts-Martial (2008 Edition) with the addition of changes made by Executive Order in 2008 and 2010.

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“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(36) Repealed.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, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security. [NOTE: The Secretary of Homeland Security has designated the Chief Counsel, U.S. Coast Guard, to serve as the Judge Advocate General of the Coast Guard.]

(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 concerning 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

with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

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 fail-

R.C.M. 202(a)

ure 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.

(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.

(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



 Number: 1 Author: bdlandrum Subject: Sticky Note Date: 8/31/2011 8:06:15 AM

(a) Paragraph (4) of the Discussion immediately after R.C.M. 202(a) is amended to read as follows:

(4) Limitations on jurisdiction over civilians. Court-Martial jurisdiction over civilians under the code is limited by the Constitution and other applicable laws, including as construed in judicial decisions. The exercise of jurisdiction under Article 2(a)(11) in peace time has been held unconstitutional by the Supreme Court of the United States. Before initiating court-martial proceedings against a civilian, relevant statutes, decisions, service regulations, and policy memorandum should be carefully examined.

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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

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

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.

(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.

(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-

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

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 Homeland Security, 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

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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

(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 rec-

ognized 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 per-

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son 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 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 “clergyman’s assistant” is a person employed by or assigned to assist a clergyman in his capacity as a spiritual advisor.

(3) 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.

(d) *Definitions.* As used in this rule:

(1) The term “a child of either” includes not only a biological child, adopted child, or ward of one of the spouses but also includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this rule only, a child is: (i) an individual under the age of 18; or (ii) an individual with a mental handicap who functions under the age of 18.

(2) The term “temporary physical custody” includes instances where a parent entrusts his or her child with another. There is no minimum amount of time necessary to establish temporary physical custody nor must there be a written agreement. Rather, the focus is on the parent’s agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances where a parent entrusts another with the care of their child for recurring care or during absences due to temporary duty or deployments.

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 dis-

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closure 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.

(e) *Pretrial session.* At any time after referral of charges and prior to arraignment, any party may move for a session under Article 39(a) to consider matters relating to classified information that may arise in connection with the trial. Following such motion or *sua sponte*, the military judge promptly shall hold a session under Article 39(a) to establish the timing of requests for discovery, the provision of notice under subdivision (h), and the initiation of the procedure under subdivision (i). In addition, the military judge may consider any other matters that re-

late to classified information or that may promote a fair and expeditious trial.

(f) *Action after referral of charges.* If a claim of privilege has been made under this rule with respect to classified information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter shall be reported to the convening authority. The convening authority may:

- (1) institute action to obtain the classified information for the use by the military judge in making a determination under subdivision (i);
- (2) dismiss the charges;
- (3) dismiss the charges or specifications or both to which the information relates; or
- (4) take such other action as may be required in the interests of justice.

If, after a reasonable period of time, the information is not provided to the military judge in circumstances where proceeding with the case without such information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates.

(g) *Disclosure of classified information to the accused.*

(1) *Protective order.* If the Government agrees to disclose classified information to the accused, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

- (A) Prohibiting the disclosure of the information except as authorized by the military judge;
- (B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;
- (C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;
- (D) All persons requiring security clearances shall cooperate with investigatory personnel in any investigations which are necessary to obtain a security clearance.
- (E) Requiring the maintenance of logs regarding access by all persons authorized by the military

judge to have access to the classified information in connection with the preparation of the defense;

(F) Regulating the making and handling of notes taken from material containing classified information; or

(G) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(2) *Limited disclosure.* The military judge, upon motion of the Government, shall authorize (A) the deletion of specified items of classified information from documents to be made available to the defendant, (B) the substitution of a portion or summary of the information for such classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the military judge *in camera* and shall not be disclosed to the accused.

(3) *Disclosure at trial of certain statements previously made by a witness.*

(A) *Scope.* After a witness called by the Government has testified on direct examination, the military judge, on motion of the accused, may order production of statements in the possession of the United States under R.C.M. 914. This provision does not preclude discovery or assertion of a privilege otherwise authorized under these rules or this Manual.

(B) *Closed session.* If the privilege in this rule is invoked during consideration of a motion under R.C.M. 914, the Government may deliver such statement for the inspection only by the military judge *in camera* and may provide the military judge with an affidavit identifying the portions of the statement that are classified and the basis for the classification assigned. If the military judge finds that disclosure of any portion of the statement identified by the Government as classified could reasonably be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation and that such portion of the statement is consistent with the witness' testimony, the military judge shall

excise the portion from the statement. With such material excised, the military judge shall then direct delivery of such statement to the accused for use by the accused. If the military judge finds that such portion of the statement is inconsistent with the witness' testimony, the Government may move for a proceeding under subdivision (i).

(4) *Record of trial.* If, under this subdivision, any information is withheld from the accused, the accused objects to such withholding, and the trial is continued to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents as well as the Government's motion and any materials submitted in support thereof shall be sealed and attached to the record of trial as an appellate exhibit. Such material shall be made available to reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(h) *Notice of the accused's intention to disclose classified information.*

(1) *Notice by the accused.* If the accused reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a court-martial proceeding, the accused shall notify the trial counsel in writing of such intention and file a copy of such notice with the military judge. Such notice shall be given within the time specified by the military judge under subdivision (e) or, if no time has been specified, prior to arraignment of the accused.

(2) *Continuing duty to notify.* Whenever the accused learns of classified information not covered by a notice under (1) that the accused reasonably expects to disclose at any such proceeding, the accused shall notify the trial counsel and the military judge in writing as soon as possible thereafter.

(3) *Content of notice.* The notice required by this subdivision shall include a brief description of the classified information. The description, to be sufficient, must be more than a mere general statement of the areas about which evidence may be introduced. The accused must state, with particularity, which items of classified information he reasonably expects will be revealed by his defense.

(4) *Prohibition against disclosure.* The accused may not disclose any information known or believed to be classified until notice has been given under this subdivision and until the Government has been

afforded a reasonable opportunity to seek a determination under subdivision (i).

(5) *Failure to comply.* If the accused fails to comply with the requirements of this subdivision, the military judge may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the accused of any witness with respect to any such information.

(i) *In camera proceedings for cases involving classified information.*

(1) *Definition.* For purposes of this subdivision, an “*in camera proceeding*” is a session under Article 39(a) from which the public is excluded.

(2) *Motion for in camera proceeding.* Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an *in camera* proceeding concerning the use at any proceeding of any classified information. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege under this rule may grant the Government leave to move for an *in camera* proceeding concerning the use of additional classified information.

(3) *Demonstration of national security nature of the information.* In order to obtain an *in camera* proceeding under this rule, the Government shall submit the classified information and an affidavit *ex parte* for examination by the military judge only. The affidavit shall demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute, or regulation.

(4) *In camera proceeding.*

(A) *Procedure.* Upon finding that the Government has met the standard set forth in subdivision (i)(3) with respect to some or all of the classified information at issue, the military judge shall conduct an *in camera* proceeding. Prior to the *in camera* proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the clas-

sified information when the Government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the *in camera* proceeding the military judge shall determine whether the information may be disclosed at the court-martial proceeding. Where the Government’s motion under this subdivision is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

(B) *Standard.* Classified information is not subject to disclosure under this subdivision unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. In presentencing proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment shall be admitted only if no unclassified version of such information is available.

(C) *Ruling.* Unless the military judge makes a written determination that the information meets the standard set forth in (B), the information may not be disclosed or otherwise elicited at a court-martial proceeding. The record of the *in camera* proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

(D) *Alternatives to full disclosure.* If the military judge makes a determination under this subdivision that would permit disclosure of the information or if the Government elects not to contest the relevance, necessity, and admissibility of any classified information, the Government may proffer a statement admitting for purposes of the proceeding any relevant facts such information would tend to prove or may submit a portion of summary to be used in lieu of the information. The military judge shall order that such statement, portion, or summary be used by the accused in place of the classified information unless the military judge finds that use of the classified information itself is necessary to afford the accused a fair trial.

(E) *Sanctions.* If the military judge determines that alternatives to full disclosure may not be used and the Government continues to object to disclosure of the information, the military judge shall issue

any order that the interests of justice require. Such an order may include an order:

- (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 material 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.

Any such order shall permit the Government to avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

(j) *Introduction of classified information.*

(1) *Classification status.* Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(2) *Precautions by the military judge.* In order to prevent unnecessary disclosure of classified information, 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 classified information contained therein.

(3) *Contents of writing, recording, or photograph.* The military judge may permit proof of the contents of a writing, recording, or photograph that contains classified information without requiring introduction into evidence of the original or a duplicate.

(4) *Taking of testimony.* During the examination of a witness, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be relevant and necessary to the defense. 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 classified information. Such action may include requiring the Government to provide the military judge with a proffer or 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.

(5) *Closed session.* The military judge may exclude the public during that portion of the presentation of evidence that discloses classified information.

(6) *Record of trial.* The record of trial with respect to any classified matter will be prepared under R.C.M. 1103(h) and 1104(b)(1)(D).

(k) *Security procedures to safeguard against compromise of classified information disclosed to courts-martial.* The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to courts-martial and appellate authorities.

Rule 506. Government information other than classified information

(a) *General rule of privilege.* Except where disclosure is required by an Act of Congress, government information is privileged from disclosure if disclosure would be detrimental to the public interest.

(b) *Scope.* "Government information" includes official communication and documents and other information within the custody or control of the Federal Government. This rule does not apply to classified information (Mil. R. Evid. 505) or to the identity of an informant (Mil. R. Evid. 507).

(c) *Who may claim the privilege.* The privilege may be claimed by the head of the executive or military department or government agency concerned. The privilege for records and information of the Inspector General may be claimed by the immediate superior of the inspector general officer responsible for creation of the records or information, the Inspector General, or any other superior authority. A person who may claim the privilege may authorize a witness or the trial counsel to claim the privilege on his or her behalf. The authority of a witness or the 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 Government shall respond in writing to a request for government information if the privilege in this rule is claimed for such information. The Government shall:

- (1) delete specified items of government information claimed to be privileged from documents made available to the accused;

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(2) substitute a portion or summary of the information for such documents;

(3) substitute a statement admitting relevant facts that the government information would tend to prove;

(4) provide the document subject to conditions similar to those set forth in subdivision (g) of this rule; or

(5) withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the public interest.

(e) *Pretrial session.* At any time after referral of charges and prior to arraignment, any party may move for a session under Article 39(a) to consider matters relating to government information that may arise in connection with the trial. Following such motion, or *sua sponte*, the military judge promptly shall hold a pretrial session under Article 39(a) to establish the timing of requests for discovery, the provision of notice under subdivision (h), and the initiation of the procedure under subdivision (i). In addition, the military judge may consider any other matters that relate to government information or that may promote a fair and expeditious trial.

