

Section 4. Part IV of the Manual for Courts-Martial, United States is amended and reads as follows:

PUNITIVE ARTICLES

(Statutory text of each Article is in bold)

SUBPART 1—GENERAL PROVISIONS

1. Article 77 (10 U.S.C. 877)—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 or design.

One who, without knowledge of the criminal venture or plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime. See the parentheticals in the examples in subparagraph 1.b.(2)(a) of this paragraph. In some circumstances, inaction may make one liable 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 a 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 subparagraph 1.b.(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, Conspiracy, 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.

Analysis

1. Art. 77—Principals

This paragraph is taken, without change, from paragraph 1 (Article 77—Principals), MCM (2016 edition).

2. Article 78 (10 U.S.C. 878)—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 UCMJ 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 18. If the offense involved is a serious offense, and the accused does anything to conceal it, failure to report it may constitute the offense of misprision of a serious offense, under Article 131c. *See* paragraph 84.

(3) *Offense punishable by the UCMJ.* The term “offense punishable by this chapter” in the text of the article means any offense described in the UCMJ.

(4) *Status of principal.* The principal who committed the offense in question need not be subject to the UCMJ, but the offense committed must be punishable by the UCMJ.

(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. *Maximum punishment.* Any person subject to the UCMJ who is found guilty as an accessory after the fact to an offense punishable under the UCMJ 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.

e. *Sample specification.*

In that _____ (personal jurisdiction data), knowing that (at/on board—location), on or about ____ 20 __, had 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 _____.

Analysis

2. Art. 78—Accessory after the fact

This paragraph is taken from paragraph 2 (Article 78—Accessory after the fact), MCM (2016 edition).

2017 Amendment: c. Explanation. (2) Failure to report offense. This subparagraph is amended and reflects that the offense of misprision of a serious offense has been relocated from Article 134 to Article 131c as part of the Military Justice Act of 2016’s realignment of the punitive articles. The substance of the offense remains the same.

3. Article 79 (10 U.S.C. 879)—Conviction of offense charged, lesser included offenses, and attempts

a. *Text of statute.*

(a) **IN GENERAL.—An accused may be found guilty of any of the following:**

(1) **The offense charged.**

(2) **A lesser included offense.**

(3) **An attempt to commit the offense charged.**

(4) **An attempt to commit a lesser included offense, if the attempt is an offense in its own right.**

(b) **LESSER INCLUDED OFFENSE DEFINED.—In this section (article), the term “lesser included offense” means—**

(1) **an offense that is necessarily included in the offense charged; and**

(2) **any lesser included offense so designated by regulation prescribed by the President.**

(c) **REGULATORY AUTHORITY.—Any designation of a lesser included offense in a regulation referred to in subsection (b) shall be reasonably included in the greater offense.**

b. *Explanation.*

(1) *In general.* Article 79 contains two provisions concerning notice of lesser included offenses: (1) offenses that are “necessarily included” in the charged offense in accordance with Article 79(b)(1); and (2) offenses designated as lesser included offenses by the President under Article 79(b)(2). Each provision sets forth an independent basis for providing notice of a lesser included offense.

(2) “*Necessarily included*” offenses. Under Article 79(b)(1), an offense is “necessarily included” in a charged offense when the elements of the lesser offense are a subset of the elements of the charged offense, thereby putting the accused on notice to be prepared to defend against the lesser offense in addition to the offense specifically charged. A lesser offense is “necessarily included” when:

(a) All of the elements of the lesser offense are included in the greater offense, and the common elements are identical (for example, wrongful appropriation as a lesser included offense of larceny);

(b) All of the elements of the lesser offense are included in the greater offense, but at least one element is a subset by being legally less serious (for example, unlawful entry 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 a subset by being legally less serious (for example, voluntary manslaughter as a lesser included offense of premeditated murder).

(3) *Offenses designated by the President*. Under Article 79(b)(2), Congress has authorized the President to designate lesser included offenses by regulation.

(a) The President may designate an offense as a lesser included offense under Article 79(b)(2), subject to the requirement in Article 79(c) that the designated lesser included offense “shall be reasonably included in the greater offense.”

(b) Appendix 12A sets forth the list of lesser included offenses designated by the President under Article 79(b)(2).

(c) The President may include a “necessarily included offense” in the list of offenses prescribed under Article 79(b)(2), but is not required to do so. A court may identify an offense as a “necessarily included” offense under Article 79(b)(1) regardless of whether the offense has been designated under Article 79(b)(2).

Discussion

For offenses that may or may not be lesser included offenses, see R.C.M. 307(c)(3) and its accompanying Discussion regarding charging in the alternative.

(4) *Sua sponte duty*. A military judge must instruct panel members on lesser included offenses reasonably raised by the evidence.

(5) *Multiple lesser included offenses*. When the offense charged is a compound offense comprising two or more lesser included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged.

(6) *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:

Of the Specification: Guilty, except the word “murder” substituting therefor the words “willfully and unlawfully kill,” of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge: Not guilty, but guilty of a violation of Article 119.

If a court-martial finds an accused guilty of a lesser included offense, the finding as to the charge shall state a violation of the specific punitive article violated and not a violation of Article 79.

Analysis

3. Art. 79—Conviction of offense charged, lesser included offenses, and attempts

This paragraph is taken from paragraph 3 (Article 79—Conviction of lesser included offenses) of MCM (2016 edition).

2017 Amendment: a. *Text of statute.* Article 79 is amended and provides two statutory grounds for identifying “lesser included offenses.” Under the first, the lesser offense must be “necessarily included” in the greater offense. *See, e.g.,* the elements test articulated in *United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010); *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010). Under the second, the offense must be expressly designated by the President as a lesser included offense. The President’s authority extends only to an offense “reasonably included” in the greater offense. The President has done so in Appendix 12A.

b. *Explanation.* Subparagraph b.1.(a) sets forth an explanation of “necessarily included offenses.” Subparagraph b.1.(b) explains the President’s express authority under Article 79 to designate certain closely related offenses to be “reasonably included” lesser offenses of greater ones, including offenses that do not strictly meet the “necessarily included” elements test. Whether “necessarily included” or “reasonably included,” a lesser included offense must be raised by the evidence at trial. That is, while all presidentially designated lesser included offenses (*see* Appendix 12A) qualify as lesser included offenses, a party is not entitled to an instruction on a lesser included offense if the evidence at trial does not reasonably raise it. *See United States v. Bean*, 62 M.J. 264, 265 (C.A.A.F. 2005).

SUBPART 2—INCHOATE OFFENSES

4. Article 80 (10 U.S.C. 880)—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 UCMJ;

(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 apply 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 surrender
- (d) Article 103a—Espionage
- (e) Article 103b—Aiding the enemy
- (f) Article 119—Death or injury of 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. *Maximum punishment*. Any person subject to the UCMJ who is found guilty of an attempt under Article 80 to commit any offense punishable by the UCMJ 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, and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged. Except in the cases of attempts of rape and sexual

assault under Article 120(a) or (b), rape and sexual assault of a child under Article 120b(a) or (b), mandatory minimum punishment provisions shall not apply.

e. *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).

Analysis

4. Article 80—Attempts

This paragraph is taken from paragraph 4 (Article 80—Attempts) of the MCM (2016 edition). *2017 Amendment: c. Explanation. (6) Attempts not under Article 80.* This subparagraph is amended and reflects that the offenses of Article 104—Aiding the enemy and Article 106a—Espionage are renumbered Articles 103b and 103a respectively, as part of the Military Justice Act of 2016’s reorganization of the punitive articles.

d. *Maximum punishment.* This subparagraph is amended and reflects that the offense of forcible sodomy under Article 125 is now addressed under Article 120.

5. Article 81 (10 U.S.C. 881)—Conspiracy

a. *Text of statute.*

(a) 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) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.

b. *Elements.*

(1) *Conspiracy.*

(a) That the accused entered into an agreement with one or more persons to commit an offense under the UCMJ; and

(b) 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.

(2) *Conspiracy when offense is an offense under the law of war resulting in the death of one or more victims.*

(a) That the accused entered into an agreement with one or more persons to commit an offense under the law of war;

(b) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused knowingly performed an overt act for the purpose of bringing about the object of the conspiracy; and

(c) That death resulted to one or more victims.

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 UCMJ, but the other co-conspirators need not be. A person may be guilty of conspiracy although incapable of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the car to be used in a robbery. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. However, the conspirator who joined an existing conspiracy can be convicted of this offense only if, at or after the time of joining the conspiracy, an overt act in furtherance of the object of the agreement is committed.

(2) *Agreement.* The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

(3) *Object of the agreement.* The object of the agreement must, at least in part, involve the commission of one or more offenses under the UCMJ. 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, extramarital sexual conduct, 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* subparagraph 91.c.(4)(a)(ii).

d. *Maximum punishment*.

(1) *Offenses under the UCMJ*. Any person subject to the UCMJ 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, subject to subparagraph d.(2) of this paragraph.

(2) *Offenses under the law of war resulting in the death of one or more victims*. Any person subject to the UCMJ who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.

e. *Sample specification*

(1) *Conspiracy*.

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 _____.

(2) *Conspiracy when an offense is an offense under the law of war resulting in the death of one or more victims*.

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 law of war, to wit: (murder of _____), and in order to effect the object of the conspiracy the said _____ knowingly did _____ resulting in the death of _____.

Analysis

5. Article 81—Conspiracy

This paragraph is taken from paragraph 5 (Article 81—Conspiracy) of MCM (2016 edition) without substantive change.

6. Article 82 (10 U.S.C. 882)—Soliciting commission of offenses

a. Text of statute.

(a) SOLICITING COMMISSION OF OFFENSES GENERALLY.—Any person subject to this chapter who solicits or advises another to commit an offense under this chapter (other than an offense specified in subsection (b)) shall be punished as a court-martial may direct.

(b) SOLICITING DESERTION, MUTINY, SEDITION, OR MISBEHAVIOR BEFORE THE ENEMY.—Any person subject to this chapter who solicits or advises another to violate section 885 of this title (article 85), section 894 of this title (article 94), or section 99 of this title (article 99)—

(1) if the offense solicited or advised is attempted or is committed, shall be punished with the punishment provided for the commission of the offense; and

(2) if the offense solicited or advised is not attempted or committed, 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 a certain offense under the UCMJ; 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 offense under the UCMJ. 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 any offense under the UCMJ 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 as an element in another offense.* Some offenses require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under Article 82. 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 and obstructing justice.

d. Maximum punishment.

(1) *Solicitation of Espionage.* Such punishment that a court-martial may direct, other than death.

(2) *Solicitation of Desertion; Mutiny or Sedition; Misbehavior before the enemy.* If the offense solicited or advised is committed or 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 attempted, then the following punishment may be imposed: Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years, or the maximum punishment of the underlying offense, whichever is lesser.

(3) *Solicitation of all other offenses.* Any person subject to the UCMJ who is found guilty of soliciting or advising another person to commit an offense not specified in Article 82(b) which, if committed by one subject to the UCMJ, would be punishable under the UCMJ, shall be subject to the following maximum punishment: Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years, or the maximum punishment of the underlying offense, whichever is lesser.

e. *Sample specifications.*

(1) *For soliciting another to commit an offense.*

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_____.

(2) *For soliciting desertion (Article 85) or mutiny (Article 94(a)).*

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(a)) [*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 _____)].

[*Note: This language should be added to the end of the specification if the offense solicited or advised is actually committed.]

(3) *For soliciting sedition (Article 94(b)) or misbehavior before or in the presence of the enemy (Article 99).*

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(b)) [*and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about ____ 20 __, (at/on board—location), committed by _____ (and _____)].

[*Note: This language should be added to the end of the specification if the offense solicited or advised is actually committed.]

Analysis

6. Article 82—Soliciting commission of offenses

This paragraph is taken from paragraphs 6 (Article 82—Solicitation) and 105 (Article 134—Soliciting another to commit an offense) of MCM (2016 edition).

2017 Amendment a. Text of Statute. Article 82 is revised and incorporates the solicitation of any offense under the UCMJ in one consolidated statute. Specifically, the former Article 134—Soliciting another to commit an offense (MCM (2016 edition), is relocated to Article 82. Soliciting another to commit a criminal offense is a well-recognized concept in criminal law that does not rely upon the “terminal element” of Article 134 as the basis for its criminality. Accordingly, the newly consolidated Article 82 does not require proof of the Article 134 “terminal element.”

The maximum authorized confinement for solicitation to commit desertion, mutiny or sedition, or misbehavior before the enemy where the offense is not committed or attempted is

changed to confinement for 15 years or the maximum confinement for the underlying offense, whichever is lesser. The maximum authorized punishment for solicitation to commit unspecified offenses is changed to a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years, or the maximum punishment for the underlying offense, whichever is lesser.