(f) *Action after motion for disclosure of information.* After referral of charges, if the defense moves for disclosure of government information for which a claim of privilege has been made under this rule, the matter shall be reported to the convening authority. The convening authority may:

(1) institute action to obtain the information for use by the military judge in making a determination under subdivision (i);

(2) dismiss the charges;

(3) dismiss the charges or specifications or both to which the information relates; or

(4) take other action as may be required in the interests of justice.

If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.

(g) *Disclosure of government information to the accused.* If the Government agrees to disclose government information to the accused subsequent to a claim of privilege under this rule, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the ac-

cused. The terms of any such protective order may include provisions:

(1) Prohibiting the disclosure of the information except as authorized by the military judge;

(2) Requiring storage of the material in a manner appropriate for the nature of the material to be disclosed; upon reasonable notice;

(3) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(4) Requiring the maintenance of logs recording access by persons authorized by the military judge to have access to the government information in connection with the preparation of the defense;

(5) Regulating the making and handling of notes taken from material containing government information; or

(6) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

(h) *Prohibition against disclosure.* The accused may not disclose any information known or believed to be subject to a claim of privilege under this rule unless the military judge authorizes such disclosure.

(i) *In camera proceedings.*

(1) *Definition.* For the purpose of this subdivision, an “*in camera proceeding*” is a session under Article 39(a) from which the public is excluded.

(2) *Motion for in camera proceeding.* Within the time specified by the military judge for the filing of a motion under this rule, the Government may move for an *in camera* proceeding concerning the use at any proceeding of any government information that may be subject to a claim of privilege. Thereafter, either prior to or during trial, the military judge for good cause shown or otherwise upon a claim of privilege may grant the Government leave to move for an *in camera* proceeding concerning the use of additional government information.

(3) *Demonstration of public interest nature of the information.* In order to obtain an *in camera* proceeding under this rule, the Government shall demonstrate, through the submission of affidavits and information for examination only by the military judge, that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

(4) *In camera proceeding.*

(A) *Finding of identifiable damage.* Upon finding that the disclosure of some or all of the information submitted by the Government under subsection (i)(3) reasonably could be expected to cause identifiable damage to the public interest, the military judge shall conduct an *in camera* proceeding.

(B) *Disclosure of the information to the defense.* Subject to subdivision (F), below, the Government shall disclose government information for which a claim of privilege has been made to the accused, for the limited purpose of litigating, *in camera*, the admissibility of the information at trial. The military judge shall enter an appropriate protective order to the accused and all other appropriate trial participants concerning the disclosure of the information according to subsection (g), above. The accused shall not disclose any information provided under this subsection unless, and until, such information has been admitted into evidence by the military judge. In the *in camera* proceeding, both parties shall have the opportunity to brief and argue the admissibility of the government information at trial.

(C) *Standard.* Government information is subject to disclosure at the court-martial proceeding under this subsection if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused, and is otherwise admissible in the court-martial proceeding.

(D) *Ruling.* No information may be disclosed at the court-martial proceeding or otherwise unless the military judge makes a written determination that the information is subject to disclosure under the standard set forth in subsection (C), above. The military judge will specify in writing any information that he or she determines is subject to disclosure. The record of the *in camera* proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

(E) *Alternatives to full disclosure.* If the military 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.

(1) *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. 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 rea-

sonable 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

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made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

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

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

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

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

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

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

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

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

(1) when the patient is dead;

(2) when the communication is evidence of 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 matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Mil. R. Evid. 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated

to awaken the witness's conscience and impress the witness's mind with the duty to do so.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualifications as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

Rule 605. Competency of military judge as witness

(a) The military judge presiding at the court-martial may not testify in that court-martial as a witness. No objection need be made to preserve the point.

(b) This rule does not preclude the military judge from placing on the record matters concerning docketing of the case.

Rule 606. Competency of court member as witness

(a) *At the court-martial.* A member of the court-martial may not testify as a witness before the other members in the trial of the case in which the member is sitting. If the member is called to testify, the opposing party, except in a special court-martial without a military judge, shall be afforded an opportunity to object out of the presence of the members.

(b) *Inquiry into validity of findings or sentence.* Upon an inquiry into the validity of the findings or sentence, a member may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process in connection therewith, except that a member may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. Nor may the member's affidavit or evidence of any statement by the member concerning a matter about which the member would be precluded from testifying be received for these purposes.

PART IV
PUNITIVE ARTICLES
(Statutory text of each Article is in bold)

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 of statute. 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 parentheses in the examples in paragraph 1b(2)(a) above. In some circumstances, inaction may make one liable

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as a party, where there is a duty to act. If a person (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 of statute.* **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 _____ 2 0 _____ committed an offense punishable 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 of statute.* **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 of statute.*

(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 119a—attempting to kill an unborn child
- (g) 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 of statute.* **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

¶5.c.(3)

agreement must, at least in part, involve the commission 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 of statute.

(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

¶6.f.(1)

or 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), (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 of statute.

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 qualifications 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 of statute.* 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 of statute.*

(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**

¶9.a.(a)(3)

(3) without being regularly separated from one 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 un-

authorized 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 hazard-

¶9.c.(2)(c)

ous 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 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), 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 of statute.* 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,

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or duty section with the intent to abandon it (special type of duty and specific intent).

(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 with-*

out 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 of statute.*

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.

¶11.c.

c. *Explanation.*

(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. Knowl-

edge 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 of statute.*

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 Homeland Security, 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 of statute.*

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 of statute.* 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) *Determination of lawfulness.* The lawfulness of an order is a question of law to be determined by the military judge.

(iii) *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.

(iv) *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.

(v) *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

¶14.c.(2)(b)

must be directed specifically to the subordinate. Violations of regulations, standing orders or directives, or failure to perform previously established duties 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 _____,



Number: 1 Author: bdlandrum Subject: Sticky Note Date: 8/31/2011 8:09:19 AM

(a) Para. 14, Article 90, Assaulting or willfully disobeying superior commissioned officer, paragraph c.(2)(g) is amended to read as follows:

(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. Immediate compliance is required for any order that does not explicitly or implicitly indicate that delayed compliance is authorized or directed. 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.

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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 of statute.* 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 of statute.* 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 or-**

der 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 Homeland Security, 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) re-

¶16.c.(1)(b)

tains its character as a general order or regulation 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* paragraph 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____) (_____), by (wrongfully) _____.

(2) *Violation or failure to obey other lawful written order.*

In that _____ (personal jurisdiction data), having knowledge of a lawful order issued by _____, to wit: (paragraph _____, (_____ the Combat Group Regulation No. _____) (U S S _____, Regulation _____), 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 treat-

ment) (to _____) (not 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 about _____ 20 _____ to about _____ 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 of statute.*

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 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

¶17.c.(2)

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 of statute.*

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.*

In that _____ (personal jurisdiction data),

¶18.f.(3)

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 of statute.*

**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

¶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 of statute.

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.*

¶20.e.(3)

Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

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 of statute.*

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 of statute.*

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 respon-

sible 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 of statute.*

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

¶23.b.(2)(c)

(c) That this act occurred while the accused was before or in the presence of the enemy.

(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

¶23.d.(6)(b)

(b) Article 80—attempts

(7) *Causing false alarms.* Article 80—attempts

(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 about _____ 20____, (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 about _____ 20____, (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 about _____ 20____, (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 about _____ 20____, (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 about _____ 20____, (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 about _____ 20____, (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 about _____ 20____, (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 about _____ 20____, (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 of statute.*

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_____, (attempt to) c o m p e l _____, t h e c o m m a n d e r

¶24.f.(1)

of _____, (to give up to the enemy) (to abandon) said _____, 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 of statute.*

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 of statute.*

Any person subject to this chapter who forces a safeguard shall suffer death or such other pun-

ishment 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 of statute.**

(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, 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

¶27.b.(3)(a)

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 _____), (an inhabitant of _____) (_____).

28. Article 104—Aiding the enemy

a. *Text of statute.*

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 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

¶28.c.(5)(a)

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 author-

ity, 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 of statute*.

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 authori-

ties, 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 of statute.*

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 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

¶30.a.

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 members 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 of statute.*

(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 information, 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 cryptolineart 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 photolineart 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 weapon-

ry) (military spacecraft) (military satellites) (early warning systems) (_____, a means of defense or retaliation against a large scale attack) (war plans) (communications intelligence) (cryptolineart 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 of statute.*

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 immateriality 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 of statute.*

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.* “To suffer” means to allow or permit. The willful or negligent sufferance specified by this article in-



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(a) Para. 32, Article 108, Military Property of the United States-sale, loss, damage, destruction, or wrongful disposition, paragraph c.(1) is amended to read as follows:

(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. Military property is a term of art, and should not be confused with government property. The terms are not interchangeable. While all military property is government property, not all government property is military property. An item of government property is not military property unless the item in question meets the definition provided above. It 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 neglect of the accused. Retail merchandise of service exchange stores is not military property under this article.

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cludes: 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 of statute.*

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 intended purpose. Damage consists of any physical injury to the property. To constitute an offense under

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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 of statute.*

(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 the said _____, at or 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, _____ 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, bet-

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ween _____ 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 of statute.*

(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 subparagraph (b) of paragraph 35a. [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 manipu-

lation 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.

- (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

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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/on board 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-14A 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)(breath) was, as shown by chemical analysis, equal to or exceeded (.10)(____) grams of alcohol per (100 milliliters of blood)(210 liters of breath), which is the limit under (cite applicable State law)(cite applicable statute or regulation)] [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 of statute.*

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 of statute.*

(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, phencyclidine, 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, phencyclidine, 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 possible, 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

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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 con-*

trolled 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).

(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,

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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 of statute.*

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 du-

ties 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 of statute.*

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 offenses: 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

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(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 of statute.*

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 of statute.*

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

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

¶41.f.(1)

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 of statute.*

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 ac-

cused 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 of statute.*

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, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, 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, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, 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 premedi-

tated 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 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

¶43.c.(3)(b)

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 perpetrate) _____) murder _____ by means of (shooting him/her with a rifle) (_____).

44. Article 119—Manslaughter

a. *Text of statute.*

(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 manslaughter 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



Number: 1 Author: bdlandrum Subject: Sticky Note Date: 8/31/2011 8:09:38 AM
(b) Paragraph 44, Article 119, Manslaughter, paragraph b. is amended to read as follows:

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.
- (Note: Add the following if applicable)

- (e) That the person killed was a child under the age of 16 years.

(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.
- (Note: Add the following if applicable)

- (e) That the person killed was a child under the age of 16 years.

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(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, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, 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

(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

Number: 1 Author: bdlandrum Subject: Sticky Note Date: 8/31/2011 8:09:47 AM
(b) Paragraph 44, Article 119, Manslaughter, paragraph b.(2)(d) is amended to read as follows:

(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, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson.