SUBPART 3—PLACE OF DUTY OFFENSES

7. Article 83 (10 U.S.C. 883)—Malingering

a. *Text of statute.*

Any person subject to this chapter who, with the intent to avoid work, duty, or service—

(1) feigns illness, physical disablement, mental lapse, or mental 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, mental 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. The seriousness of a sham physical or mental disability is also not material on the question of guilt. 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.

Discussion

Bona fide suicide attempts should not be charged as criminal offenses. When making a determination whether the injury by the Servicemember was a bona fide suicide attempt, the convening authority should consider factors including, but not limited to, health conditions, personal stressors, and DoD policy related to suicide prevention.

d. *Maximum punishment.*

(1) *Feigning illness, physical disablement, mental lapse, or mental derangement.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Feigning illness, physical disablement, mental lapse, or mental 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.

e. *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 _____).

Analysis

7. Article 83—Malingering

This paragraph is taken from paragraph 40 (Article 115—Malingering) of MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

8. Article 84 (10 U.S.C. 884)—Breach of medical quarantine

a. *Text of statute.*

Any person subject to this chapter—

(1) who is ordered into medical quarantine by a person authorized to issue such order; and

(2) who, with knowledge of the quarantine and the limits of the quarantine, goes beyond those limits before being released from the quarantine by proper authority;

shall be punished as a court-martial may direct.

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; and

(4) That the accused went beyond the limits of the medical quarantine before being released therefrom by proper authority.

[Note: If the offense involved violation of a medical quarantine imposed in response to emergence of a “quarantinable communicable disease” as defined in 42 C.F.R. §70.1, add the following element]

(5) That the medical quarantine was imposed in reference to a quarantinable communicable disease (to wit: _____) as defined in 42 C.F.R. § 70.1.

c. *Explanation.*

(1) *Distinguishing “Quarantine” from “Quarters” orders.* Putting a person “on quarters” or other otherwise excusing a person from duty because of illness does not of itself constitute a medical quarantine.

d. *Maximum punishment.*

(1) *Breach of medical quarantine involving a quarantinable communicable disease defined by 42 C.F.R. §70.1.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Breach of medical quarantine—all other cases.* Bad-conduct discharge, forfeiture of two-thirds pay per month for 6 months, and confinement for 6 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data) having been placed in medical quarantine by a person authorized to order the accused into medical quarantine (for a quarantinable communicable disease as defined in 42 C.F.R. §70.1, to wit: _____), having knowledge of the quarantine and the limits of the quarantine, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, break said medical quarantine.

Analysis

8. Article 84—Breach of medical quarantine

This paragraph is taken from paragraph 100 (Article 134—Quarantine: medical, breaking), MCM (2016 edition). The offense remains the same substantively, except that proof of the Article 134 “terminal element” is no longer required.

2017 Amendment: c. Explanation. Formal medical quarantines are addressed in DoDI 6200.03, Public Health Emergency Management within the Department of Defense, March 5, 2010 (Change 2, effective October 2, 2013). This instruction provides an example of a commander’s power to institute medical quarantines as an incidence of command, but the commander’s power generally to institute a medical quarantine is not limited to the situations discussed in DoDI 6200.03. Quarantines may include, but are not limited to, orders to remain within a restricted area and to submit to diagnostic or medical treatment. *See id.* at Enclosure 3, ¶2(c)–(e), (h), 4a(7)(a)–(i).

d. *Maximum Punishment.* A new maximum punishment category is added and aligns this offense with federal law (*see* 42 U.S.C. § 271) by enhancing maximum punishments for breaking of medical quarantines declared in reference to a “quarantinable communicable disease.” Under 42 U.S.C. § 271, a “quarantinable communicable disease” extends to those diseases defined by the President by Executive Order. The President has done so in Executive Order 13295 (April 4, 2003, as amended July 3, 2014), now promulgated in 42 C.F.R. §70.1.

9. Article 85 (10 U.S.C. 885)—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

(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; 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* subparagraph 10.c.

(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 proved by circumstantial evidence. Among the circumstances from which an inference may be drawn that an accused intended to remain absent permanently are: that the period of absence was lengthy; that the accused attempted to, or did, dispose of uniforms or other military property; that the accused purchased a ticket for a distant point or was arrested, apprehended, or surrendered a considerable distance from the accused's station; that the accused could have conveniently surrendered to military control but did not; that the accused was dissatisfied with the accused's unit, ship, or with military service; that the accused made remarks indicating an intention to desert; that the accused was under charges or had escaped from confinement at the time of the absence; that the accused made preparations indicative of an intent not to return (for example, financial arrangements); or that the accused enlisted or accepted an appointment in the same or another armed force without disclosing the fact that the accused had not been regularly separated, or entered any foreign armed service without being authorized by the United States. On the other hand, the following are included in the circumstances which may tend to negate an inference that the accused intended to remain away permanently: previous long and excellent service; that the accused left valuable personal property in the unit or on the ship; or that the accused was under the influence of alcohol or drugs during the absence. These lists are illustrative only.

(iv) Entries on documents, such as personnel accountability records, which administratively refer to an accused as a "deserter" are not evidence of intent to desert.

(v) Proof of, or a plea of guilty to, an unauthorized absence, even of extended duration, does not, without more, prove guilt of desertion.

(d) *Effect of enlistment or appointment in the same or a different armed force*. Article 85(a)(3) does not state a separate offense. Rather, it is a rule of evidence by which the prosecution may prove intent to remain away permanently. Proof of an enlistment or acceptance of an appointment in a Service without disclosing a preexisting duty status in the same or a different service provides the basis from which an inference of intent to permanently remain away from the earlier unit, organization, or place of duty may be drawn. Furthermore, if a person, without being regularly separated from one of the armed forces, enlists or accepts an appointment in the same or another armed force, the person's presence in the military service under such an enlistment or appointment is not a return to military control and does not terminate any desertion or absence without authority from the earlier unit or organization, unless the facts of the earlier period of service are known to military authorities. If a person, while in desertion, enlists or accepts an appointment in the same or another armed force, and deserts while serving the enlistment or appointment, the person may be tried and convicted for each desertion.

(2) *Quitting unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service.*

(a) *Hazardous duty or important service.* “Hazardous duty” or “important service” may include service such as duty in a combat or other dangerous area; embarkation for certain foreign or sea duty; movement to a port of embarkation for that purpose; entrainment for duty on the border or coast in time of war or threatened invasion or other disturbances; strike or riot duty; or employment in aid of the civil power in, for example, protecting property, or quelling or preventing disorder in times of great public disaster. Such services as drill, target practice, maneuvers, and practice marches are not ordinarily “hazardous duty or important service.” Whether a duty is hazardous or a service is important depends upon the circumstances of the particular case, and is a question of fact for the court-martial to decide.

(b) *Quits.* “Quits” in Article 85 means “goes absent without authority.”

(c) *Actual knowledge.* Article 85(a)(2) requires proof that the accused actually knew of the hazardous duty or important service. Actual knowledge may be proved by circumstantial evidence.

(3) *Attempting to desert.* Once the attempt is made, the fact that the person desists, voluntarily or otherwise, does not cancel the offense. The offense is complete, for example, if the person, intending to desert, hides in an empty freight car on a military 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 paragraph 9.c.(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 87a or an offense under Article 134.

d. *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.

e. *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), knowing that (he) (she) would be required to perform (hazardous duty) (important service), namely: _____, did, on or about

____ 20 __, (a time of war) with intent to (avoid said hazardous duty) (shirk said important service), 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 ____ (____)).

Analysis

9. Article 85—Desertion

This paragraph is taken, without substantive change, from paragraph 9 (Article 85—Desertion), MCM (2016 edition).

10. Article 86 (10 U.S.C. 886)—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, 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 without prior military request.* When an absentee is in the hands of civilian authorities for other reasons and these authorities make the absentee available for return to military control, the absence is terminated when the military authorities are informed of the absentee's availability.

(11) *Findings of more than one absence under one specification.* An accused may properly be found guilty of two or more separate unauthorized absences under one specification, provided that each absence is included within the period alleged in the specification and provided that the accused was not misled. If an accused is found guilty of two or more unauthorized absences under a single specification, the maximum authorized punishment shall not exceed that authorized if the accused had been found guilty as charged in the specification.

d. *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.

e. *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).

Analysis

10. Article 86—Absence without leave

This paragraph is taken, without substantive change, from paragraph 10 (Article 86—Absence without leave), MCM (2016 edition).

11. Article 87 (10 U.S.C. 887)—Missing movement; jumping from vessel

a. *Text of statute.*

(a) MISSING MOVEMENT.—Any person subject to this chapter who, through neglect or design, misses the movement of a ship, aircraft, or unit with which the person is required in the course of duty to move shall be punished as a court-martial may direct.

(b) JUMPING FROM VESSEL INTO THE WATER.—Any person subject to this chapter who wrongfully and intentionally jumps into the water from a vessel in use by the armed forces shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Missing movement.*

(a) That the accused was required in the course of duty to move with a ship, aircraft, or unit;

(b) That the accused knew of the prospective movement of the ship, aircraft, or unit;
and

(c) That the accused missed the movement through design or neglect.

(2) *Jumping from vessel into the water.*

(a) That the accused jumped from a vessel in use by the armed forces into the water; and

(b) That such act by the accused was wrongful and intentional.

c. *Explanation.*

(1) *Missing movement.*

(a) *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.

(b) *Mode of movement.*

(i) *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.

(ii) *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.

(c) *Design.* “Design” means on purpose, intentionally, or according to plan and requires specific intent to miss the movement.

(d) *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.

(e) *Actual knowledge.* In order to be guilty of the offense, the accused must have actually known of the prospective movement that was missed. Knowledge of the exact hour or even of the exact date of the scheduled movement is not required. It is sufficient if the approximate date was known by the accused as long as there is a causal connection between the conduct of the accused and the missing of the scheduled movement. Knowledge may be proved by circumstantial evidence.

(f) *Proof of absence.* That the accused actually missed the movement may be proved by documentary evidence, as by a proper entry or absence of 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.

(2) *Jumping from vessel into the water.* The term “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.

Discussion

Bona fide suicide attempts should not be charged as criminal offenses. When making a determination whether an action by the Servicemember was a bona fide suicide attempt, the convening authority should consider factors including, but not limited to, health conditions, personal stressors, and DoD policy related to suicide prevention.

d. Maximum punishment.

(1) *Missing movement.*

(a) *Design.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(b) *Neglect.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Jumping from vessel into the water.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. *Sample specifications.*

(1) *Missing movement*

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.

(2) *Jumping from vessel into the water.*

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).

Analysis

11. Article 87—Missing movement; jumping from vessel

This paragraph is taken from paragraphs 11 (Article 87—Missing movement) and 91 (Article 134—Jumping from vessel into the water), MCM (2016 edition).

2017 Amendment: a. Text of Statute. The Article 134 offense of jumping from a vessel into the water is relocated to Article 87 as part of the realignment and consolidation of the punitive articles. The substance of both offenses remains the same with the exception of the removal of the terminal element from the former Article 134 offense.

12. Article 87a (10 U.S.C. 887a)—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 confinement, 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: pretrial arrest under Article 9 (*see* R.C.M. 304) and arrest under Article 15 (*see* subparagraph 5.c.(3), Part V, MCM (2016 edition)). This article prohibits breaking any arrest.

(b) *Authority to order arrest.* *See* R.C.M. 304(b) and paragraph 2 and subparagraph 5.b., Part V, MCM (2016 edition) 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) of this paragraph.

(c) *Escape*. For a discussion of escape, see subparagraph c.(5)(c) of this paragraph.

(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 13.

(5) *Escape from confinement*.

(a) *Confinement*. Confinement is physical restraint imposed under R.C.M. 305, 1102, or subparagraph 5.b., Part V, MCM (2016 edition). For purposes of the element of post-trial confinement (subparagraph b.(5)(d)) and increased punishment therefrom (subparagraph e.(4)), 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), 1102(b)(2); and paragraph 2 and subparagraph 5.b., Part V, MCM (2016 edition) concerning who may order confinement.

(c) *Escape*. An escape may be either with or 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 subparagraph 24.c.(2)(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. *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 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.

e. *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.

Analysis

12. Article 87a—Resistance, flight, breach of arrest, and escape

This paragraph is taken from paragraph 19 (Article 95—Resistance, flight, breach, of arrest, and escape), MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

13. Article 87b (10 U.S.C. 887b)—Offenses against correctional custody and restriction

a. *Text of statute.*

(a) **ESCAPE FROM CORRECTIONAL CUSTODY.—Any person subject to this chapter—**

(1) who is placed in correctional custody by a person authorized to do so;

(2) who, while in correctional custody, is under physical restraint; and

(3) who escapes from the physical restraint before being released from the physical restraint by proper authority;

shall be punished as a court-martial may direct.

(b) **BREACH OF CORRECTIONAL CUSTODY.—Any person subject to this chapter—**

(1) who is placed in correctional custody by a person authorized to do so;

(2) who, while in correctional custody, is under restraint other than physical restraint; and

(3) who goes beyond the limits of the restraint before being released from the correctional custody or relieved of the restraint by proper authority;

shall be punished as a court-martial may direct.

(c) BREACH OF RESTRICTION.—Any person subject to this chapter—

(1) who is ordered to be restricted to certain limits by a person authorized to do so; and

(2) who, with knowledge of the limits of the restriction, goes beyond those limits before being released by proper authority;

shall be punished as a court-martial may direct.

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; and

(c) That the accused freed himself or herself from the physical restraint of this correctional custody before being released therefrom by proper authority.

(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;

and

(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.

(3) Breach of restriction.

(a) That a certain person ordered the accused to be restricted to certain limits;

(b) That said person was authorized to order said restriction;

(c) That the accused knew of the restriction and the limits thereof; and

(d) That the accused went beyond the limits of the restriction before being released therefrom by proper authority.

c. Explanation.

(1) Escape from correctional custody. Escape from correctional custody is the act of a person undergoing the punishment of correctional custody pursuant to Article 15, who, before being set at liberty by proper authority, casts off any physical restraint imposed by the custodian or by the place or conditions of custody.

(2) Breach of correctional custody. Breach of restraint during correctional custody is the act of a person undergoing the punishment who, in the absence of physical restraint imposed by a custodian or by the place or conditions of custody, breaches any form of restraint imposed during this period.

(3) Authority to impose correctional custody. See Part V concerning who may impose correctional custody. Whether the status of a person authorized that person to impose correctional custody is a question of law to be decided by the military judge. Whether the person who imposed correctional custody had such a status is a question of fact to be decided by the factfinder.

(4) Breach of restriction. 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)(5)), and administrative restriction in the interest of training, operations, security, or safety.

d. 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.

(3) *Breach of restriction.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

e. *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 _____.

(3) *Breach of restriction.*

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.

Analysis

13. Article 87b—Offenses against correctional custody and restriction

This paragraph is taken from paragraph 70 (Article 134—Correctional custody—offenses against) and paragraph 102 (Article 134—Restriction, breaking), MCM (2016 edition). These offenses are consolidated and relocated to their current position in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles; proof of the Article 134 “terminal element” is no longer required.

SUBPART 4—AUTHORITY OFFENSES

14. Article 88 (10 U.S.C. 888)—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, 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, 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. Maximum punishment. Dismissal, forfeiture of all pay and allowances, and confinement for 1 year.

e. 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 _____) (_____), a (State) (_____) in which (he) (she), the said _____, was then (on duty), (present)], to wit: “_____,” or words to that effect.

Analysis

14. Article 88—Contempt toward officials

This paragraph is taken, without substantive change, from paragraph 12 (Article 88—Contempt toward officials), MCM (2016 edition).

15. Article 89 (10 U.S.C. 889)—Disrespect toward superior commissioned officer; assault of superior commissioned officer

a. Text of statute.

(a) DISRESPECT.—Any person subject to this chapter who behaves with disrespect toward that person’s superior commissioned officer shall be punished as a court-martial may direct.

(b) ASSAULT.—Any person subject to this chapter who strikes that person’s superior commissioned officer or draws or lifts up any weapon or offers any violence against that officer while the officer is in the execution of the officer’s office shall be punished—

(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

(2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

b. Elements.

(1) *Disrespect toward superior commissioned officer.*

(a) That the accused did or omitted certain acts or used certain language to or concerning a certain commissioned officer;

- (b) That such behavior or language was directed toward that officer;
- (c) That the officer toward whom the acts, omissions, or words were directed was the superior commissioned officer of the accused;
- (d) 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
- (e) That, under the circumstances, the behavior or language was disrespectful to that commissioned officer.

(2) *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.

[Note: if the offense was committed in time of war, add the following element]

- (e) That the offense was committed in time of war.

c. *Explanation.*

(1) *Superior Commissioned Officer.* See 10 U.S.C. § 801(5) (“The term ‘superior commissioned officer’ means a commissioned officer superior in rank or command.”).

(2) *Disrespect toward superior commissioned officer.*

(a) *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.

(b) *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.

(c) *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.

(d) *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.

(3) *Striking or assaulting superior commissioned officer.*

(a) *Superior commissioned officer.* The definition in subparagraph 15.c.(1) of this paragraph, applies here.

(b) *Knowledge.* The definition in subparagraph 15.c.(2)(a) of this paragraph, applies here.

(c) *Strikes.* “Strikes” means an intentional blow, and includes any offensive touching of the person of an officer, however slight.

(d) *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.”

(e) *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.

(f) *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 commissioned 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.

(g) *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* subparagraph 15.c.(2)(d)). 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* subparagraph 77.c.; R.C.M. 916(e)).

d. *Maximum punishment.*

(1) *Disrespect toward superior commissioned officer in command.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Disrespect toward superior commissioned officer superior in rank.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) *Striking, drawing or lifting up a weapon or offering any violence to superior commissioned officer in execution of office in time of war.* Death or such other punishment as a court-martial may direct.

(4) *Striking, drawing or lifting up a weapon or offering any violence to superior commissioned officer in execution of office at any other time.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *Sample specifications.*

(1) *Disrespect toward superior commissioned officer.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, behave himself/herself with disrespect toward _____, (his) (her) superior commissioned officer (in command) (in rank), then known by the said _____ to be (his) (her) superior commissioned officer (in command) (in rank), 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 _____) (_____).

(2) *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 (in command) (in rank), then

known by the said _____ to be (his) (her) superior commissioned officer (in command) (in rank), who was then in the execution of (his) (her) office, (in) (on) the _____ with (a) ((his) (her)) _____.

(3) *Drawing or lifting up a weapon against superior commissioned officer.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, (a time of war) (draw) (lift up) a weapon, to wit: a _____, against _____, (his) (her) superior commissioned officer (in command) (in rank), then known by the said _____ to be (his) (her) superior commissioned officer (in command) (in rank), who was then in the execution of (his) (her) office.

(4) *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 (in command) (in rank), then known by the said _____ to be (his) (her) superior commissioned officer (in command) (in rank), who was then in the execution of (his) (her) office, by _____.

Analysis

15. Article 89—Disrespect toward superior commissioned officer; assault of superior commissioned officer

This paragraph is taken from paragraphs 13 (Article 89—Disrespect toward superior commissioned officer) and 14 (Article 90—Assaulting or willfully disobeying superior commissioned officer), MCM (2016 edition).

2017 Amendment: a. Text of Statute. Article 89 is amended and incorporates the offense of willfully assaulting a superior commissioned officer, which is relocated from Article 90 MCM (2016 edition) in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

c. Explanation. (1) *Superior commissioned officer.* The definition of superior commissioned officer is changed from MCM (2016 edition), Part IV, subparagraph 13.c.(1). The definition of “superior commissioned officer,” as revised, removes the separate Service distinction. *See* MCM 201X, Part IV, subparagraph 16.c.(1).

d. Maximum punishment. The maximum punishment is adjusted and differentiates situations where the disrespect is directed at a superior commissioned officer in command from situations where a commissioned officer is superior in rank.

16. Article 90 (10 U.S.C. 890)—Willfully disobeying superior commissioned officer

a. Text of statute.

Any person subject to this chapter who willfully disobeys a lawful command of that person’s superior commissioned officer shall be punished—

(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

(2) 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 received a lawful command from a superior commissioned officer;

(2) That this officer was the superior commissioned officer of the accused;

(3) That the accused then knew that this officer was the accused's superior commissioned officer; and

(4) That the accused willfully disobeyed the lawful command.

[Note: if the offense was committed in time of war, add the following element]

(5) That the offense was committed in time of war.

c. *Explanation.*

(1) *Superior commissioned officer.* See subparagraph 15.c.(1).

(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, custom of the Service, or applicable order, to direct, coordinate, or control the duties, activities, health, welfare, morale, or discipline of the accused.

(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 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. 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.

(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. *Maximum punishment.*

(1) *Willfully disobeying a lawful order of superior commissioned officer in time of war.* Death or such other punishment as a court-martial may direct.

(2) *At any other time.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

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.

Analysis

16. Article 90—Willfully disobeying superior commissioned officer

This paragraph is taken from paragraph 14 (Article 90—Assaulting or willfully disobeying superior commissioned officer), MCM (2016 edition).

2017 Amendment: a. Text of Statute. Article 90 is amended by relocating the offense of “striking or assaulting superior commissioned officer” to Article 89 in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

c. *Explanation (1) Superior commissioned officer.* The definition of superior commissioned officer is changed from MCM (2016 edition), Part IV, subparagraph 13.c.(1). The definition of “superior commissioned officer,” as revised, removes the separate Service distinction. The basis for the authority of the issuing officer is defined in Part IV, subparagraph 16.c.(2)(a)(iii).

17. Article 91 (10 U.S.C. 891)—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 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 subparagraph 15.c. For a discussion of "assault,"

see subparagraph 77.c. 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 subparagraph 16.c 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 execution of his office,” see subparagraph 15.c. For a discussion of “disrespect,” see subparagraph 15.c.

d. *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.

e. *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) (subject-matter jurisdiction data, if required), 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) (subject-matter jurisdiction data, if required), on or about ____ 20 __, [did treat with contempt] [was disrespectful in (language) (deportment) 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) (_____).

Analysis

17. Article 91—Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

This paragraph is taken, without substantive change, from paragraph 15 (Article 91—Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer), MCM (2016 edition).

18. Article 92 (10 U.S.C. 892)—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 order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or**
- (3) is derelict in the performance of his duties;**

shall be punished as a court-martial may direct.

b. Elements.

(1) *Violation of or failure to obey a lawful general order or regulation.*

(a) That there was in effect a certain lawful general order or regulation;

(b) That the accused had a duty to obey it; and

(c) That the accused violated or failed to obey the order or regulation.

(2) *Failure to obey other lawful order.*

(a) That a member of the armed forces issued a certain lawful order;

(b) That the accused had knowledge of the order;

(c) That the accused had a duty to obey the order; and

(d) That the accused failed to obey the order.

(3) *Dereliction in the performance of duties.*

(a) That the accused had certain duties;

(b) That the accused knew or reasonably should have known of the duties; and

(c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

[Note: In cases where the dereliction of duty resulted in death or grievous bodily harm, add the following element as applicable]

(d) That such dereliction of duty resulted in death or grievous bodily harm to a person other than the accused.

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) retains 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 subparagraph 16.c.

(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 performing 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) of this paragraph 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 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 subparagraph 13.c.(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 subparagraph 17.b.(2) if the order was issued by a warrant, noncommissioned, or petty officer in the execution of office.

(3) *Derelection 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) *Derelect.* 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 purposely, 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.

(e) *Grievous bodily harm*. For purposes of this offense, the term “grievous bodily harm” has the same meaning ascribed to it in Article 128 (paragraph 77).

(f) Where the dereliction of duty resulted in death or grievous bodily harm, the intent to cause death or grievous bodily harm is not required.

d. *Maximum punishment*.

(1) *Violation of 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 or failure to obey other lawful order*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(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) *Through neglect or culpable inefficiency resulting in death or grievous bodily harm*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(C) *Willful*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(D) *Willful dereliction of duty resulting in death or grievous bodily harm*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

[Note: For (1) and (2) of this rule, 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.]

e. *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 ____ (Article, U.S. Navy Regulations, dated __) (General Order No. __, U.S. Navy, dated ____), 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. __) (USS _____, 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 treatment) (to) (not to _____) (_____), an order which it was (his) (her) duty to obey (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 [, and that such dereliction of duty resulted in (grievous bodily harm, to wit: (broken leg) (deep cut) (fractured skull) (_____) to _____) (the death of _____)].

Analysis

18. Article 92—Failure to obey order or regulation

This paragraph is taken from paragraph 16, (Article 92—Failure to obey order or regulation) MCM (2016 edition).

19. Article 93 (10 U.S.C. 893)—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 UCMJ 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 even though the duties are arduous or hazardous or both.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *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) (_____).

Analysis

19. Article 93—Cruelty and maltreatment

This paragraph is taken from paragraph 17 (Article 93—Cruelty and maltreatment) MCM (2016 edition).

d. Maximum punishment. The maximum authorized confinement for a violation of Article 93 is increased from two to three years.