Executive Order: 2010 Amendments to the Manual for Courts-Martial, United States

Number: 2 Author: bdlandrum Subject: Sticky Note Date: 8/31/2011 8:09:52 AM
(d) Paragraph 44, Article 119, Manslaughter, paragraph c.(2)(c) is added following paragraph c.(2)(b):

(c) When committed upon a child under 16 years of age. The maximum punishment is increased when involuntary manslaughter is committed upon a child under 16 years of age. The accused's knowledge that the child was under 16 years of age at the time of the offense is not required for the increased maximum punishment.

Executive Order 13468: 2008 Amendments to the Manual for Courts-Martial, United States

Number: 3 Author: bdlandrum Subject: Sticky Note Date: 7/29/2011 8:55:38 AM
(c) Paragraph 44, Article 119, Manslaughter, paragraph c.(1)(c) is added following paragraph c.(1)(b):

(c) When committed upon a child under 16 years of age. The maximum punishment is increased when voluntary manslaughter is committed upon a child under 16 years of age. The accused's knowledge that the child was under 16 years of age at the time of the offense is not required for the increased maximum punishment.

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¶44.e.

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 (in (on) 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) (_____)) u n l a w f u l l y kill _____ by _____ him/her (in (on) the _____ with a _____.

44a. Article 119a.--Death or injury of an unborn child

a. *Text of statute.*

(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 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 authorized by state or federal law to perform abortions 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) **As used 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.**

b. *Elements.*

(1) *Injuring an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(a))), (involuntary manslaughter (article 119(b)(2))), (rape (article 120)), (robbery (article 122)), (maiming (article 124)), (assault (article 128)), of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belonging to))] a woman;

Number: 1 Author: bdlandrum Subject: Sticky Note Date: 8/31/2011 8:10:01 AM
(e) Paragraph 44, Article 119, Manslaughter, paragraph e.(3) is added following paragraph e.(2):

(3) Voluntary manslaughter of a child under 16 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(f) Paragraph 44, Article 119, Manslaughter, paragraph e.(4) is added following paragraph e.(3):

(4) Involuntary manslaughter of a child under 16 years of age. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

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Number: 2 Author: bdlandrum Subject: Sticky Note Date: 8/31/2011 8:10:05 AM
(g) Paragraph 44, Article 119, Manslaughter, paragraph f. is amended to read as follows:

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 _____, willfully and unlawfully kill _____, (a child under 16 years of age) by _____ him/her (in) (on) 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 _____, (by culpable negligence) (while (perpetrating) (attempting to perpetrate) an offense directly affecting the person of _____, to wit: (maiming) (a battery) (_____)) unlawfully kill _____ (a child under 16 years of age) by _____ him/her (in) (on) the _____ with a _____.

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- (b) That the woman was then pregnant; and
- (c) That the accused thereby caused bodily injury to the unborn child of that woman.

(2) *Killing an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(a))), (involuntary manslaughter (article 119(b)(2))), (rape (article 120)), (robbery (article 122)), (maiming (article 124)), (assault (article 128)), of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] a woman;

- (b) That the woman was then pregnant; and
- (c) That the accused thereby caused the death of the unborn child of that woman.

(3) *Attempting to kill an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(a))), (involuntary manslaughter (article 119(b)(2))), (rape (article 120)), (robbery (article 122)), (maiming (article 124)), (assault (article 128)), of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belonging to))] a woman;

- (b) That the woman was then pregnant; and
- (c) That the accused thereby intended and attempted to kill the unborn child of that woman.

(4) *Intentionally killing an unborn child.*

(a) That the accused was engaged in the [(murder (article 118)), (voluntary manslaughter (article 119(a))), (involuntary manslaughter (article 119(b)(2))), (rape (article 120)), (robbery (article 122)), (maiming (article 124)), (assault (article 128)), of] or [burning or setting afire, as arson (article 126), of (a dwelling inhabited by) (a structure or property (known to be occupied by) (belonging to))] a woman;

- (b) That the woman was then pregnant; and
- (c) That the accused thereby intentionally killed the unborn child of that woman.

c. *Explanation.*

(1) *Nature of offense.* This article makes it a separate, punishable crime to cause the death of or bodily injury to an unborn child while engaged in arson (article 126, UCMJ); murder (article 118, UCMJ); voluntary manslaughter (article 119(a),

UCMJ); involuntary manslaughter (article 119(b)(2), UCMJ); rape (article 120(a), UCMJ); robbery (article 122, UCMJ); maiming (article 124, UCMJ); or assault (article 128, UCMJ) against a pregnant woman. For all underlying offenses, except arson, this article requires that the victim of the underlying offense be the pregnant mother. For purposes of arson, the pregnant mother must have some nexus to the arson such that she sustained some “bodily injury” due to the arson. For the purposes of this article the term “woman” means a female of any age. This article does not permit the prosecution of any—

(a) 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;

(b) person for any medical treatment of the pregnant woman or her unborn child; or

(c) woman with respect to her unborn child.

(2) The offenses of “injuring an unborn child” and “killing an unborn child” do not require proof that—

(a) the person engaging in the conduct (the accused) had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(b) the accused intended to cause the death of, or bodily injury to, the unborn child.

(3) The offense of “attempting to kill an unborn child” requires that the accused intended by his conduct to cause the death of the unborn child (See paragraph b(3)(c) above).

(4) *Bodily injury.* For the purpose of this offense, the term “bodily injury” is that which is provided by section 1365 of title 18, to wit: a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.

(5) *Unborn child.* “Unborn child” means a child in utero or a member of the species homo sapiens who is carried in the womb, at any stage of development, from conception to birth.

d. *Lesser included offenses.*

(1) *Killing an unborn child.* Article 119a — injuring an unborn child

(2) *Intentionally killing an unborn child.*

¶44a.d.(2)(a)

(a) Article 119a — killing an unborn child

(b) Article 119a — injuring an unborn child

(c) Article 119a — attempts (attempting to kill an unborn child)

e. *Maximum punishment.*

The maximum punishment for (1) Injuring an unborn child; (2) Killing an unborn child; (3) Attempting to kill an unborn child; or (4) Intentionally killing an unborn child is such punishment, other than death, as a court-martial may direct, but shall be consistent with the punishment had the bodily injury, death, attempt to kill, or intentional killing occurred to the unborn child's mother.

f. *Sample specifications.*

(1) *Injuring an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, cause bodily injury to the unborn child of , a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to)))] that woman.

(2) *Killing an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, cause the death of the unborn child of , a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to)))] that woman.

(3) *Attempting to kill an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, attempt to kill the unborn child of , a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to)))] that woman.

(4) *Intentionally killing an unborn child.*

In that _____ (personal jurisdiction

tion data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20____, intentionally kill the unborn child of , a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to)))] that woman.

45. Article 120—Rape, sexual assault, and other sexual misconduct

a. *Text of statute.*

(a) *Rape. Any person subject to this chapter who causes another person of any age to engage in a sexual act by—*

(1) **using force against that other person;**

(2) **causing grievous bodily harm to any person;**

(3) **threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;**

(4) **rendering another person unconscious;**
or

(5) **administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.**

(b) *Rape of a child. Any person subject to this chapter who—*

(1) **engages in a sexual act with a child who has not attained the age of 12 years; or**

(2) **engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years; is guilty of rape of a child and shall be punished as a court-martial may direct.**

(c) *Aggravated sexual assault. Any person subject to this chapter who—*

(1) **causes another person of any age to engage in a sexual act by—**

(A) **threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be**

subjected to death, grievous bodily harm, or kidnapping); or

(B) causing bodily harm; or

(2) engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—

(A) appraising the nature of the sexual act;

(B) declining participation in the sexual act; or

(C) communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.

(d) *Aggravated sexual assault of a child.* Any person subject to this chapter who engages in a sexual act with a child who has attained the age of 12 years is guilty of aggravated sexual assault of a child and shall be punished as a court-martial may direct.

(e) *Aggravated sexual contact.* Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(f) *Aggravated sexual abuse of a child.* Any person subject to this chapter who engages in a lewd act with a child is guilty of aggravated sexual abuse of a child and shall be punished as a court-martial may direct.

(g) *Aggravated sexual contact with a child.* Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (b) (rape of a child) had the sexual contact been a sexual act, is guilty of aggravated sexual contact with a child and shall be punished as a court-martial may direct.

(h) *Abusive sexual contact.* Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(i) *Abusive sexual contact with a child.* Any per-

son subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (d) (aggravated sexual assault of a child) had the sexual contact been a sexual act, is guilty of abusive sexual contact with a child and shall be punished as a court-martial may direct.

(j) *Indecent liberty with a child.* Any person subject to this chapter who engages in indecent liberty in the physical presence of a child—

(1) with the intent to arouse, appeal to, or gratify the sexual desire of any person; or

(2) with the intent to abuse, humiliate, or degrade any person; is guilty of indecent liberty with a child and shall be punished as a court-martial may direct.

(k) *Indecent act.* Any person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.

(l) *Forcible pandering.* Any person subject to this chapter who compels another person to engage in an act of prostitution with another person to be directed to said person is guilty of forcible pandering and shall be punished as a court-martial may direct.

(m) *Wrongful sexual contact.* Any person subject to this chapter who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.

(n) *Indecent exposure.* Any person subject to this chapter who intentionally exposes, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-martial may direct.

(o) *Age of child.*

(1) *Twelve years.* In a prosecution under subsection (b) (rape of a child), subsection (g) (aggravated sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty

had not attained the age of 12 years. It is not an affirmative defense that the accused reasonably believed that the child had attained the age of 12 years.

(2) *Sixteen years.* In a prosecution under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 16 years. Unlike in paragraph (1), however, it is an affirmative defense that the accused reasonably believed that the child had attained the age of 16 years.

(p) *Proof of threat.* In a prosecution under this section, in proving that the accused made a threat, it need not be proven that the accused actually intended to carry out the threat.

(q) *Marriage.*

(1) *In general.* In a prosecution under paragraph (2) of subsection (c) (aggravated sexual assault), or under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), subsection (j) (indecent liberty with a child), subsection (m) (wrongful sexual contact), or subsection (n) (indecent exposure), it is an affirmative defense that the accused and the other person when they engaged in the sexual act, sexual contact, or sexual conduct were married to each other.

(2) *Definition.* For purposes of this subsection, a marriage is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and the other person as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.

(3) *Exception.* Paragraph (1) shall not apply if the accused's intent at the time of the sexual conduct is to abuse, humiliate, or degrade any person.

(r) *Consent and mistake of fact as to consent.* Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under

any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).

(s) *Other affirmative defenses not precluded.* The enumeration in this section of some affirmative defenses shall not be construed as excluding the existence of others.