20. Article 93a (10 U.S.C. 893a)—Prohibited activities with military recruit or trainee by person in position of special trust

a. Text of statute.

(a) ABUSE OF TRAINING LEADERSHIP POSITION.—Any person subject to this chapter—

(1) who is an officer, a noncommissioned officer, or a petty officer;

(2) who is in a training leadership position with respect to a specially protected junior member of the armed forces; and

(3) who engages in prohibited sexual activity with such specially protected junior member of the armed forces;

shall be punished as a court-martial may direct.

(b) ABUSE OF POSITION AS MILITARY RECRUITER.—Any person subject to this chapter—

(1) who is a military recruiter and engages in prohibited sexual activity with an applicant for military service; or

(2) who is a military recruiter and engages in prohibited sexual activity with a specially protected junior member of the armed forces who is enlisted under a delayed entry program;

shall be punished as a court-martial may direct.

(c) CONSENT.—Consent is not a defense for any conduct at issue in a prosecution under this section (article).

(d) DEFINITIONS.—In this section (article):

(1) SPECIALLY PROTECTED JUNIOR MEMBER OF THE ARMED FORCES.—The term “specially protected junior member of the armed forces” means—

(A) a member of the armed forces who is assigned to, or is awaiting assignment to, basic training or other initial active duty for training, including a member who is enlisted under a delayed entry program;

(B) a member of the armed forces who is a cadet, a midshipman, an officer candidate, or a student in any other officer qualification program; and

(C) a member of the armed forces in any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

(2) TRAINING LEADERSHIP POSITION.—The term “training leadership position” means, with respect to a specially protected junior member of the armed forces, any of the following:

(A) Any drill instructor position or other leadership position in a basic training program, an officer candidate school, a reserve officers' training corps unit, a training program for entry into the armed forces, or any program that, by regulation prescribed by the Secretary concerned, is identified as a training program for initial career qualification.

(B) Faculty and staff of the United States Military Academy, the United States Naval Academy, the United States Air Force Academy, and the United States Coast Guard Academy.

(3) APPLICANT FOR MILITARY SERVICE.—The term “applicant for military service” means a person who, under regulations prescribed by the Secretary concerned, is an applicant for original enlistment or appointment in the armed forces.

(4) MILITARY RECRUITER.—The term “military recruiter” means, a person who, under regulations prescribed by the Secretary concerned, has the primary duty to recruit persons for military service.

(5) PROHIBITED SEXUAL ACTIVITY.—The term “prohibited sexual activity” means, as specified in regulations prescribed by the Secretary concerned, inappropriate physical intimacy under circumstances described in such regulations.

b. Elements.

(1) Abuse of training leadership position.

- (a) That the accused was a commissioned, warrant, noncommissioned, or petty officer;
- (b) That the accused was in a training leadership position with respect to a specially protected member of the armed forces; and
- (c) That the accused engaged in prohibited sexual activity with a person the accused knew, or reasonably should have known was a specially protected junior member of the armed forces.

(2) Abuse of position as a military recruiter.

- (a) That the accused was a commissioned, warrant, noncommissioned or petty officer;
- (b) That the accused was performing duties as a military recruiter; and,
- (c) That the accused engaged in prohibited sexual activity with a person the accused knew, or reasonably should have known, was an applicant for military service or;
- (d) That the accused engaged in prohibited sexual activity with a person the accused knew, or reasonably should have known, was a specially protected junior member of the armed forces who is enlisted under a delayed entry program.

c. Explanation.

(1) In general. The prevention of inappropriate sexual activity by trainers, recruiters, and drill instructors with recruits, trainees, students attending service academies, and other potentially vulnerable persons in the initial training environment is crucial to the maintenance of good order and military discipline. Military law, regulation, and custom invests officers, non-commissioned officers, drill instructors, recruiters, cadre, and others with the right and obligation to exercise control over those they supervise. In this context, inappropriate sexual activity between recruits/trainees and their respective recruiters/trainers are inherently destructive to good order and discipline. The responsibility for identifying relationships subject to this offense, and those outside the scope of this offense, is entrusted to the individual Services to determine and specify by appropriate regulations (e.g., a married “training and leadership position” Servicemember and a “specially protected junior member of the armed forces” who were married prior to assuming those roles as defined by this offense).

(2) *Knowledge*. The accused must have actual or constructive knowledge that a person was a “specially protected junior member of the armed forces” or an “applicant for military service” (as those terms are defined in this offense). Knowledge may be proved by circumstantial evidence. Actual knowledge need not be shown if the accused reasonably should have known under the circumstances the status of the person as a “specially protected junior member of the armed forces” or an “applicant for military service.” This may be demonstrated by regulations, training or operating manuals, customs of the Service, or similar evidence.

(3) *Consent*. Consent is not a defense to this offense.

d. *Maximum punishment*. Dishonorable Discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications*.

(1) *Prohibited act with specially protected junior member of the armed forces*.

In that ___ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, while in a position of authority over ___, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___ 20___, engage in a prohibited act, to wit: _____ with _____, whom the accused (knew) (reasonably should have known) was a specially protected junior Servicemember in initial active duty training.

(2) *Prohibited act with an applicant for military service*.

In that ___ (personal jurisdiction data), a (commissioned) (warrant) (noncommissioned) (petty) officer, while in a position of authority over ___, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ___ 20___, engage in a prohibited act, to wit: _____ with _____, whom the accused (knew) (reasonably should have known) was (an applicant to the armed forces via (_____)) (a specially protected junior enlisted member of the armed forces enlisted under a delayed entry program).

Analysis

20. Article 93a—Prohibited activities with military recruit or trainee by person in position of special trust

2017 Amendment: This article is a new enumerated provision and implements Article 93a, as enacted in Section 5410 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and criminalizes acts of “prohibited sexual activity,” specified in regulations by the Secretary concerned, between those in positions of special trust and junior military members in initial active duty training, officer qualification programs, other training programs for initial career qualification, in a delayed entry program, or applicants for military service.

21. Article 94 (10 U.S.C. 894)—Mutiny or sedition

a. *Text of statute*.

(a) **Any person subject to this chapter who—**

(1) **with intent to usurp or override lawful military authority, refuses, 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) of this paragraph.

(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.*

(a) *In general.* 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* subparagraph 18.c.(3) (Dereliction of duty).

(b) *Superior commissioned officer.* For purposes of this paragraph, a superior commissioned officer means a superior commissioned officer in the chain of command.

(5) *Attempted mutiny.* For a discussion of attempts, see paragraph 4.

d. *Maximum punishment.* Death or such other punishment as a court-martial may direct.

e. *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) (subject-matter jurisdiction data, if required), 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), 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 _____) (_____).

Analysis

21. Article 94—Mutiny or sedition

This paragraph is taken, without substantial change, from paragraph 18 (Article 94—Mutiny and sedition) of MCM (2016 edition).

2017 Amendment: Subparagraph c.(4)(b) is amended and clarifies the definition of “superior commissioned officer.”

SUBPART 5—ENEMY/POST OFFENSES

22. Article 95 (10 U.S.C. 895)—Offenses by sentinel or lookout

a. *Text of statute.*

(a) DRUNK OR SLEEPING ON POST, OR LEAVING POST BEFORE BEING RELIEVED.—Any sentinel or lookout who is drunk on post, who sleeps on post, or who leaves post before being regularly relieved, shall be punished—

(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

(2) if the offense is committed other than in time of war, by such punishment, other than death, as a court-martial may direct.

(b) LOITERING OR WRONGFULLY SITTING ON POST.—Any sentinel or lookout who loiters or wrongfully sits down on post shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Drunk or sleeping on post, or leaving post before being relieved.*

(a) That the accused was posted or on post as a sentinel or lookout;

(b) That the accused was drunk while on post, was 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:]

(c) That the offense was committed (in time of war) (while the accused was receiving special pay under 37 U.S.C. § 310).

(2) *Loitering or wrongfully sitting on post.*

(a) That the accused was posted as a sentinel or lookout; and

(b) That while so posted, the accused loitered or wrongfully sat down on post.

[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:]

(c) That the accused was so posted (in time of war) (while receiving special pay under 37 U.S.C. § 310).

c. *Explanation.*

(1) *Drunk or sleeping on post, or leaving post before being relieved.*

(a) *In general.* This article defines three kinds of misbehavior committed by sentinels or lookouts: being drunk on post, sleeping upon post, or leaving it before being regularly relieved. This article does not include an officer or enlisted person of the guard, or of a ship's watch, not posted or performing the duties of a sentinel or lookout, nor does it include a person whose duties as a watchman or attendant do not require constant alertness.

(b) *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.

(c) *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.

(d) *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.

(e) *Drunk.* For an explanation of "drunk," see subparagraph 51.c.(6).

(f) *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).

(2) *Loitering or wrongfully sitting on post by a sentinel or lookout.*

(a) *In general.* The discussion set forth in subparagraph 22.c.(1) 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. *Maximum punishment.*

(1) *Drunk or sleeping on post, or leaving post before being relieved.*

(a) *In time of war.* Death or such other punishment as a court-martial may direct.

(b) *While receiving special pay under 37 U.S.C. § 310.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(c) *In all other places.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(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.

e. *Sample specifications.*

(1) *Drunk or sleeping on post, or leaving post before being relieved.*

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 (drunk) (sleeping) upon (his) (her) post) (did leave (his) (her) post before (he) (she) was regularly relieved).

(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.

Analysis

22. Article 95—Offenses by sentinel or lookout

This paragraph is taken from paragraph 38 (Article 113—Misbehavior of sentinel or lookout) and the portions of paragraph 104 (Article 134—Sentinel or lookout: offenses against or by) relating to the offense of “Loitering or wrongfully sitting on post by a sentinel or lookout” of MCM (2016 edition). This offense is relocated from subparagraph 104.b.(2) of Article 134 MCM (2016 edition). Proof of the “terminal element” of Article 134 is no longer required.

23. Article 95a (10 U.S.C. 895)—Disrespect toward sentinel or lookout

a. *Text of statute.*

(a) **DISRESPECTFUL LANGUAGE TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, uses wrongful and disrespectful language that is directed toward and within the hearing of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.**

(b) DISRESPECTFUL BEHAVIOR TOWARD SENTINEL OR LOOKOUT.—Any person subject to this chapter who, knowing that another person is a sentinel or lookout, behaves in a wrongful and disrespectful manner that is directed toward and within the sight of the sentinel or lookout, who is in the execution of duties as a sentinel or lookout, shall be punished as a court-martial may direct.

b. *Elements.*

- (1) That a certain person was a sentinel or lookout;
- (2) That the accused knew that said person was a sentinel or lookout;
- (3) That the accused used certain disrespectful language or behaved in a certain disrespectful manner;
- (4) That such language or behavior was wrongful;
- (5) That such language or behavior was directed toward and within the sight or hearing of the sentinel or lookout; and
- (6) That said person was at the time in the execution of duties as a sentinel or lookout.

c. *Explanation.* See subparagraph 15.c.(2)(b) for a discussion of “disrespect.”

d. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), 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.

Analysis

23. Article 95a—Disrespect toward sentinel or lookout

This paragraph is taken from the portions of paragraph 104 (Article 134—Sentinel or lookout: offenses against or by) of MCM (2016 edition) relating to the offense of “Disrespect to a sentinel or lookout.” This offense is relocated to its current position in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles. The offense remains the same substantively, except that proof of the Article 134 “terminal element” is no longer required.

24. Article 96 (10 U.S.C. 896)—Release of prisoner without authority; drinking with prisoner

a. *Text of statute.*

(a) RELEASE OF PRISONER WITHOUT AUTHORITY.—Any person subject to this chapter—

- (1) who, without authority to do so, releases a prisoner; or**
- (2) who, through neglect or design, allows a prisoner to escape;**

shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with the law.

(b) DRINKING WITH PRISONER.—Any person subject to this chapter who unlawfully drinks any alcoholic beverage with a prisoner shall be punished as a court-martial may direct.

b. *Elements.*

- (1) *Releasing a prisoner without authority.*

- (a) That a certain person was a prisoner; and
- (b) That the accused released the prisoner without authority.
- (2) *Allowing a prisoner to escape through neglect.*
 - (a) That a certain person was a prisoner;
 - (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) *Allowing a prisoner to escape through design.*
 - (a) That a certain person was a prisoner;
 - (b) That the design of the accused was to allow the escape of that prisoner; and
 - (c) That the prisoner escaped as a result of the carrying out of the design of the accused.
- (4) *Drinking with prisoner.*
 - (a) That a certain person was a prisoner; and
 - (b) That the accused unlawfully drank any alcoholic beverage with that prisoner.

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 a person with authority to release the prisoner.

(2) *Releasing a prisoner without authority.*

(a) *Release.* The release of a prisoner is removal of restraint by the custodian rather than by the prisoner.