(t) *Definitions.* In this section:

(1) *Sexual act.* The term “sexual act” means—

(A) contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

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

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

(3) *Grievous bodily harm.* The term “grievous bodily harm” means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose. It is the same level of injury as in section 928 (article 128) of this chapter, and a lesser degree of injury than in section 2246(4) of title 18.

(4) *Dangerous weapon or object.* The term “dangerous weapon or object” means—

(A) any firearm, loaded or not, and whether operable or not;

(B) any other weapon, device, instrument, material, or substance, whether animate or inanimate, that in the manner it is used, or is intended

to be used, is known to be capable of producing death or grievous bodily harm; or

(C) any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.

(5) *Force*. The term “force” means action to compel submission of another or to overcome or prevent another’s resistance by—

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

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

(C) physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.

(6) *Threatening or placing that other person in fear*. The term “threatening or placing that other person in fear” under paragraph (3) of subsection (a) (rape), or under subsection (e) (aggravated sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to death, grievous bodily harm, or kidnapping.

(7) *Threatening or placing that other person in fear*.

(A) *In general*. The term “threatening or placing that other person in fear” under paragraph (1)(A) of subsection (c) (aggravated sexual assault), or under subsection (h) (abusive sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping.

(B) *Inclusions*. Such lesser degree of harm includes—

(i) physical injury to another person or to another person’s property; or

(ii) a threat—

(I) to accuse any person of a crime;

(II) to expose a secret or publicize an asserted fact, whether true or false, tending to

subject some person to hatred, contempt, or ridicule; or

(III) through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

(8) *Bodily harm*. The term “bodily harm” means any offensive touching of another, however slight.

(9) *Child*. The term “child” means any person who has not attained the age of 16 years.

(10) *Lewd act*. The term “lewd act” means—

(A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.

(11) *Indecent liberty*. The term “indecent liberty” means indecent conduct, but physical contact is not required. It includes one who with the requisite intent exposes one’s genitalia, anus, buttocks, or female areola or nipple to a child. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct, it is an indecent liberty; the child’s consent is not relevant.

(12) *Indecent conduct*. The term “indecent conduct” means that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person’s consent, and contrary to that other person’s reasonable expectation of privacy, of—

(A) that other person’s genitalia, anus, or buttocks, or (if that other person is female) that person’s areola or nipple; or

(B) that other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125) of this chapter), or sexual contact.

(13) *Act of prostitution.* The term “act of prostitution” means a sexual act, sexual contact, or lewd act for the purpose of receiving money or other compensation.

(14) *Consent.* The term “consent” means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused’s use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. A person cannot consent to sexual activity if—

- (A) under 16 years of age; or
- (B) substantially incapable of—

(i) appraising the nature of the sexual conduct at issue due to—

(I) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or

(II) mental disease or defect that renders the person unable to understand the nature of the sexual conduct at issue;

(ii) physically declining participation in the sexual conduct at issue; or

(iii) physically communicating unwillingness to engage in the sexual conduct at issue.

(15) *Mistake of fact as to consent.* The term “mistake of fact as to consent” means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to dis-

cover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused’s state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.

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

b. *Elements.*

(1) *Rape.*

(a) *Rape by using force.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act by using force against that other person.

(b) *Rape by causing grievous bodily harm.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act by causing grievous bodily harm to any person.

(c) *Rape by using threats or placing in fear.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(d) *Rape by rendering another unconscious.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act by rendering that other person unconscious.

(e) *Rape by administration of drug, intoxicant, or other similar substance.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act by administering to that other person a drug, intoxicant, or other similar substance;

(ii) That the accused administered the drug,

intoxicant or other similar substance by force or threat of force or without the knowledge or permission of that other person; and

(iii) That, as a result, that other person's ability to appraise or control conduct was substantially impaired.

(2) *Rape of a child.*

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

(i) That the accused engaged in a sexual act with a child; and

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

(b) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using force.*

(i) That the accused engaged in a sexual act with a child;

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

(iii) That the accused did so by using force against that child.

(c) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm.*

(i) That the accused engaged in a sexual act with a child;

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

(iii) That the accused did so by causing grievous bodily harm to any person.

(d) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.*

(i) That the accused engaged in a sexual act with a child;

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

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

(e) *Rape of a child who has attained the age of*

12 years but has not attained the age of 16 years by rendering that child unconscious.

(i) That the accused engaged in a sexual act with a child;

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

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

(f) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance.*

(i) That the accused engaged in a sexual act with a child;

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

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

(b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that child; and

(c) That, as a result, that child's ability to appraise or control conduct was substantially impaired.

(3) *Aggravated sexual assault.*

(a) *Aggravated sexual assault by using threats or placing in fear.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act; and

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

(b) *Aggravated sexual assault by causing bodily harm.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act; and

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

(c) *Aggravated sexual assault upon a person substantially incapacitated or substantially incapa-*

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ble of appraising the act, declining participation, or communicating unwillingness.

(i) That the accused engaged in a sexual act with another person, who is of any age; and

(Note: add one of the following elements)

(ii) That the other person was substantially incapacitated;

(iii) That the other person was substantially incapable of appraising the nature of the sexual act;

(iv) That the other person was substantially incapable of declining participation in the sexual act; or

(v) That the other person was substantially incapable of communicating unwillingness to engage in the sexual act.

(4) *Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years.*

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

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

(5) *Aggravated sexual contact.*

(a) *Aggravated sexual contact by using force.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by using force against that other person.

(b) *Aggravated sexual contact by causing grievous bodily harm.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by causing grievous bodily harm to any person.

(c) *Aggravated sexual contact by using threats or placing in fear.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

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

be subjected to death, grievous bodily harm, or kidnapping.

(d) *Aggravated sexual contact by rendering another unconscious.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

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

(e) *Aggravated sexual contact by administration of drug, intoxicant, or other similar substance.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

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

(b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that other person; and

(c) That, as a result, that other person's ability to appraise or control conduct was substantially impaired.

(6) *Aggravated sexual abuse of a child.*

(a) That the accused engaged in a lewd act; and

(b) That the act was committed with a child who has not attained the age of 16 years.

(7) *Aggravated Sexual Contact with a Child.*

(a) *Aggravated sexual contact with a child who has not attained the age of 12 years.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

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

(b) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using force.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact

with or by a child or by another person with a child; and

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

(iii) That the accused did so by using force against that child.

(c) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

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

(iii) That the accused did so by causing grievous bodily harm to any person.

(d) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

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

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

(e) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by rendering another or that child unconscious.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the

child had attained the age of 12 years but had not attained the age of 16 years; and

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

(f) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

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

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

(b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that child or that other person; and

(c) That, as a result, that child's or that other person's ability to appraise or control conduct was substantially impaired.

(8) *Abusive sexual contact.*

(a) *Abusive sexual contact by using threats or placing in fear.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

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

(b) *Abusive sexual contact by causing bodily harm.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

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

(c) *Abusive sexual contact upon a person sub-*

¶45.b.(8)(c)

stantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness.

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(Note: add one of the following elements)

(ii) That the other person was substantially incapacitated;

(iii) That the other person was substantially incapable of appraising the nature of the sexual contact;

(iv) That the other person was substantially incapable of declining participation in the sexual contact; or

(v) That the other person was substantially incapable of communicating unwillingness to engage in the sexual contact.

(9) *Abusive sexual contact with a child.*

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

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

(10) *Indecent liberty with a child.*

(a) That the accused committed a certain act or communication;

(b) That the act or communication was indecent;

(c) That the accused committed the act or communication in the physical presence of a certain child;

(d) That the child was under 16 years of age; and

(e) That the accused committed the act or communication with the intent to:

(i) arouse, appeal to, or gratify the sexual desires of any person; or

(ii) abuse, humiliate, or degrade any person.

(11) *Indecent act.*

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

(b) That the conduct was indecent conduct.

(12) *Forcible pandering.*

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

(b) That the accused directed another person to said person, who then engaged in an act of prostitution.

(13) *Wrongful sexual contact.*

(a) That the accused had sexual contact with another person;

(b) That the accused did so without that other person's permission; and

(c) That the accused had no legal justification or lawful authorization for that sexual contact.

(14) *Indecent exposure.*

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

(b) That the accused's exposure was in an indecent manner;

(c) That the exposure occurred in a place where the conduct involved could reasonably be expected to be viewed by people other than the accused's family or household; and

(d) That the exposure was intentional.

c. *Explanation.*

(1) *Definitions.* The terms are defined in Paragraph 45a.(t), *supra*.

(2) *Character of victim.* See Mil. R. Evid. 412 concerning rules of evidence relating to the character of the victim of an alleged sexual offense.

(3) *Indecent.* In conduct cases, "indecent" generally signifies that form of immorality relating to sexual impurity that is not only grossly vulgar, obscene, and repugnant to common propriety, but also tends to excite lust and deprave the morals with respect to sexual relations. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

d. *Lesser included offenses.* The following lesser included offenses are based on internal cross-references provided in the statutory text of Article 120. See subsection (e) for a further listing of possible lesser included offenses.

(1) *Rape.*

(a) Article 120—Aggravated sexual contact

(b) Article 134—Assault with intent to commit rape

- (c) Article 128—Aggravated assault; Assault; Assault consummated by a battery
- (d) Article 80—Attempts
- (2) *Rape of a child.*
 - (a) Article 120—Aggravated sexual contact with a child; Indecent act
 - (b) Article 134—Assault with intent to commit rape
 - (c) Article 128—Aggravated assault; Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16
 - (d) Article 80—Attempts
- (3) *Aggravated sexual assault.*
 - (a) Article 120—Abusive sexual contact
 - (b) Article 128—Aggravated assault; Assault; Assault consummated by a battery
 - (c) Article 80—Attempts
- (4) *Aggravated sexual assault of a child.*
 - (a) Article 120—Abusive sexual contact with a child; Indecent act
 - (b) Article 128—Aggravated assault; Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16
 - (c) Article 80—Attempts
- (5) *Aggravated sexual contact.*
 - (a) Article 128—Aggravated assault; Assault; Assault consummated by a battery
 - (b) Article 80—Attempts
- (6) *Aggravated sexual abuse of a child.*
 - (a) Article 120—Indecent act
 - (b) Article 128—Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16
 - (c) Article 80—Attempts
- (7) *Aggravated sexual contact with a child.*
 - (a) Article 120—Indecent act
 - (b) Article 128—Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16
 - (c) Article 80—Attempts
- (8) *Abusive sexual contact.*
 - (a) Article 128—Assault; Assault consummated by a battery
 - (b) Article 80—Attempts
- (9) *Abusive sexual contact with a child.*