(b) *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. 1103.

(3) *Allowing a prisoner to escape through neglect.*

(a) *Allow.* “Allow” means to 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 custodian in the same or similar circumstances.

(c) *Escape.* Escape is defined in subparagraph 12.c.(5)(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.

(4) *Allowing a prisoner to escape through design.* An escape is allowed through design when it is intended by the custodian. 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.

(5) *Drinking with prisoner.* For purposes of this section, “unlawful” is synonymous with “wrongful.” That is, it is unlawful to drink an alcoholic beverage with a prisoner unless the accused had a legal justification or excuse to do so. In this context, any consumption of alcohol with a prisoner would be unlawful unless the accused had been granted specific authority to do so by competent authority (e.g., a commander of a confinement facility authorizing limited alcohol consumption by prisoners on a holiday or special occasion).

(6) See also Article 87a which proscribes escape from confinement and may be used to prosecute offenses not otherwise covered by Article 96.

d. *Maximum punishment.*

(1) *Releasing a prisoner without authority.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Allowing a prisoner to escape through neglect.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) *Allowing a prisoner to escape through design.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(4) *Drinking with prisoner.* Confinement for 1 year and forfeiture of two-thirds pay per month for 1 year.

e. *Sample specifications.*

(1) *Releasing a prisoner without authority.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about ____ 20 __, without authority, release _____, a prisoner.

(2) *Allowing a prisoner to escape through neglect or design.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about ____ 20 __, through (neglect) (design), allow _____, a prisoner, to escape.

(3) *Drinking with prisoner.*

In that ____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about ____ 20 __, unlawfully drink alcohol with _____, a prisoner.

Analysis

24. Article 96—Release of prisoner without authority; drinking with prisoner

This paragraph is taken from paragraphs 20 (Article 96—Releasing prisoner without authority) and 74 (Article 134—Drinking liquor with prisoner) of MCM (2016 edition). These offenses were relocated and consolidated in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles. The offenses remain substantively the same, except that: (1) the term “suffers” was stricken and replaced with “allows” and reflects modern usage of terminology; and (2) in the case of the “drinking with prisoner” offense, the scope of the offense was extended to apply to any person who unlawfully drinks an alcoholic beverage with a prisoner and proof of the terminal element of Article 134 is no longer required.

2017 Amendment: c. Explanation (5) Drinking with prisoner. This explanation clarifies that drinking with a prisoner is unlawful unless competent authority has granted the accused specific permission to consume alcohol with a prisoner.

d. *Maximum punishment.* The maximum authorized confinement for allowing a prisoner to escape through neglect is increased from one to two years; the maximum authorized confinement for allowing a prisoner to escape through design is increased from two to five years. The maximum authorized confinement and period of forfeitures of two-thirds pay per month for drinking with a prisoner is increased from three months to one year.

25. Article 97 (10 U.S.C. 897)—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 UCMJ to arrest, apprehend, or confine. *See* Articles 7 and 9; R.C.M. 302, 304, 305, and 1103, and paragraph 2 and subparagraph 5.b., 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 UCMJ.

(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. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. Sample specification.

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), did, (at/on board—location), on or about _____ 20 __, unlawfully (apprehend _____) (place _____ in arrest) (confine _____ in _____).

Analysis

25. Article 97—Unlawful detention

This paragraph is taken, without substantive change, from paragraph 21 (Article 97—Unlawful detention) of MCM (2016 edition).

26. Article 98 (10 U.S.C. 898)—Misconduct as 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 subparagraph 27.c.(1)(b).

(2) *In time of war.* See R.C.M. 103(19).

(3) *Acting without authority to the detriment of another for the purpose of securing favorable treatment.*

(a) *Nature of offense.* Unauthorized conduct by a prisoner of war must be intended to result in improvement by the enemy of the accused's condition and must operate to the detriment of other prisoners either by way of closer confinement, reduced rations, physical punishment, or other harm. Examples of this conduct include reporting plans of escape being prepared by others or reporting secret food caches, equipment, or arms. The conduct of the prisoner must be contrary to law, custom, or regulation.

(b) *Escape.* Escape from the enemy is authorized by custom. An escape or escape attempt which results in closer confinement or other measures against fellow prisoners still in the hands of the enemy is not an offense under this article.

(4) *Maltreating prisoners while in a position of authority.*

(a) *Authority.* The source of authority is not material. It may arise from the military rank of the accused or—despite Service regulations or customs to the contrary—designation by the captor authorities, or voluntary election or selection by other prisoners for their self-government.

(b) *Maltreatment.* The maltreatment must be real, although not necessarily physical, and it must be without justifiable cause. Abuse of an inferior by inflammatory and derogatory words may, through mental anguish, constitute this offense.

d. *Maximum punishment.* Any punishment other than death that a court-martial may direct.

e. *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) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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.

Analysis

26. Article 98—Misconduct as prisoner

This paragraph is taken from paragraph 29 (Article 105—Misconduct as a prisoner) of MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

27. Article 99 (10 U.S.C. 899)—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
- (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 defense 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. *Maximum punishment.* All offenses under Article 99. Death or such other punishment as a court-martial may direct.

e. *Sample specifications.*

(1) *Running away.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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.

Analysis

27. Article 99—Misbehavior before the enemy

This paragraph is taken, without substantive change, from paragraph 23 (Article 99—Misbehavior before the enemy) of MCM (2016 edition).

28. Article 100 (10 U.S.C. 900)—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 subparagraph 27.c.(1)(b).

d. *Maximum punishment.* All offenses under Article 100. Death or such other punishment as a court-martial may direct.

e. *Sample specifications.*

(1) *Compelling surrender or attempting to compel surrender.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about ____ 20 __, (attempt to) compel _____, the commander 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) (subject-matter jurisdiction, if required), on or about ____ 20 __, without proper authority, offer to surrender to the enemy by (striking the (colors) (flag)) (_____).

Analysis

28. Article 100—Subordinate compelling surrender

This paragraph is taken, without substantive change, from paragraph 24 (Article 100—Subordinate compelling surrender) of MCM (2016 edition).

29. Article 101 (10 U.S.C. 901)—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. *Maximum punishment.* Death or such other punishment as a court-martial may direct.

e. *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) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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: _____.

Analysis

29. Article 101—Improper use of countersign

This paragraph is taken, without substantive change, from paragraph 25 (Article 101—Improper use of a countersign) of MCM (2016 edition).

30. Article 102 (10 U.S.C. 902)—Forcing a safeguard

a. *Text of statute.*

Any person subject to this chapter who forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

b. *Elements.*

(1) That a safeguard had been issued or posted for the protection of a certain person or persons, place, or property;

(2) That the accused knew or should have known of the safeguard; and

(3) That the accused forced the safeguard.

c. *Explanation.*

(1) *Safeguard.* A safeguard is a detachment, guard, or detail posted by a commander for the protection of persons, places, or property of the enemy, or of a neutral affected by the relationship of belligerent forces in their prosecution of war or during circumstances amounting to a state of belligerency. The term also includes a written order left by a commander with an enemy subject or posted upon enemy property for the protection of that person or property. A safeguard is not a device adopted by a belligerent to protect its own property or nationals or to ensure order within its own forces, even if those forces are in a theater of combat operations, and the posting of guards or of off-limits signs does not establish a safeguard unless a commander takes those actions to protect enemy or neutral persons or property. The effect of a safeguard is to pledge the honor of the nation that the person or property shall be respected by the national armed forces.

(2) *Forcing a safeguard.* Forcing a safeguard means to perform an act or acts in violation of the protection of the safeguard.

(3) *Nature of offense.* Any trespass on the protection of the safeguard will constitute an offense under this article, whether the safeguard was imposed in time of war or in circumstances amounting to a state of belligerency short of a formal state of war.

(4) *Knowledge.* Actual knowledge of the safeguard is not required. It is sufficient if an accused should have known of the existence of the safeguard.

d. *Maximum punishment.* Death or such other punishment as a court-martial may direct.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), 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) (_____) (_____).

Analysis

30. Article 102—Forcing a safeguard

This paragraph is taken, without substantive change, from paragraph 26 (Article 102—Forcing a safeguard) of MCM (2016 edition).

31. Article 103 (10 U.S.C. 903)—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 commission and on conviction shall be punished by death or such other punishment as a court-martial or a military commission may direct. This section does not apply to a military commission established under chapter 47A of this title.

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 subparagraph 27.c.(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 spying.

(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 103a with giving intelligence to or communicating with the enemy, but may not be charged under this article as being a spy.

d. *Maximum punishment.* Death or such other punishment as a court-martial or military commission may direct.

e. *Sample specification.*

In that _____ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction, if required), 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.

Analysis

31. Article 103—Spies

This paragraph is taken from paragraph 30 (Article 106—Spies) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles and is amended to remove the mandatory death penalty.

2017 Amendment: d. *Maximum punishment.* As amended, death is the maximum authorized punishment for the offense, rather than a mandatory punishment.

32. Article 103a (10 U.S.C. 903a)—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 cryptographic 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, photographic 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 in 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, photographic 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 cryptographic 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 cryptographic information, or (4) any other major weapons system or major element of defense strategy. See R.C.M. 1004 concerning presentencing proceedings in capital cases.

d. *Maximum punishment.*

(1) *Espionage as a capital offense.* Death or such other punishment as a court-martial may direct.

(2) *Espionage or attempted espionage.* Any punishment, other than death, that a court-martial may direct.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), 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 photographic negative) (a blueprint) (a plan) (a map) (a model) (a note) (an instrument) (an appliance) (information) relating to the national defense, [(which directly concerned (nuclear weaponry) (military spacecraft) (military satellites) (early warning systems) (_____, a means of defense or retaliation against a large scale attack) (war plans) (communications intelligence) (cryptographic 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 _____).

Analysis

32. Article 103a—Espionage

This paragraph is taken from paragraph 30a (Article 106a—Espionage) of MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

33. Article 103b (10 U.S.C. 903b)—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. This section does not apply to a military commission established under chapter 47A of this title.

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 103b.* 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 subparagraph 27.c.(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 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* subparagraph 26.c.(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. *Maximum punishment.*

Death or such other punishment as a court-martial or military commission may direct.

e. *Sample specifications.*

(1) *Aiding or attempting to aid the enemy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), on or about ____ 20 __, without proper authority, knowingly (harbor) (protect) _____, an enemy, by (concealing the said ____ in (his) (her) house) (_____).

(3) *Giving intelligence to the enemy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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) (____).

Analysis

33. Article 103b—Aiding the enemy

This paragraph is taken from paragraph 28 (Article 104—Aiding the enemy) of MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

SUBPART 6—FALSITY OFFENSES

34. Article 104 (10 U.S.C. 904)—Public records offenses

a. *Text of statute.*

Any person subject to this chapter who, willfully and unlawfully—

(1) alters, conceals, removes, mutilates, obliterates, or destroys a public record; or

(2) takes a public record with the intent to alter, conceal, remove, mutilate, obliterate, or destroy the public record;

shall be punished as a court-martial may direct.

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; and

(2) That the act of the accused was willful and unlawful.

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. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *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: _____.

Analysis

34. Article—Public record offenses

This paragraph is taken from paragraph 99 (Article 134—Public record: altering, concealing, removing, mutilating, obliterating, or destroying) of MCM (2016 edition). The offense remains the same substantively, except that proof of the Article 134 terminal element is no longer required.

35. Article 104a (10 U.S.C. 904a)—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 104a 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 104a.

d. *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.

e. *Sample specifications.*

(1) *For fraudulent enlistment or appointment.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), 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 or 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) (subject-matter jurisdiction, if required), 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).

Analysis

35. Article 104a—Fraudulent enlistment, appointment, or separation

This paragraph is taken from paragraph 7 (Article 83—Fraudulent enlistment, appointment, or separation) of MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

36. Article 104b (10 U.S.C. 904b)—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. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), 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).

Analysis

36. Article 104b—Unlawful enlistment, appointment, or separation

This paragraph is taken from paragraph 8 (Article 84—Effecting unlawful enlistment, appointment, or separation) of MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

37. Article 105 (10 U.S.C. 905)—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; an 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. *But see* paragraph 70. 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 41 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 to 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 subparagraph 70.c.(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 subparagraph 70.c.(4).

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Forgery—making or altering.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, with intent to defraud, falsely [make (in its entirety) (the signature of _____ as an indorsement to) (the signature of _____ to) (_____) a certain (check) (writing) (_____) in the following words and figures, to wit: _____] [alter a certain (check) (writing) (_____) in the following words and figures, to wit: _____, by (adding thereto _____) (_____)], which said (check) (writing) (_____) would, if genuine, apparently operate to the legal harm of another [*and which _____ (could be) (was) used to the legal harm of _____, in that _____].

[*Note: This allegation should be used when the document specified is not one which by its nature would clearly operate to the legal prejudice of another—for example, an insurance application. The manner in which the document could be or was used to prejudice the legal rights of another should be alleged in the last blank.]

(2) *Forgery—uttering.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, with intent to defraud, (utter) (offer) (issue) (transfer) a certain (check) (writing) (_____) in the following words and figures, to wit: _____, a writing which would, if genuine, apparently operate to the legal harm of another, (which said (check) (writing) (_____)) (the signature to which said (check) (writing) (_____)) (_____) was, as (he) (she), the said _____, then well knew, falsely (made) (altered) (*and which _____ (could be) (was) used to the legal harm of _____, in that _____).

[*Note: See the note following (1), of subparagraph e.]

Analysis

37. Article 105—Forgery

This paragraph is taken from paragraph 48 (Article 123—Forgery) of MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

38. Article 105a (10 U.S.C. 905a)—False or unauthorized pass offenses

a. Text of statute.

(a) **WRONGFUL MAKING, ALTERING, ETC.**—Any person subject to this chapter who, wrongfully and falsely, makes, alters, counterfeits, or tampers with a military or official pass, permit, discharge certificate, or identification card shall be punished as a court-martial may direct.

(b) **WRONGFUL SALE, ETC.**—Any person subject to this chapter who wrongfully sells, gives, lends, or disposes of a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.

(c) **WRONGFUL USE OR POSSESSION.**—Any person subject to this chapter who wrongfully uses or possesses a false or unauthorized military or official pass, permit, discharge certificate, or identification card, knowing that the pass, permit, discharge certificate, or identification card is false or unauthorized, shall be punished as a court-martial may direct.

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 the accused then knew that the pass, permit, discharge certificate, or identification card was false or unauthorized.

(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; and

(c) That the accused then knew that the pass, permit, discharge certificate, or identification card was false or unauthorized.

(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; and

(c) That the accused then knew that the pass, permit, discharge certificate, or identification card was false or unauthorized.

[Note: When there is intent to defraud or deceive, add the following element:]

(d) That the accused used or possessed the pass, permit, discharge certificate, or identification card with 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 subparagraphs 70.c.(14) and (15).

d. 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.

e. 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) (_____), (he) (she), the said _____, then well knowing the same to be (false) (unauthorized).

Analysis

38. Article 105a—False or unauthorized pass offenses

This paragraph is taken from paragraph 77 (Article 134—False pretenses, obtaining services under) of MCM (2016 edition). The offense remains the same substantively, except that proof of the Article 134 terminal element is no longer required.

39. Article 106 (10 U.S.C. 906)—Impersonation of officer, noncommissioned or petty officer, or agent or official

a. Text of statute.

(a) IN GENERAL.—Any person subject to this chapter who, wrongfully and willfully, impersonates—

- (1) an officer, a noncommissioned officer, or a petty officer;**
- (2) an agent of superior authority of one of the armed forces; or**
- (3) an official of a government;**

shall be punished as a court-martial may direct.

(b) IMPERSONATION WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and with intent to defraud, impersonates any person referred to in paragraph (1), (2), or (3) of subsection (a) shall be punished as a court-martial may direct.

(c) IMPERSONATION OF GOVERNMENT OFFICIAL WITHOUT INTENT TO DEFRAUD.—Any person subject to this chapter who, wrongfully, willfully, and without intent to defraud, impersonates an official of a government by committing an act that exercises or asserts the authority of the office that the person claims to have shall be punished as a court-martial may direct.

b. Elements.

(1) That the accused impersonated an officer, noncommissioned officer, or petty officer, or an agent of superior authority of one of the armed forces, or an official of a certain government, in a certain manner; and

(2) That the impersonation was wrongful and willful.

[Note 1: If intent to defraud is in issue, add the following element:]

(3) 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 element:]

(3) 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) *Officer.* The term “officer” has the same meaning as that term carries in 10 U.S.C. § 101(b)(1).

(3) *Willfulness.* Willful means with the knowledge that one is falsely holding one’s self out as such.

(4) *Intent to defraud.* See subparagraph 70.c.(14).

d. Maximum punishment.

(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(n) (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 subparagraph b note 1.]

[**See subparagraph b note 2.]

Analysis

39. Article 106—Impersonation of officer, noncommissioned or petty officer, or agent or official

This paragraph is taken from paragraph 86 (Article 134—Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official) of MCM (2016 edition). This offense is relocated from Article 134. The offense remains the same substantively, except that proof of the Article 134 terminal element is no longer required.

2017 Amendment: a. Text of statute. The phrase “commissioned, warrant officer” is replaced with “officer.” This change aligns this offense with the definition of “officer” under 10 U.S.C. § 101(b)(1) which defines “officer” to mean a commissioned or warrant officer.

c. Explanation (2) Officer. This provision is added to the MCM and explains that the definition of “officer” for purposes of this statute is derived from the existing definition of that term in 10 U.S.C. § 101(b)(1).

40. Article 106a (10 U.S.C. 906a)—Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

a. *Text of statute.*

Any person subject to this chapter—

(1) who is not authorized to wear an insignia, decoration, badge, ribbon, device, or lapel button; and

(2) who wrongfully wears such insignia, decoration, badge, ribbon, device, or lapel button upon the person’s uniform or civilian clothing;

shall be punished as a court-martial may direct.

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; and

(3) That the wearing was wrongful.

[Note: If applicable, add the following element]

(4) That the accused wore any of the following decorations: (Medal of Honor); (Distinguished Service Cross); (Navy Cross); (Air Force Cross); (Silver Star); (Purple Heart) (or any valor device on any personal award).

c. *Explanation.*

(1) *In general.* Authorization of the wearing of a military insignia, decoration, badge, ribbon, device, or lapel pin is governed by Department of Defense and Service regulations. The wearing of a uniform item is “wrongful” where it is intentional and the accused knew that the accused was not entitled to wear it.

(2) *Scope of “unauthorized” wear.* The wearing of an item on a uniform is not unauthorized if such act is under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, for instance, as part of a costume for dramatic or other reasons, or if it is done for legitimate law enforcement activities.

(3) *Wrongful.* Conduct is wrongful when it is done without legal justification or excuse. Actual knowledge that the accused was not authorized to wear the uniform item in question is required. Knowledge may be proved by circumstantial evidence.

d. *Maximum punishment.*

(1) *Wrongful wearing of the Medal of Honor, Distinguished Service Cross; Navy Cross; Air Force Cross; Silver Star; and Purple Heart, or a valor device on any personal award.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *All other cases.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), on or about ____ 20 __, wrongfully, 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) (_____).

Analysis

40. Article 106a—Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button

This paragraph is taken from paragraph 113 (Article 134—Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button) of MCM (2016 edition). This offense is relocated from Article 134 in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles. The offense remains the same substantively, except that proof of the Article 134 terminal element is no longer required.

2017 Amendment: c. *Explanation* (1) *In general.* MCM (2016 edition) did not provide an explanation for this provision. An explanation is added and clarifies the gravamen of this offense, the scope of unauthorized wear, and knowledge.

d. *Maximum punishment.* The maximum authorized confinement is increased from six months to a year for violations of the article involving specified medals and awards.

41. Article 107 (10 U.S.C. 907)—False official statements; false swearing

a. *Text of statute.*

(a) FALSE OFFICIAL STATEMENTS.—Any person subject to this chapter who, with intent to deceive—

(1) signs any false record, return, regulation, order, or other official document, knowing it to be false; or

(2) makes any other false official statement knowing it to be false; shall be punished as a court-martial may direct.

(b) FALSE SWEARING.—Any person subject to this chapter—

(1) who takes an oath that—

(A) is administered in a matter in which such oath is required or authorized by law; and

(B) is administered by a person with authority to do so; and

(2) who, upon such oath, makes or subscribes to a statement;

if the statement is false and at the time of taking the oath, the person does not believe the statement to be true, shall be punished as a court-martial may direct.

b. *Elements.*

(1) *False official statements.*

(a) That the accused signed a certain official document or made a certain official statement;

(b) That the document or statement was false in certain particulars;

(c) That the accused knew it to be false at the time of signing it or making it; and

(d) That the false document or statement was made with the intent to deceive.

(2) *False swearing.*

(a) That the accused took an oath or equivalent;

(b) 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;

(c) That the oath or equivalent was administered by a person having authority to do so;

(d) That upon this oath or equivalent the accused made or subscribed a certain statement;

(e) That the statement was false; and

(f) That the accused did not then believe the statement to be true.

c. *Explanation.*

(1) *False official statements.*

(a) *Statements.* Statements may be made orally or in writing and include records, returns, regulations, orders, or other documents.

(b) *Official statements.* Official statements are those that affect military functions, which encompass matters within the jurisdiction of the military departments and Services. There are three broad categories of official statements under this offense:

(i) where the accused makes a statement while acting in the line of duty or where the statement bears a clear and direct relationship to the accused's official duties;

(ii) where the accused makes a statement to a military member who is carrying out a military duty at the time the statement is made; or

(iii) where the accused makes a statement to a civilian who is necessarily performing a military function at the time the accused makes the statement.

(c) *Status of victim of the deception.* The rank or status 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 from the accused. The Government may be the victim of this offense.

(d) *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.

(e) *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.

(f) *Knowledge that the 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.

(2) *False swearing*.

(a) *Nature of offense*. False swearing is the making under a lawful oath or equivalent of any false statement, oral or written, not believing the statement to be true. It does not include such statements made in a judicial proceeding or course of justice, as those are under Article 131, perjury (*see* paragraph 81). Unlike a false official statement, there is no requirement that the statement be made with an intent to deceive or that the statement be official.

(b) *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. *Maximum punishment*.

(1) *False official statement*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *False swearing*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specifications*.

(1) *False official statements*.

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.

(2) *False swearing*.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, (in an affidavit) (in _____), (make) (subscribe) under lawful (oath) (affirmation) a false statement in substance as follows: _____, which statement (he) (she) did not then believe to be true.

Analysis

41. Article 107—False official statements; false swearing

This paragraph is taken from paragraphs 31 (Article 107—False official statement) and 79 (Article 134—False swearing) of MCM (2016 edition). The offense of False swearing is relocated from Article 134 (MCM (2016 edition)), to Article 107 in conjunction with the reorganization of the punitive articles in the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). The substance of False swearing remains unchanged, except that the terminal element of Article 134 is no longer required.

2017 Amendment: c. Explanation. (1)(b) *Official statements*. This explanation is revised and clarifies whether a statement relates to the official duties of the speaker or hearer. *See United*

States v. Spicer, 71 M.J. 470 (C.A.A.F. 2013). See also *United States v. Passut*, 73 M.J. 27 (C.A.A.F. 2014), and *United States v. Capel*, 71 M.J. 485 (C.A.A.F. 2013).

42. Article 107a (10 U.S.C. 907a)—Parole violation

a. *Text of statute.*

Any person subject to this chapter—

(1) who, having been a prisoner as the result of a court-martial conviction or other criminal proceeding, is on parole with conditions; and

(2) who violates the conditions of parole;

shall be punished as a court-martial may direct.

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; and

(4) That the accused violated the conditions of parole by doing an act or failing to do an act.

c. *Explanation.*

(1) Prisoner refers only to those in confinement resulting from conviction at a court-martial or other criminal proceeding.

(2) Parole is defined as “word of honor.” A prisoner on parole, or parolee, has agreed to adhere to a parole plan and conditions of parole. A parole plan is a written or oral agreement made by the prisoner prior to parole to do or refrain from doing certain acts or activities. A parole plan may include a residence requirement stating where and with whom a parolee will live, and a requirement that the prisoner have an offer of guaranteed employment. Conditions of parole include the parole plan and other reasonable and appropriate conditions of parole, such as paying restitution, beginning or continuing treatment for alcohol or drug abuse, or paying a fine ordered executed as part of the prisoner’s court-martial sentence. In return for giving his or her word of honor to abide by a parole plan and conditions of parole, the prisoner is granted parole.

d. *Maximum punishment.* Bad-conduct discharge, confinement for 6 months, and forfeiture of two-thirds pay per month for 6 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), a prisoner on parole, did, (at/on board—location) (subject-matter jurisdiction, if required), on or about ____ 20 __, violate the conditions of (his) (her) parole by _____.

Analysis

42. Article 107a—Parole violation

This paragraph is taken from paragraph 97a (Article 134—Parole, violation of) of MCM (2016 edition). The offense remains the same substantively, except that proof of the Article 134 terminal element is no longer required.