- (a) Article 120—Indecent act
 - (b) Article 128—Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16
 - (c) Article 80—Attempts
 - (10) *Indecent liberty with a child.*
 - (a) Article 120—Indecent act
 - (b) Article 80—Attempts
 - (11) *Indecent act.* Article 80—Attempts
 - (12) *Forcible pandering.* Article 80—Attempts
 - (13) *Wrongful sexual contact* Article 80—Attempts
 - (14) *Indecent exposure.* Article 80—Attempts
- e. *Additional lesser included offenses.* Depending on the factual circumstances in each case, to include the type of act and level of force involved, the following offenses may be considered lesser included in addition to those offenses listed in subsection d. (See subsection (d) for a listing of the offenses that are specifically cross-referenced within the statutory text of Article 120.) The elements of the proposed lesser included offense should be compared with the elements of the greater offense to determine if the elements of the lesser offense are derivative of the greater offense and vice versa. See Appendix 23 for further explanation of lesser included offenses.
- (1)(a) *Rape by using force.* Article 120—Indecent act; Wrongful sexual contact
 - (1)(b) *Rape by causing grievous bodily harm.* Article 120—Aggravated sexual assault by causing bodily harm; Abusive sexual contact by causing bodily harm; Indecent act; Wrongful sexual contact
 - (1)(c) *Rape by using threats or placing in fear.* Article 120—Aggravated sexual assault by using threats or placing in fear; Abusive sexual contact by using threats or placing in fear; Indecent act; Wrongful sexual contact
 - (1)(d) *Rape by rendering another unconscious.* Article 120—Aggravated sexual assault upon a person substantially incapacitated; Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact
 - (1)(e) *Rape by administration of drug, intoxicant, or other similar substance.* Article 120—Aggravated sexual assault upon a person substantially incapacitated; Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

¶45.e.(2)(a) - (f)

(2)(a) - (f) *Rape of a child who has not attained 12 years; Rape of a child who has attained the age of 12 years but has not attained the age of 16 years.* Article 120—Aggravated sexual assault of a child; Aggravated sexual abuse of a child; Abusive sexual contact with a child; Indecent liberty with a child; Wrongful sexual contact

(3) *Aggravated sexual assault.* Article 120—Wrongful sexual contact; Indecent act

(4) *Aggravated sexual assault of a child.* Article 120—Aggravated sexual abuse of a child; Indecent liberty with a child; Wrongful sexual contact

(5)(a) *Aggravated sexual contact by force.* Article 120—Indecent act; Wrongful sexual contact

(5)(b) *Aggravated sexual contact by causing grievous bodily harm.* Article 120—Abusive sexual contact by causing bodily harm; Indecent act; Wrongful sexual contact

(5)(c) *Aggravated sexual contact by using threats or placing in fear.* Article 120—Abusive sexual contact by using threats or placing in fear; Indecent act; Wrongful sexual contact

(5)(d) *Aggravated sexual contact by rendering another unconscious.* Article 120—Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(5)(e) *Aggravated sexual contact by administration of drug, intoxicant, or other similar substance.* Article 120—Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(6) *Aggravated sexual abuse of a child.* Article 120—Aggravated sexual contact with a child; Aggravated sexual abuse of a child; Indecent liberty with a child; Wrongful sexual contact

(7) *Aggravated sexual contact with a child.* Article 120—Abusive sexual contact with a child; Indecent liberty with a child; Wrongful sexual contact

(8) *Abusive sexual contact.* Article 120—Wrongful sexual contact; Indecent act

(9) *Abusive sexual contact with a child.* Article 120—Indecent liberty with a child; Wrongful sexual contact

(10) *Indecent liberty with a child.* Article 120—Wrongful sexual contact

f. *Maximum punishment.*

(1) *Rape and rape of a child.* Death or such other punishment as a court martial may direct.

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

(3) *Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years, aggravated sexual abuse of a child, aggravated sexual contact, and aggravated sexual contact with a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact with a child and indecent liberty with a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

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

(6) *Indecent act or forcible pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(7) *Wrongful sexual contact or indecent exposure.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

g. *Sample specifications.*

(1) *Rape.*

(a) *Rape by using force.*

(i) *Rape by use or display of dangerous weapon or object.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, cause _____ to engage in a sexual act, to wit: _____, by (using a dangerous weapon or object, to wit: _____ against (him)(her)) (displaying a dangerous weapon or object, to wit: _____ to (him)(her)).

(ii) *Rape by suggestion of possession of dangerous weapon or object.* In that _____ (-personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, cause _____ to engage in a sexual act, to wit: _____, by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him)(her) to believe it was a dangerous weapon or object.

(iii) *Rape by using physical violence, strength, power, or restraint to any person.* In that _____ (personal jurisdiction data), did (at/on

board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, cause _____ to engage in a sexual act, to wit: _____, by using (physical violence) (strength) (power) (restraint applied to _____), sufficient that (he)(she) could not avoid or escape the sexual conduct.

(b) *Rape by causing grievous bodily harm.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, cause _____ to engage in a sexual act, to wit: _____, by causing grievous bodily harm upon (him)(her)(_____), to wit: a (broken leg)(deep cut)(fractured skull)(_____).

(c) *Rape by using threats or placing in fear.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, cause _____ to engage in a sexual act, to wit: _____, by [threatening] [placing (him)(her) in fear] that (he)(she) (_____) will be subjected to (death)(grievous bodily harm) (kidnaping) by _____.

(d) *Rape by rendering another unconscious.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, cause _____ to engage in a sexual act, to wit: _____, by rendering (him)(her) unconscious.

(e) *Rape by administration of drug, intoxicant, or other similar substance.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, cause _____ to engage in a sexual act, to wit: _____, by administering to (him)(her) a drug, intoxicant, or other similar substance, (by force) (by threat of force) (without (his)(her) knowledge or permission), and thereby substantially impaired (his)(her) ability to [(appraise) (control)][(his) (her)] conduct.

(2) *Rape of a child.*

(a) *Rape of a child who has not attained the age of 12 years.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, engage in a sexual act,

to wit: _____ with _____, a child who had not attained the age of 12 years.

(b) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using force.*

(i) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by use or display of dangerous weapon or object.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by (using a dangerous weapon or object, to wit: _____ against (him)(her)) (displaying a dangerous weapon or object, to wit: _____ to (him)(her)).

(ii) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by suggestion of possession of dangerous weapon or object.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him)(her) to believe it was a dangerous weapon or object.

(iii) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using physical violence, strength, power, or restraint to any person.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, engage in a sexual act, to wit: _____ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by using (physical violence) (strength) (power) (restraint applied to _____) sufficient that (he)(she) could not avoid or escape the sexual conduct.

(c) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of

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16 years, by causing grievous bodily harm upon (him)(her)(____), to wit: a (broken leg)(deep cut)(fractured skull)(____).

(d) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, engage in a sexual act, to wit: ____, with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by [threatening] [placing (him)(her) in fear] that (he)(she) (____) would be subjected to (death)(grievous bodily harm) (kidnapping) by ____.

(e) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by rendering that child unconscious.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, engage in a sexual act, to wit: ____, with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by rendering (him)(her) unconscious.

(f) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, engage in a sexual act, to wit: ____, with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by administering to (him)(her) a drug, intoxicant, or other similar substance (by force) (by threat of force) (without (his)(her) knowledge or permission), and thereby substantially impaired (his)(her) ability to [(appraise)(control)][(his)(her)] conduct.

(3) *Aggravated sexual assault.*

(a) *Aggravated sexual assault by using threats or placing in fear.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, cause ____ to engage in a sexual act, to wit: ____, by [threatening] [placing(him)(her) in fear of] [(physical injury to ____)(injury to ____'s property)(accusation of crime)(exposition of secret)(abuse of military position)(____)].

(b) *Aggravated sexual assault by causing bodily harm.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, cause ____ to engage in a sexual act, to wit: ____, by causing bodily harm upon (him)(her)(____), to wit: ____.

(c) *Aggravated sexual assault upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, engage in a sexual act, to wit: ____ with ____, who was (substantially incapacitated) [substantially incapable of (appraising the nature of the sexual act)(declining participation in the sexual act) (communicating unwillingness to engage in the sexual act)].

(4) *Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, engage in a sexual act, to wit: ____ with ____, who had attained the age of 12 years, but had not attained the age of 16 years.

(5) *Aggravated sexual contact.*

(a) *Aggravated sexual contact by using force.*

(i) *Aggravated sexual contact by use or display of dangerous weapon or object.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____)] (cause ____ to engage in sexual contact, to wit: ____, with ____) (cause sexual contact with or by ____, to wit: ____)] by (using a dangerous weapon or object, to wit: ____ against (him)(her)) (displaying a dangerous weapon or object, to wit: ____ to (him)(her)).

(ii) *Aggravated sexual contact by suggestion of possession of dangerous weapon or object.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____)] (cause ____ to engage in sexual contact, to wit: ____, with ____) (cause sexual contact with or by ____, to wit: ____)] by the suggestion of

possession of a dangerous weapon or an object that was used in a manner to cause (him)(her)(____) to believe it was a dangerous weapon or object.

(iii) *Aggravated sexual contact by using physical violence, strength, power, or restraint to any person.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____)(cause ____ to engage in sexual contact, to wit: ____, with ____) (cause sexual contact with or by ____, to wit: ____)] by using (physical violence) (strength) (power) (restraint applied to ____), sufficient that (he)(she)(____) could not avoid or escape the sexual conduct.

(b) *Aggravated sexual contact by causing grievous bodily harm.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____)(cause ____ to engage in sexual contact, to wit: ____, with ____) (cause sexual contact with or by ____, to wit: ____)] by causing grievous bodily harm upon (him)(her)(____), to wit: a (broken leg)(deep cut)(fractured skull)(____).

(c) *Aggravated sexual contact by using threats or placing in fear.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____)(cause ____ to engage in sexual contact, to wit: ____, with ____) (cause sexual contact with or by ____, to wit: ____)] by [(threatening (him)(her)(____)] [(placing(him)(her)(____) in fear] that (he)(she)(____) will be subjected to (death)(grievous bodily harm)(kidnapping) by ____.

(d) *Aggravated sexual contact by rendering another unconscious.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____)(cause ____ to engage in sexual contact, to wit: ____, with ____) (cause sexual contact with or by ____, to wit: ____)] by rendering (him)(her)(____) unconscious.

(e) *Aggravated sexual contact by administration of drug, intoxicant, or other similar substance.*

In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____)(cause ____ to engage in sexual contact, to wit: ____, with ____) (cause sexual contact with or by ____, to wit: ____)] by administering to (him)(her)(____) a drug, intoxicant, or other similar substance, (by force) (by threat of force) (without (his)(her)(____) knowledge or permission), and thereby substantially impaired (his)(her)(____) ability to [(appraise) (control)] [(his) (her)] conduct.