43. Article 108 (10 U.S.C. 908)—Military property of United States—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. 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 in this paragraph. 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 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 includes: deliberate violation or intentional disregard of some specific law, regulation, or order; reckless or unwarranted personal use of the property; causing or allowing it to remain exposed to the weather, insecurely housed, or not guarded; permitting it to be consumed, wasted, or injured by other persons; or loaning it to a person, known to be irresponsible, by whom it is damaged.

(3) *Value and damage.* In the case of loss, destruction, sale, or wrongful disposition, the value of the property controls the maximum punishment which may be adjudged. In the case of damage, the amount of damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by the Government agency normally employed in such work, or the cost of replacement, as shown by Government price lists or otherwise, whichever is less.

(4) *Firearms or explosive.* For purposes of determining the maximum punishment for this offense (see subparagraphs. d.(1)(b) and d.(3)(b)), the term “explosive” includes ammunition. See generally R.C.M. 103(11), (12).

d. *Maximum punishment.*

(1) *Selling or otherwise disposing of military property.*

(a) *Of a value of \$1,000.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Of a value of more than \$1,000.00 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 \$1,000.00 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 \$1,000.00.* 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 \$1,000.00 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 \$1,000.00, or of any firearm or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *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) \$_____).

Analysis

43. Article 108—Military property of United States—Loss, damage, destruction, or wrongful disposition

This paragraph is taken from paragraph 32 (Article 108—Military property of United States—Loss, damage, destruction, or wrongful disposition) of MCM (2016 edition).

2017 Amendment: c. Explanation. Subparagraph c.(4) *Firearms and Explosives* clarifies that this term specifically includes ammunition.

d. *Maximum punishment.* The threshold amount for purposes of the maximum punishment in relation to the qualifying value of property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in federal civilian law for equivalent misconduct. *See* 18 U.S.C. § 1361.

44. Article 108a (10 U.S.C. 908a)—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 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 subparagraph 27.c.(1)(b).

(6) *Firearms or explosive.* For purposes of determining the maximum punishment for this offense (see subparagraph d.(1)(b)), the term "explosive" includes ammunition. See generally R.C.M. 103(11), (12).

d. *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 \$1000.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *Of a value of more than \$1000.00 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.

e. *Sample specifications.*

(1) *Failing to secure public property taken from the enemy.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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) (subject-matter jurisdiction, if required), 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/onboard—location) (subject-matter jurisdiction, if required), on or about (date), engage in (looting) (and) (pillaging) by unlawfully (seizing) (appropriating) _____, (property which had been left behind) (the property of _____), [(an inhabitant of _____) (_____)].

Analysis

44. Article 108a—Captured or abandoned property

This paragraph is taken, without change, from paragraph 27 (Article 103—Captured or abandoned property) of MCM (2016 edition).

2017 Amendment: c. Explanation. Subparagraph c.(6) *Firearms and explosives* is added and aligns it with an identical provision in paragraph 43.

d. Maximum Punishment. The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in civilian jurisdictions. Maximum punishments focus on the amount of damage inflicted and the value of the property destroyed.

45. Article 109 (10 U.S.C. 909)—Property other than military property of 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) *Damaging non-military property.*

(a) That the accused willfully and wrongfully damaged certain personal property in a certain manner;

- (b) that the property was that of another person; and
- (c) that the damage inflicted on the property was of a certain amount.

(3) *Destroying non-military property.*

(a) That the accused willfully and wrongfully destroyed 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.

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, recklessly, or 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 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* subparagraph 64.c.(1)(g).

d. *Maximum punishment.*

(1) *Wasting or spoiling, non-military property—real property.*

(a) *Of property valued at \$1000.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Of property valued at more than \$1000.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Damaging any property other than military property of the United States.*

(a) *Inflicting damage of \$1000.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Inflicting damage of more than \$1000.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Destroying any property other than military property of the United States.*

(a) *Destroying property valued at \$1000.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Destroying property valued at more than \$1000.00.* Dishonorable discharge; forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Wasting or spoiling real property other than military property of the United States.*

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_____] (of a value of (about) \$_____) (the amount of said damage being in the sum of (about) \$_____), the property of _____.

(2) *Damaging any property other than military property of the United States.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, willfully and wrongfully damage by (method of damage) (identify property damaged_____) (the amount of said damage being in the sum of (about) \$_____), the property of _____.

(3) *Destroying personal property other than military property of the United States.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, willfully and wrongfully destroy (identify property destroyed _____), of a value of (about) \$_____ the property of _____.

Analysis

45. Article 109—Property other than military property of United States—waste, spoilage, or destruction

This paragraph is taken from paragraph 33 (Article 109—Property other than military property of the United States—waste, spoilage, or destruction) of MCM (2016 edition).

2017 Amendments: b. *Elements.* The maximum punishment categories are reorganized into three separate categories reflecting the type of property involved and the type of action being taken against the property.

d. *Maximum Punishment.* The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in civilian jurisdictions. Maximum punishments focus on the amount of damage inflicted and the value of the property destroyed. The maximum punishments are also further divided based on the nature of the property and the extent of the damage.

46. Article 109a (10 U.S.C. 909a)—Mail matter: wrongful taking, opening, etc.

a. *Text of statute.*

(a) **TAKING.**—Any person subject to this chapter who, with the intent to obstruct the correspondence of, or to pry into the business or secrets of, any person or organization, wrongfully takes mail matter before the mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.

(b) **OPENING, SECRETING, DESTROYING, STEALING.**—Any person subject to this chapter who wrongfully opens, secretes, destroys, or steals mail matter before the mail matter is delivered to or received by the addressee shall be punished as a court-martial may direct.

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; and

(d) That such taking was with the intent to obstruct the correspondence or pry into the business or secrets of any person or organization.

(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; and

(c) That the mail matter was opened, secreted, destroyed, or stolen by the accused before it was delivered to or received by the addressee.

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 subparagraph 64.c.(1) concerning “steal.”

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Taking.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, wrongfully take certain mail matter, to wit: (a) (letter(s)) (postal card(s)) (package(s)), addressed to _____, (out of the (_____ Post Office _____) (orderly room of _____) (unit mail box of _____) (_____)) (from _____) before (it) (they) (was) (were) (delivered) (actually received) (to) (by) the (addressee) with intent to (obstruct the correspondence) (pry into the (business) (secrets)) of _____.

(2) *Opening, secreting, destroying, or stealing.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____, 20 __, (wrongfully (open) (secret) (destroy)) (steal) certain mail matter, to wit: (a) (letter(s)) (postal card(s)) (package(s)) addressed to _____, which said (letters(s)) (_____ (was) (were) then (in (the _____ Post Office _____) (orderly room of _____) (unit mail box of _____) (custody of _____) (_____)) (had previously been committed to _____, (a representative of _____), (an official agency for the transmission of communications)) before said (letter(s)) (_____ (was) (were) (delivered) (actually received) (to) (by) the (addressee).

Analysis

46. Article 109a—Mail matter: wrongful taking, opening, etc.

This paragraph is taken from paragraph 93 (Article 134—Mail: taking, opening, secreting, destroying, or stealing) of MCM (2016 edition). The offense remains the same substantively, except that proof of the Article 134 terminal element is no longer required.

47. Article 110 (10 U.S.C. 910)—Improper hazarding of vessel or aircraft

a. Text of statute.

(a) WILLFUL AND WRONGFUL HAZARDING.—Any person subject to this chapter who, willfully and wrongfully, hazards or suffers to be hazarded any vessel or aircraft of the armed forces shall be punished by death or such other punishment as a court-martial may direct.

(b) NEGLIGENCE HAZARDING.—Any person subject to this chapter who negligently hazards or suffers to be hazarded any vessel or aircraft of the armed forces shall be punished as a court-martial may direct.

b. Elements.

(1) That a vessel or aircraft 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 or aircraft 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 or aircraft 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 or aircraft was hazarded but not of the fact of culpability on the part of any particular person. Strand means run a vessel aground so that the vessel is fast for a time.

(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 and aircraft 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 or aircraft is willfully suffered to be hazarded by one who, although not in direct control of the vessel or aircraft, knows a danger to be imminent but takes no steps to prevent it, for example, as by a navigator 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, or an aircraft's copilot or navigator who similarly fails to report an imminent danger. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a foreseeable danger.

(5) *Vessel.* See 1 U.S.C. § 3.

(6) *Aircraft.* See 18 U.S.C. § 31(a)(1). Additionally, aircraft includes remotely piloted aircraft and unmanned aerial vehicles.

d. Maximum Punishment.

(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.

e. *Sample specifications.*

(1) *Hazarding or suffering to be hazarded any vessel or aircraft, willfully and wrongfully.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), did, on ____ 20 __, while serving as ____ (aboard) (on) the _____ in the vicinity of _____, willfully and wrongfully (hazard the said (vessel) (aircraft)) (suffer the said (vessel) (aircraft)) to be hazarded) by (causing the said (vessel) (aircraft) to collide with _____) (allowing the said vessel to run aground) (allowing said aircraft to _____) (_____).

(2) *Hazarding of vessel or aircraft, negligently.*

(a) *Example 1.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), on ____ 20 __, while serving (in command of the _____) (as the pilot of _____), (making entrance to (Boston Harbor)) (approaching (_____ Air Force Base) (_____ Air Field)) did negligently hazard the said (vessel) (aircraft) by failing and neglecting to maintain or cause to be maintained an accurate (running plot of the true position) (location) of said (vessel) (aircraft) 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) (_____ runway) (_____).

(b) *Example 2.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), 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 or aircraft 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) (subject-matter jurisdiction, if required), 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 or aircraft to be hazarded, negligently.*

(a) *Example 1.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), while serving as combat intelligence center officer on board the _____, making passage from Boston to Philadelphia, and having, between _____ and _____ hours on _____, 20 __, been duly informed of decreasing radar ranges and constant radar bearing indicating that the said _____ was upon a collision course approaching a radar target, did then and there negligently suffer the said vessel or aircraft 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 _____.

(b) *Example 2.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction, if required), while serving as (navigator) (_____) on _____, transiting from (_____ Air Force Base) to (_____ Air Force Base), and having, between _____ and _____ hours on _____, 20 __, becoming aware of (inclement weather conditions) (inaccurate fuel calculations) threatening said aircraft, did then and there negligently suffer the said aircraft to be hazarded by failing and neglecting to report said (weather conditions) (inaccurate fuel calculations) to the (pilot) (copilot), as it was (his) (her) duty to do, the said (navigator) (_____), through negligence, did cause the said aircraft to _____, at or about _____ hours on said date, with resultant damage to wit: _____.

Analysis

47. Article 110—Improper hazarding of vessel or aircraft

This paragraph is taken from paragraph 34 (Article 110—Improper hazarding of a vessel) of MCM (2016 edition).

2017 Amendment: a. *Text of statute.* This offense is amended and includes improper hazarding of an aircraft, and accordingly retitled “Improper hazarding of vessel or aircraft.”

48. Article 111 (10 U.S.C. 911)—Leaving scene of vehicle accident

a. *Text of statute.*

(a) **DRIVER.**—Any person subject to this chapter—

(1) who is the driver of a vehicle that is involved in an accident that results in personal injury or property damage; and

(2) who wrongfully leaves the scene of the accident—

(A) without providing assistance to an injured person; or

(B) without providing personal identification to others involved in the accident or to appropriate authorities;

shall be punished as a court-martial may direct.

(b) **SENIOR PASSENGER.**—Any person subject to this chapter—

(1) who is a passenger in a vehicle that is involved in an accident that results in personal injury or property damage;

(2) who is the superior commissioned or noncommissioned officer of the driver of the vehicle or is the commander of the vehicle; and

(3) who wrongfully and unlawfully orders, causes, or permits the driver to leave the scene of the accident—

- (A) without providing assistance to an injured person; or
(B) without providing personal identification to others involved in the
accident or to appropriate authorities;

shall be punished as a court-martial may direct.

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); and
- (e) That such leaving was wrongful.

(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; and
- (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).

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

e. *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.]

Analysis

48. Article 111—Leaving scene of vehicle accident

This paragraph is taken from paragraph 82 (Article 134—Fleeing scene of accident) of MCM (2016 edition). The offense remains the same substantively, except that proof of the Article 134 terminal element is no longer required.

49. Article 112 (10 U.S.C. 912)—Drunkness and other incapacitation offenses

a. *Text of statute.*

(a) **DRUNK ON DUTY.**—Any person subject to this chapter, who is drunk on duty shall be punished as a court-martial may direct.

(b) **INCAPACITATION FOR DUTY FROM DRUNKENNESS OR DRUG USE.**—Any person subject to this chapter who, as a result of indulgence in any alcoholic beverage or any drug, is incapacitated for the proper performance of duty shall be punished as a court-martial may direct.