(6) *Aggravated sexual abuse of a child.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, engage in a lewd act, to wit: ____ with ____, a child who had not attained the age of 16 years.

(7) *Aggravated sexual contact with a child.*

(a) *Aggravated sexual contact with a child who has not attained the —age of 12 years.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____, a child who had not attained the age of 12 years)(cause ____ to engage in sexual contact, to wit: ____, with ____, a child who had not attained the age of 12 years) (cause sexual contact with or by ____, a child who had not attained the age of 12 years, to wit: ____)].

(b) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using force.*

(i) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by use or display of dangerous weapon or object.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause ____ to engage in sexual contact, to wit: ____, with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by ____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: ____)] by (using a dangerous weapon or object, to

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wit: ____ against (him)(her)(____)) (displaying a dangerous weapon or object, to wit: ____ to (him)(her)(____)).

(ii) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by suggestion of possession of dangerous weapon or object.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause ____ to engage in sexual contact, to wit: ____, with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by ____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: ____)] by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him)(her)(____) to believe it was a dangerous weapon or object.

(iii) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using physical violence, strength, power, or restraint to any person.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause ____ to engage in sexual contact, to wit: ____, with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by ____, a child who had not attained the age of 12 years, but had not attained the age of 16 years, to wit: ____)] by using (physical violence) (strength) (power) (restraint applied to ____) sufficient that (he)(she)(____) could not avoid or escape the sexual conduct.

(c) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years)

years)(cause ____ to engage in sexual contact, to wit: ____, with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by ____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: ____)] by causing grievous bodily harm upon (him)(her)(____), to wit: a (broken leg)(deep cut)(fractured skull)(____).

(d) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause ____ to engage in sexual contact, to wit: ____, with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by ____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: ____)] by [threatening] [placing (him)(her)(____) in fear] that (he)(she)(____) will be subjected to (death) (grievous bodily harm)(kidnapping) by ____.

(e) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by rendering that child or another unconscious.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to wit: ____ with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause ____ to engage in sexual contact, to wit: ____, with ____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by ____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: ____)] by rendering (him)(her)(____) unconscious.

(f) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance.* In that ____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about ____ 20____, [(engage in sexual contact, to

wit: _____ with _____, a child who had attained the age of 12 years but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years but had not attained the age of 16 years, to wit: _____)] by administering to (him)(her)(_____) a drug, intoxicant, or other similar substance (by force) (by threat of force) (without (his)(her)(_____) knowledge or permission), and thereby substantially impaired (his)(her)(_____) ability to [(appraise) (control)] [(his) (her)] conduct.

(8) *Abusive sexual contact.*

(a) *Abusive sexual contact by using threats or placing in fear.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, [(engage in sexual contact, to wit: _____ with _____) (cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by [(threatening) (placing (him)(her)(_____) in fear of)] [(physical injury to _____)(injury to _____'s property)(accusation of crime)(exposition of secret)(abuse of military position)(_____)].

(b) *Abusive sexual contact by causing bodily harm.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, [(engage in sexual contact, to wit: _____ with _____) (cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by causing bodily harm upon (him)(her)(_____), to wit: (_____).

(c) *Abusive sexual contact by engaging in a sexual act with a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or substantially incapable of communicating unwillingness.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, [(engage in sexual contact, to wit: _____ with _____) (cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] while (he)(she)(_____) was [substantially incapacitated] [substantially incapable of (appraising the nature of the sexual contact) (declining participation in

the sexual contact) (communicating unwillingness to engage in the sexual contact)].

(9) *Abusive sexual contact with a child.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years but had not attained the age of 16 years, to wit: _____)].

(10) *Indecent liberties with a child.* In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20_____,(take indecent liberties) (engage in indecent conduct) in the physical presence of _____, a (female) (male) under 16 years of age, by (communicating the words: to wit: _____) (exposing one's private parts, to wit: _____) (_____), with the intent to [(arouse) (appeal to) (gratify) the (sexual desire) of the _____ (or _____)] [(abuse)(humiliate)(degrade)_____].

(11) *Indecent act.* In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, wrongfully commit indecent conduct, to wit _____.

(12) *Forcible pandering.* In that _____ (personal jurisdiction data), did (at/on board-location), (subject-matter jurisdiction data, if required), on or about _____ 20_____, compel _____ to engage in [(a sexual act)(sexual contact) (lewd act), to wit: _____] for the purpose of receiving money or other compensation with _____ (a) person(s) to be directed to (him)(her) by the said _____.

(13) *Wrongful sexual contact.* In that _____ (personal jurisdiction data), did (at/on board-location), (subject-matter jurisdiction data, if required), on or about _____ 20_____, engage in sexual contact with _____, to wit: _____, and such sexual contact was without legal justification or lawful authorization and without the permission of _____.

(14) *Indecent exposure.* In that _____ (personal jurisdiction data), did (at/on board-location), (subject-matter jurisdiction data, if required), on or about _____ 20_____, intentionally (expose in an

indecent manner (his) (her) (____) (____) while (at the barracks window) (in a public place) (_____).”

45a. Article 120a—Stalking

a. *Text of statute.*

(a) **Any person subject to this section:**

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

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

(3) **whose acts induce reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself or to a member of his or her immediate family; is guilty of stalking and shall be punished as a court-martial may direct.**

(b) **In this section:**

(1) **The term “course of conduct” means:**

(A) **a repeated maintenance of visual or physical proximity to a specific person; or**

(B) **a repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or towards a specific person.**

(2) **The term “repeated,” with respect to conduct, means two or more occasions of such conduct.**

(3) **The term “immediate family,” in the case of a specific person, means a spouse, parent, child, or sibling of the person, or any other family member, relative, or intimate partner of the person who regularly resides in the household of the person or who within the six months preceding the commencement of the course of conduct regularly resided in the household of the person.**

b. *Elements.*

(1) That the accused wrongfully engaged in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm to himself or herself or a member of his or her immediate family;

(2) That the accused had knowledge, or should have had knowledge, that the specific person would be placed in reasonable fear of death or bodily harm to himself or herself or a member of his or her immediate family; and

(3) That the accused’s acts induced reasonable fear in the specific person of death or bodily harm to himself or herself or to a member of his or her immediate family.

c. *Explanation.* See Paragraph 54.c(1)(a) for an explanation of “bodily harm”.

d. *Lesser included offenses.* 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), who (knew)(should have known) that ____ would be placed in reasonable fear of (death)(bodily harm) to (himself) (herself) (____, a member of his or her immediate family) did (at/on board -- location), (subject-matter jurisdiction data, if required), (on or about ____ 20____)(from about ____ to about ____ 20____), wrongfully engage in a course of conduct directed at____, to wit:____ thereby inducing in____, a reasonable fear of (death)(bodily harm) to (himself)(herself) (____, a member of his or her immediate family).”

46. Article 121—Larceny and wrongful appropriation

a. *Text of statute.*

(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 property 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.



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(c) Paragraph 46, Larceny and wrongful appropriation, the Note following paragraph b.(1)(d) is amended to read as follows:

Note: If the property is alleged to be military property, as defined in paragraph 46.c.(1)(h), add the following element

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(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 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 publica-

tion 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



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(c) Paragraph 46, Larceny and wrongful appropriation, is amended by re-lettering paragraph 46.c.(1)(h) as paragraph 46.c.(1)(i), and adding a new paragraph 46.c.(1)(h) as follows:

(h) Military Property. Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States. Military property is a term of art, and should not be confused with government property. The terms are not interchangeable. While all military property is government property, not all government property is military property. An item of government property is not military property unless the item in question meets the definition provided above. Retail merchandise of service exchange stores is not military property under this article.

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¶46.c.(1)(h)(i)

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 permanently—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 of statute.*

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.

¶47.c.(3)

(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 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*.

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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 of statute*.

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 person'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.*

¶48.f.(1)

(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 _____ (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 of statute.*

Any person subject to this chapter who—

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(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 of statute.*

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 20 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 of statute.*

(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.*

(1) *With a child under the age of 16.*

(a) Article 125—forcible sodomy (and offenses included therein; see subparagraph (2) below)

(b) 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 80—attempts.

(3) *Sodomy.* Article 80—attempts

(Note: Consider lesser included offenses under Art. 120, depending on the factual circumstances in each case.)

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____, commit sodomy 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 of statute.*

(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 offender 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.* Dishonorable 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: (the residence of _____) (_____), (the property of _____) of a value of (about) \$_____.

(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

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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 (burn) (set fire to) (an automobile)(_____), the property of _____, of a value of (about) \$ _____.

53. Article 127—Extortion

a. *Text of statute.*

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 communication 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 _____), communicate to _____a threat to (here describe the threat).

54. Article 128—Assault

a. *Text of statute.*

(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: Add any of the following as applicable)

(v) That the weapon was a loaded firearm.

(vi) That the person was a child under the age of 16 years.

(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: Add any of the following as applicable)

(v) That the injury was inflicted with a loaded firearm.

(vi) That the person was a child under the age of 16 years.

c. *Explanation.*

(1) *Simple assault.*

(a) *Definition of assault.* An “assault” is an attempt 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

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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 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.

(v) *When committed upon a child under 16 years of age.* The maximum punishment is increased when aggravated assault with a dangerous weapon or means likely to produce death or grievous bodily harm is inflicted upon a child under 16 years of age. Knowledge that the person assaulted was under the age of 16 years is not an element of the offense.

(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,

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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).

(iv) *When committed on a child under 16 years of age.* The maximum punishment is increased when aggravated assault with intentional infliction of grievous bodily harm is inflicted upon a child under 16 years of age. Knowledge that the person assaulted was under the age of 16 years is not an element of the offense.

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; (when committed upon a child under the age of 16 years; assault consummated by a battery upon a child under the age of 16 years).

(7) *Assault in which grievous bodily harm is intentionally inflicted.* Article 128—simple assault; assault consummated by a battery; assault with a dangerous weapon; (when committed upon a child under the age of 16 years -- assault consummated by a battery upon a child under the age of 16 years).

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 con-

duct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(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) *Aggravated assault with a dangerous weapon or other means of force likely 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) *Aggravated assault with a dangerous weapon or other means of force likely to produce death or grievous bodily harm when committed upon a child under the age of 16 years.* Dishonorable discharge, total forfeitures, and confinement for 5 years.

(c) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(9) *Aggravated 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) *Aggravated assault in which grievous bodily harm is intentionally inflicted when committed upon a child under the age of 16 years.* Dishonora-

ble discharge, total forfeitures, and confinement for 8 years.

(c) *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 _____ (a child under the age of 16 years) 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 _____ (a child under the age of 16 years) 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 of statute.*

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.*

¶55.b.(1)

(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 suffi-

cient 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 between 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 of statute.*

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 enclosed 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 of statute.*

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;

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(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 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, 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 of statute.*

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 ap-**

proval, 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.

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(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 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)

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(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 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 fol-

lows: _____, the property therein certified as received being of a value of about \$_____.

59. Article 133—Conduct unbecoming an officer and gentleman

a. Text of statute.

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 of statute.

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 prejudicial 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 arti-

cle 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 of-

fenses 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 of statute.* 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 of statute.* 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.

(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. Deleted – see Appendix 27.

64. Article 134—(Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking)

a. *Text of statute*. 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 impossible 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 and 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 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

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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.*

(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.* Article 128—assault; assault consummated by a battery; assault with a dangerous weapon

(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 of statute.* 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____, wrongfully marry _____, 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 of statute.* 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), be-

ing 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 of statute.* 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

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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 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 of statute.* 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 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.

68a. Article 134—(Child endangerment)

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

b. *Elements.*

(1) That the accused had a duty for the care of a certain child;

(2) That the child was under the age of 16 years;

(3) That the accused endangered the child’s mental or physical health, safety, or welfare through design or culpable negligence; 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 child endangerment through design or culpable negligence.

(2) *Design.* Design means on purpose, intentionally, or according to plan and requires specific intent to endanger the child.

(3) *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. In the context of this offense, culpable negligence may include acts that, when viewed in the light of human experience, might foreseeably result in harm to a child, even though such harm would not necessarily be the natural and probable consequences of such acts. In this regard, the age and maturity of the child, the conditions surrounding the neglectful conduct, the proximity of assistance available, the nature of the environment in which the child may have been left, the provisions made for care of the child, and the location of the parent or adult responsible for the child relative to the location of the child, among others, may be considered in determining whether the conduct constituted culpable negligence.

(4) *Harm.* Actual physical or mental harm to the child is not required. The offense requires that the accused's actions reasonably could have caused physical or mental harm or suffering. However, if the accused's conduct does cause actual physical or mental harm, the potential maximum punishment increases. See Paragraph 54(c)(4)(a)(iii) for an explanation of "grievous bodily harm".

(5) *Endanger.* "Endanger" means to subject one to a reasonable probability of harm.

(6) *Age of victim as a factor.* While this offense may be committed against any child under 16, the age of the victim is a factor in the culpable negligence determination. Leaving a teenager alone for an evening may not be culpable (or even simple) negligence; leaving an infant or toddler for the same period might constitute culpable negligence. On the other hand, leaving a teenager without supervision for an extended period while the accused was on temporary duty outside commuting distance might constitute culpable negligence.

(7) *Duty required.* The duty of care is determined by the totality of the circumstances and may be established by statute, regulation, legal parent-child relationship, mutual agreement, or assumption of control or custody by affirmative act. When there is no duty of care of a child, there is no offense under this paragraph. Thus, there is no offense when a stranger makes no effort to feed a starving child or an individual/neighbor not charged with the care of a child does not prevent the child from running and playing in the street.

d. *Lesser included offenses.*

(1) *Child Endangerment by Design.* Article 134-Child endangerment by culpable negligence

(2) *Article 80—Attempts*

e. *Maximum punishment.*

(1) *Endangerment by design resulting in grievous bodily harm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

(2) *Endangerment by design resulting in harm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Other cases by design.* Dishonorable discharge, forfeiture of all pay and allowances and confinement for 4 years.

(4) *Endangerment by culpable negligence resulting in grievous bodily harm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(5) *Endangerment by culpable negligence resulting in harm.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(6) *Other cases by culpable negligence.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. *Sample specification.*

(1) *Resulting in grievous bodily harm.* In that____ (personal jurisdiction data),(at/on board-location) (subject matter jurisdiction data, if required) on or about____, 20____, had a duty for the care of____, a child under the age of 16 years and did endanger the (mental health) (physical health)(safety)(welfare) of said____, by (leaving the said____ unattended in his quarters for over____ hours/days with no adult present in the home) (by failing to obtain medical care for the said____'s diabetic condition) (____), and that such conduct (was by design)(constituted culpable negligence)(which resulted in grievous bodily harm, to wit:)(broken leg)(deep cut)(fractured skull)(____).

(2) *Resulting in harm.* In that____ (personal jurisdiction data),(at/on board-location) (subject matter jurisdiction data, if required) on or about____, 20____, had a duty for the care of____, a child under the age of 16 years, and did endanger the (mental health) (physical health)(safety)(welfare) of said____, by (leaving the said____ unattended in his quarters for over____ hours/days with no adult present in the home) (by failing to obtain medical care for the said____'s diabetic condition) (____), and that such conduct (was by design)(constituted

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culpable negligence) (which resulted in (harm, to wit:) (a black eye)(bloody nose)(minor cut)(_____).

(3) *Other cases.* In that _____ (personal jurisdiction data),(at/on board-location) (subject matter jurisdiction data, if required) on or about _____, 20____, was responsible for the care of____, a child under the age of 16 years, and did endanger the (mental health) (physical health)(safety)(welfare) of said____, by (leaving the said_____ unattended in his quarters for over_____ hours/days with no adult present in the home) (by failing to obtain medical care for the said____'s diabetic condition) (____), and that such conduct (was by design)(constituted culpable negligence).

69. Article 134—(Cohabitation, wrongful)

a. *Text of statute.* 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 of statute.* 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 ques-

tion 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 of statute.* 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 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 to-

ward 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 of statute.* See paragraph 60.

b. *Elements.*

(1) That the accused made a certain statement;

(2) That the statement was communicated to another person;

(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

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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 of statute.* 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) *Drunkenness.* 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) *Drunkenness.*

(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 of statute.* 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 of statute.* 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 of statute.* 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 commence, 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),

¶76.f.

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 of statute.* 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, forfeiture 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 of statute.* 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, f a l s e l y p r e t e n d e d 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 of statute.* 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 mak-

¶79.c.(1)

ing 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 of statute.* *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

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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 of statute.* *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 of statute.* 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 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.]

83. Article 134—(Fraternization)

a. *Text of statute.* 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 viola-

¶83.c.(1)

tion 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 of statute.* *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 non-

commissioned 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____, g a m b l e 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 of statute.* *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 of statute.* 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. Deleted – see Appendix 27.

88. Deleted – see Appendix 27.

89. Article 134—(Indecent language)

a. *Text of statute.* 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

¶89.b.(3)

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 45 if the communication was made in the physical presence of a child.

d. *Lesser included offenses.*

(1) Article 117—provoking speeches

(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. Deleted – see Appendix 27.

91. Article 134—(Jumping from vessel into the water)

a. *Text of statute.* 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 of statute.* 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 of statute.* *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 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.*

¶93.f.(1)

(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 t h e f i c e _____) (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 of statute.* 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 of statute.* 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 serious 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 of statute.* 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 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 preferral 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 \$_____)] (_____, 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 of statute.* 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-

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tain 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, 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 of statute.* 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) *Patronizing a prostitute.*

(a) That the accused had sexual intercourse with another person not the accused’s spouse;

(b) That the accused compelled, induced, enticed, or procured such person to engage in an act of sexual intercourse in exchange for money or other compensation; and

(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.

(3) *Pandering by inducing, enticing, or procuring act of prostitution.*

(a) That the accused 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 inducing, enticing, or procuring was wrongful;

(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.

(4) *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 and patronizing a prostitute.* 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) *Patronizing a prostitute.*

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) _____, a person not his/her spouse, to engage in (an act) (acts) of sexual intercourse with the accused in exchange for (money) ().

(3) *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 (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 _____ .

(4) *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 of statute.* *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 pa-

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role, 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 of statute.* 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.*

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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 of statute.* 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 of statute.* 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 of statute.* 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.

(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.

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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 was deleted pursuant to Executive Order 12708.

102. Article 134—(Restriction, breaking)

a. *Text of statute.* 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 of statute.* 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 of statute.* 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 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) (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 of statute.* 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 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 para-

¶104.c.(2)(a)

graph 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 of statute*. 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 of statute*. 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 of statute.* *See* paragraph 60.

b. *Elements.*

(1) That the accused, while accompanying the accuse'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 of statute.* *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 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

¶108.c.

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 designed or intended to cause panic or public fear)

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

b. *Elements.*

(1) *Threat.*

(a) That the accused communicated certain language;

(b) That the information communicated amounted to a threat;

(c) That the harm threatened was to be done by means of an explosive; weapon of mass destruction; biological or chemical agent, substance, or weapon; or hazardous material;

(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) *Hoax.*

(a) That the accused communicated or conveyed certain information;

(b) That the information communicated or conveyed concerned an attempt being made or to be

made by means of an explosive; weapon of mass destruction; biological or chemical agent, substance, or weapon; or hazardous material, to unlawfully kill, injure, or intimidate a person or to unlawfully damage or destroy certain property;

(c) That the information communicated or conveyed by the accused was false and that the accused then knew it to be 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” means 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.

(2) *Explosive.* “Explosive” means gunpowder, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electrical circuit breakers), detonators, and other detonating agents, smokeless powders, any explosive bomb, grenade, missile, or similar device, and any incendiary bomb or grenade, fire bomb, or similar device, and any other explosive compound, mixture, or similar material.

(3) *Weapon of mass destruction.* A weapon of mass destruction means any device, explosive or otherwise, that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of: toxic or poisonous chemicals, or their precursors; a disease organism; or radiation or radioactivity.

(4) *Biological agent.* The term “biological agent” means any micro-organism (including bacteria, viruses, fungi, rickettsiac, or protozoa), pathogen, or infectious substance, and any naturally occurring, bioengineered, or synthesized component of any such micro-organism, pathogen, or infectious substance, whatever its origin or method of production, that is capable of causing—

(a) death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;

(b) deterioration of food, water, equipment, supplies, or materials of any kind; or

(c) deleterious alteration of the environment.

(5) *Chemical agent, substance, or weapon.* A chemical agent, substance, or weapon refers to a toxic chemical and its precursors or a munition or device, specifically designed to cause death or other harm through toxic properties of those chemicals that would be released as a result of the employment of such munition or device, and any equipment specifically designed for use directly in connection with the employment of such munitions or devices.

(6) *Hazardous material.* A substance or material (including explosive, radioactive material, etiologic agent, flammable or combustible liquid or solid, poison, oxidizing or corrosive material, and compressed gas, or mixture thereof) or a group or class of material designated as hazardous by the Secretary of Transportation.

(7) *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.

d. *Lesser included offenses.*

(1) *Threat.*

(a) Article 134—communicating a threat

(b) Article 80—attempts

(c) Article 128—assault

(2) *Hoax.* Article 80—attempts

e. *Maximum punishment.* Dishonorable discharge, forfeitures of all pay and allowances, and confinement for 10 years.

f. *Sample specifications.*

(1) *Threat.*

In that _____ (personal jurisdiction data) did, (at/on board--location) on or about _____ 20____, wrongfully communicate certain information, to wit:_____, which language constituted a threat to harm a person or property by means of a(n) [explosive; weapon of mass destruction; biological agent, substance, or weapon; chemical agent, substance, or weapon; and/or (a) hazardous material(s)].

(2) *Hoax.*

In that _____ (personal jurisdiction data) did, (at/on board--location), on or about _____ 20____, maliciously (communicate

(convey) certain information concerning an attempt being made or to be made to unlawfully [(kill) (injure) (intimidate)_____] [(damage) (destroy)_____] by means of a(n) [explosive; weapon of mass destruction; biological agent, substance, or weapon; chemical agent, substance, or weapon; and/or (a) hazardous material(s)], to wit:_____, which information was false and which the accused then knew to be false.

110. Article 134—(Threat, communicating)

a. *Text of statute.* 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____, wrongfully communicate to _____ a threat (injure _____ by _____)

¶110.f.

(accuse _____ of having committed the offense of _____) (_____).

111. Article 134—(Unlawful entry)

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

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____, unlawfully 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 of statute.* 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

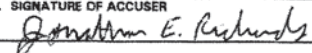
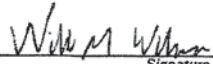
e. *Maximum punishment.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

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) (_____).

APPENDIX 4

Charge Sheet (DD FORM 458)

CHARGE SHEET				
I. PERSONAL DATA				
1. NAME OF ACCUSED <i>(Last, First, Middle Initial)</i> James, Reuben 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 2006	b. TERM 3 years
7. PAY PER MONTH		8. NATURE OF RESTRAINT OF ACCUSED		9. DATE(S) IMPOSED
a. BASIC 1,534.00	b. SEA/FOREIGN DUTY 0.00	c. TOTAL 1,534.00	Restriction 1 August 2007	
II. CHARGES AND SPECIFICATIONS				
10. CHARGE: VIOLATION OF THE UCMJ, ARTICLE 86				
I				
SPECIFICATION:				
In that Private First Class Reuben J. James, U.S. Army, Company A, 1st Battalion, 61st Infantry Brigade, Fort Blank, Missouri, did, on or about 15 July 2007, 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 2007.				
Charge II: Violation of the UCMJ, Article 112a				
In that Private First Class Reuben J. James, U.S. Army, Company A, 1st Battalion, 61st Infantry Brigade, Fort Blank, Missouri, did, on or about 12 July 2007, wrongfully possess 10 grams of marijuana.				
III. PREFERRAL				
11a. NAME OF ACCUSER <i>(Last, First, Middle Initial)</i> Richards, Jonathan E.		b. GRADE CPT	c. ORGANIZATION OF ACCUSER Co A, 1st Bn, 61st Inf Bde	
d. SIGNATURE OF ACCUSER 			e. DATE (YYYYMMDD) 1 AUG 07	
AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this <u>1st</u> day of <u>August</u> , 2007, 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.				
_____ Will M. Wilson <i>Typed Name of Officer</i>		_____ 1st Bn, 61st Inf Bde <i>Organization of Officer</i>		
_____ CPT <i>Grade</i>		_____ Adjutant <i>Official Capacity to Administer Oath</i> <i>(See R.C.M. 307(b), must be commissioned officer)</i>		
_____  <i>Signature</i>				

DD FORM 458, MAY 2000

PREVIOUS EDITION IS OBSOLETE.

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 ¹	DD, BCD	3 yrs. ¹	Total
	Solicitation to mutiny ¹	DD, BCD	10 yrs. ¹	Total
	Solicitation to commit act of misbehavior before enemy ¹	DD, BCD	10 yrs. ¹	Total
	Solicitation to commit act of sedition ¹	DD, BCD	10 yrs. ¹	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 ⁴	Total
	Intent to avoid hazardous duty, shirk important service ¹	DD, BCD	5 yrs. ¹	Total
	Other cases			
	Terminated by apprehension	DD, BCD	3 yrs. ¹	Total
	Otherwise terminated	DD, BCD	2 yrs. ¹	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 ⁴	Total
	Striking, drawing or lifting up any weapon or offering any violence toward superior commissioned officer execution of duty ¹	DD, BCD	10 yrs. ¹	Total
	Willfully disobeying lawful order of superior commissioned officer ¹	DD, BCD	5 yrs. ¹	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.

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 ²	DD, BCD	2 yrs.	Total
	Violation, failure to obey other order ²	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 ⁴	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 ⁴	Total
100	Subordinate compelling surrender	Death, DD, BCD	Life ⁴	Total
101	Improper use of countersign	Death, DD, BCD	Life ⁴	Total
102	Forcing safeguard	Death, DD, BCD	Life ⁴	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 ⁴	Total
104	Aiding the enemy	Death, DD, BCD	Life ⁴	Total
105	Misconduct as prisoner	DD, BCD	Life ⁴	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 ⁴	Total
	Other cases	DD, BCD	Life ⁴	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

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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 More than \$500.00	BCD DD, BCD	1 yr. 5 yrs.	Total Total
110	Hazarding a vessel Willfully and wrongfully Negligently	Death, DD, BCD DD, BCD	Life ⁴ 2 yrs.	Total Total
111	Drunken driving Resulting in personal injury Other cases	DD, BCD BCD	1 yr., 6 mos. 6 mos.	Total Total
112	Drunk on duty	BCD	9 mos.	Total
112a	Wrongful use, possession, etc. of controlled substances ³ 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 Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances 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 Phenobarbital and Schedule IV and V controlled substances	DD, BCD DD, BCD DD, BCD DD, BCD	5 yrs. 2 yrs. 15 yrs. 10 yrs.	Total Total Total Total
113	Misbehavior of sentinel or lookout In time of war In other time: While receiving special pay under 37 U.S.C. 310 Other places	Death, DD, BCD DD, BCD DD, BCD	Life ⁴ 10 yrs. 1 yr.	Total Total 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 Other Intentional self-inflicted injury In time of war, or while receiving special pay under 37 U.S.C. 310 Other	DD, BCD DD, BCD DD, BCD DD, BCD	3 yrs. 1 yr. 10 yrs. 5 yrs.	Total Total Total Total
116	Riot Breach of peace	DD, BCD None	10 yrs. 6 mos.	Total 2/3 6 mos.
117	Provoking speech, gestures	None	6 mos.	2/3 6 mos.
118	Murder Article 118(1) or (4) Article 118(2) or (3)	Death, mandatory minimum life with parole, DD, BCD DD, BCD	Life ⁴ Life ⁴	Total Total
119	Manslaughter Voluntary Involuntary	DD, BCD DD, BCD	15 yrs. 10 yrs.	Total Total
119a	Death or injury to an Unborn Child (see Part IV, Para. 44a.(a)(1))			



Number: 1 Author: bdlandrum Subject: Sticky Note Date: 8/31/2011 8:10:36 AM
Appendix 12, the Maximum Punishment Chart, is amended as follows:

(a) In the item relating to Article 119, by inserting after the maximum punishment for involuntary manslaughter:

“Voluntary manslaughter of a child under the age of 16 years DD, BCD 20 yrs Total”

“Involuntary manslaughter of a child under the age of 16 years DD, BCD, 15 yrs Total”

Executive Order 13468: 2008 Amendments to the Manual for Courts-Martial, United States

App. 12, Art. 119a

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Article	Offense	Discharge	Confinement	Forfeitures
	Injuring or killing an unborn child	Such punishment, other than death, as a court-martial may direct, but such punishment shall be consistent with the punishment had the bodily injury or death occurred to the unborn child's mother.		
	Attempting to kill an unborn child	Such punishment, other than death, as a court-martial may direct, but such punishment shall be consistent with the punishment had the attempt been made to kill the unborn child's mother.		
	Intentional killing of an unborn child	Such punishment, other than death, as a court-martial may direct, but such punishment shall be consistent with the punishment had the death occurred to the unborn child's mother.		
120	Rape and Rape of a Child	Death, DD, BCD	Life	Total
	Aggravated Sexual Assault	DD, BCD	30 yrs	Total
	Aggravated Sexual Assault of a Child	DD, BCD	20 yrs	Total
	Aggravated Sexual Abuse of a Child	DD, BCD	20 yrs	Total
	Aggravated Sexual Contact	DD, BCD	20 yrs	Total
	Aggravated Sexual Contact with a Child	DD, BCD	20 yrs	Total
	Abusive Sexual Contact with a Child	DD, BCD	15 yrs	Total
	Indecent Liberty with a Child	DD, BCD	15 yrs	Total
	Abusive Sexual Contact	DD, BCD	7 yrs	Total
	Indecent Act	DD, BCD	5 yrs	Total
	Forcible Pandering	DD, BCD	5 yrs	Total
	Wrongful Sexual Contact	DD, BCD	1 yr	Total
	Indecent Exposure	DD, BCD	1 yr	Total
120a	Stalking	DD, BCD	3 yrs	Total
121	Larceny			
	Of military property of a value of \$500.00 or less	BCD	1 yr.	Total
	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

A12-4

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Article	Offense	Discharge	Confinement	Forfeitures
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	20 yrs	Total
125	Sodomy			
	By force and without consent	DD, BCD	Life ⁴	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 ⁴	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
	Aggravated assault with a dangerous weapon or other means of force to produce death or grievous bodily harm when committed upon a child under the age of 16 years	DD, BCD	5 yrs	Total
	Aggravated assault in which grievous bodily harm is intentionally inflicted when committed upon a child under the age of 16 years	DD, BCD	8 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)			
	\$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			
	With intent to commit murder or rape	DD, BCD	20 yrs.	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
	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
	Child Endangerment:			
	Endangerment by design resulting in grievous bodily harm	DD, BCD	8 yrs	Total
	Endangerment by design resulting in harm	DD, BCD	5 yrs	Total
	Other cases by design	DD, BCD	4 yrs	Total
	Endangerment by culpable negligence resulting in grievous bodily harm	DD, BCD	3 yrs	Total
	Endangerment by culpable negligence resulting in harm	BCD	2 yrs	Total
	Other cases by culpable negligence	BCD	1 yr	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 language			
	Communicated to child under 16 yrs	DD, BCD	2 yrs.	Total
	Other cases	BCD	6 mos.	Total
	Jumping from vessel into the water	BCD	6 mos.	Total
	Kidnapping	DD, BCD	Life ⁴	Total
	Mail, taking, opening, secreting, destroying, or stealing	DD, BCD	5 yrs.	Total

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Article	Offense	Discharge	Confinement	Forfeitures
	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 and patronizing a prostitute	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	DD, BCD	1 yr.	Total
	Self-injury without intent to avoid service			
	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 (<i>see</i> 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 la- pel 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.