(c) **DRUNK PRISONER.**—Any person subject to this chapter who is a prisoner and, while in such status, is drunk shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Drunk on duty.*

- (a) That the accused was on a certain duty; and
- (b) That the accused was drunk while on this duty.

(2) *Incapacitation for duty from drunkenness or drug use.*

- (a) That the accused had certain duties to perform;
- (b) That the accused was incapacitated for the proper performance of such duties; and
- (c) That such incapacitation was the result of previous indulgence in intoxicating liquor or any drug.

(3) *Drunk prisoner.*

- (a) That the accused was a prisoner; and
- (b) That while in such status the accused was drunk.

c. *Explanation.*

(1) *Drunk on duty.*

(a) *Drunk.* Drunk includes a blood alcohol content limit with respect to alcohol concentration in a person's blood of 0.08 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person's breath of 0.08 grams of alcohol per 210 liters of breath, as shown by chemical analysis. *See* Article 113(b)(3). Drunk also includes intoxication by alcohol that is sufficient to impair the rational and full exercise of mental or physical faculties. *See* subparagraph 51.c.(6).

(b) *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.

(c) *Nature of offense.* It is necessary that the accused be 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 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.

(d) *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.

(2) *Incapacitation for duty from drunkenness or drug use*.

(a) *Incapacitated*. Incapacitated means unfit or unable to properly perform duties as a result of previous alcohol consumption or drug use. Illness resulting from previous indulgence is an example of being "unable" to perform duties.

(b) *Affirmative defense*. The accused's lack of knowledge of the duties assigned is an affirmative defense to this offense.

(3) *Drunk prisoner*.

(a) *Prisoner*. See subparagraph 24.c.(1).

(b) *Drunk*. See subparagraph 49.c.(1)(a).

d. *Maximum punishment*.

(1) *Drunk on duty*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

(2) *Incapacitation for duty from drunkenness or drug use*. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(3) *Drunk prisoner*. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specifications*.

(1) *Drunk on duty*.

In that _____ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, found drunk while on duty as _____.

(2) *Incapacitation for duty from drunkenness or drug use*.

In that _____ (personal jurisdiction data), was, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, as a result of previous overindulgence in intoxicating liquor or drugs incapacitated for the proper performance of (his) (her) duties.

(3) *Drunk prisoner*.

In that _____ (personal jurisdiction data), a prisoner, was (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, found drunk.

Analysis

49. Article 112—Drunkenness and other incapacitation offenses

This paragraph is taken from paragraphs 36 (Article 112—Drunk on duty), 75 (Article 134—Drunk Prisoner) and 76 (Article 134—Drunkenness—incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug) of MCM (2016 edition).

2017 Amendment: a. Text of statute. The new text reflects the migration of paragraphs 75 and 76 from Article 134 offenses MCM (2016 edition) to Article 112; proof of the terminal element of Article 134 is no longer required. This migration places the similar offenses of drunk on duty, drunk prisoner, and incapacitation for duty under the same UCMJ article.

(2) *Incapacitation for duty from drunkenness or drug use.* Under paragraph 76 of MCM (2016 edition) wrongful indulgence in alcohol or drugs was required. The word wrongful has been removed from the incapacitation for duty from drunkenness or drug use offense; the act of being incapacitated for duty is itself wrongful in the military context. However, this offense retains the affirmative defense formerly utilized in the paragraph 76 of MCM (2016 edition) namely: that at the time of the offense the accused neither knew, nor reasonably should have known, that he or she was assigned to, or susceptible to recall for, military duties. *See* subparagraph 49.c.(2)(b). Likewise, the defenses of accident (*see* R.C.M. 916(f)) and mistake of fact (*see* R.C.M. 916 (j)) continue to apply to instances where the accused accidentally or mistakenly consumed drugs or alcohol, not knowing them to be such at the time of ingestion.

c. *Explanation.* (1) *Drunk on Duty.* (a) *Drunk.* This definition is taken from subparagraph 35.c.(6), MCM (2016 edition).

(2) *Incapacitation for duty from drunkenness or drug use.*

(a) *Incapacitated.* The cross-reference to the explanation of drunk is changed to reflect the relocation of that definition from subparagraph 35.c.(6), MCM (2016 edition) to subparagraph 49.c.(1)(a).

(3) *Drunk prisoner.*

(a) *Prisoner.* The cross-reference to the explanation of prisoner is changed and reflects the Military Justice Act of 2016's relocation of the former Article 134—Drinking liquor with prisoner offense paragraph 74 of MCM (2016 edition) to Article 96.

(b) *Drunk.* The cross-reference to the explanation of drunk is changed and reflects the Military Justice Act of 2016's relocation of that definition from subparagraph 35.c.(6), MCM (2016 edition), to subparagraph 49.c.(1)(a).

50. Article 112a (10 U.S.C. 912a)—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 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 UCMJ 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. *Maximum punishment*.

(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 for 5 years.

(b) *Marijuana (possession of less than 30 grams or use), phenobarbital, and Schedule IV and V controlled substances*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Wrongful distribution, possession, manufacture, or introduction of controlled substance with intent to distribute, or wrongful importation or exportation of a controlled substance*.

(a) *Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II, and III controlled substances*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(b) *Phenobarbital and Schedule IV and V controlled substances*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

When any offense under this paragraph 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.

e. *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) (subject-matter jurisdiction data, if required), on or about _____, 20 __, wrongfully introduce _____ (grams) (ounces) (pounds) (_____) of _____ (a Schedule (_____) controlled substance) onto a vessel, aircraft, vehicle, or installation used by the armed forces or under control of the armed forces, to wit: _____ (with the intent to distribute the said controlled substance) (while on duty as a sentinel or lookout) (while receiving special pay under 37 U.S.C. § 310) (during a time of war).

(4) *Wrongful importation or exportation of controlled substance.*

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), 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).

Analysis

50. Article 112a—Wrongful use, possession, etc., of controlled substances

This paragraph is taken, without substantive change, from paragraph 37 (Article 112a—Wrongful use, possession, etc., of controlled substances) of MCM (2016 edition).

51. Article 113 (10 U.S.C. 913)—Drunken or reckless operation of a 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 0.08 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person’s breath is 0.08 grams of alcohol per 210 liters of breath, as shown by chemical analysis. The Secretary may by regulation prescribe limits that are lower than the limits specified in the preceding sentence, if such lower limits are based on scientific developments, as reflected in Federal law of general applicability.

(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 or exceeded the applicable limit under Article 113(b).

[Note: Add the following if applicable]

- (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.* See 18 U.S.C. § 31(a)(1).
- (4) *Operates.* Operating a vehicle, aircraft, or vessel includes not only driving or guiding a vehicle, aircraft, or vessel while it is in motion, either in person or through the agency of another, but also setting of its motive power in action or the manipulation of its controls so as to cause the particular vehicle, aircraft, or vessel to move.
- (5) *Physical control and actual physical control.* These terms as used in the statute are synonymous. They describe the present capability and power to dominate, direct, or regulate the vehicle, vessel, or aircraft, either in person or through the agency of another, regardless of whether such vehicle, aircraft, or vessel is operated. For example, the intoxicated person seated behind the steering wheel of a vehicle with the keys of the vehicle in or near the ignition but with the engine not turned on could be deemed in actual physical control of that vehicle. However, the person asleep in the back seat with the keys in his or her pocket would not be deemed in actual physical control. Physical control necessarily encompasses operation.
- (6) *Drunk or impaired.* Drunk and impaired mean any intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties. The term drunk is used in relation to intoxication by alcohol. The term impaired is used in relation to intoxication by a substance described in Article 112(a).
- (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 Article 113, 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. *Maximum punishment*.

(1) *Resulting in personal injury*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(2) *No personal injury involved*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. *Sample specification*.

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20 __, (in the motor pool area) (near the Officers' 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) (her) (blood or breath) equaled or exceeded the applicable limit under subparagraph (b) of the text of the statute in paragraph 50 as shown by chemical analysis] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (ordering

that the aircraft be flown below the authorized altitude)] [and did thereby cause said (vehicle) (aircraft) (vessel) to (strike and) (injure _____)].

Analysis

51. Article 113—Drunken or reckless operation of a vehicle, aircraft, or vessel

This paragraph is taken from paragraph 35 (Article 111—Drunken or reckless operation of a vehicle, aircraft, or vessel) of MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the reorganization of the punitive articles in the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

2017 Amendment: a. *Text of statute.* The substance of the offense remains the same, except for a lower blood alcohol content limit with respect to alcohol concentration in a person's blood pursuant to Section 5425 of the NDAA for FY17. The Secretary may by regulation prescribe limits that are lower if such lower limits are based on scientific developments, as reflected in federal civilian law of general applicability.

52. Article 114 (10 U.S.C. 914)—Endangerment offenses

a. *Text of statute.*

(a) **RECKLESS ENDANGERMENT.**—Any person subject to this chapter who engages in conduct that—

(1) is wrongful and reckless or is wanton; and

(2) is likely to produce death or grievous bodily harm to another person;

shall be punished as a court-martial may direct.

(b) **DUELING.**—Any person subject to this chapter—

(1) who fights or promotes, or is concerned in or connives at fighting a duel; or

(2) who, having knowledge of a challenge sent or about to be sent, fails to report the facts promptly to the proper authority; shall be punished as a court-martial may direct.

(c) **FIREARM DISCHARGE, ENDANGERING HUMAN LIFE.**—Any person subject to this chapter who, willfully and wrongly, discharges a firearm, under circumstances such as to endanger human life shall be punished as a court-martial may direct.

(d) **CARRYING CONCEALED WEAPON.**—Any person subject to this chapter who unlawfully carries a dangerous weapon concealed on or about his person shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Reckless endangerment*

(a) That the accused did engage in conduct;

(b) That the conduct was wrongful and reckless or wanton; and

(c) That the conduct was likely to produce death or grievous bodily harm to another person.

(2) *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.

(3) *Promoting a duel.*

(a) That the accused promoted a duel between certain persons; and

- (b) That the accused did so in a certain manner.
- (4) *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.
- (5) *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.
- (6) *Firearm discharge, endangering human life.*
 - (a) That the accused discharged a firearm;
 - (b) That the discharge was willful and wrongful; and
 - (c) That the discharge was under circumstances such as to endanger human life.
- (7) *Carrying concealed weapon.*
 - (a) That the accused carried a certain weapon concealed on or about the accused's person;
 - (b) That the carrying was unlawful; and
 - (c) That the weapon was a dangerous weapon.

Discussion

For negligent discharge of a firearm, see paragraph 100.

c. Explanation.

(1) *Reckless endangerment.*

(a) *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.

(b) *Wrongfulness.* Conduct is wrongful when it is without legal justification or excuse.

(c) *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.

(d) *Wantonness.* Wanton includes "reckless" but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(e) *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.

(f) *Grievous bodily harm.* This phrase has the same meaning given it in subparagraph 77.c.(1)(c).

(g) *Death or injury not required.* It is not necessary that death or grievous bodily harm be actually inflicted to prove reckless endangerment.

(2) *Dueling.*

(a) *Duel.* A duel is combat between two persons for private reasons fought with deadly weapons by prior agreement.

(b) *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.

(c) *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.

(3) *Firearm discharge, endangering human life.* “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.

(4) *Carrying concealed weapon.*

(a) *Concealed weapon.* A weapon is concealed when it is carried by a person and intentionally covered or kept from sight.

(b) *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.

(c) *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. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

e. *Sample specifications.*

(1) *Reckless endangerment.*

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: _____, conduct likely to cause death or grievous bodily harm to _____.

(2) *Dueling.*

(a) *Dueling.*

In that _____ (personal jurisdiction data) (and _____), did, (at/onboard—location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, fight a duel (with _____), using as weapons therefor (pistols) (swords) (_____).

(a) *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).

(b) *Conniving at fighting a duel.*

In that _____ (personal jurisdiction data), having knowledge that _____ and _____ were about to engage in a duel, did (at/onboard—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) (_____).

(c) *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.

(3) *Firearm discharge, endangering human life.*

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.

(4) *Carrying concealed weapon.*

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 _____.

Analysis

52. Article 114—Endangerment Offenses

This paragraph is taken from paragraphs 39 (Article 114—Dueling), 81 (Article 134—Firearm, discharging—willfully, under such circumstances as to endanger human life), 100a (Article 134—Reckless endangerment), and 112 (Article 134—Weapon: concealed, carrying) of MCM (2016 edition). These offenses are relocated and consolidated into the newly titled Article 114—Endangerment offenses in conjunction with the reorganization of the punitive articles in the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

d. *Maximum punishment.* By prescribing one maximum punishment for all of these offenses, the 2017 amendments authorize the imposition of a dishonorable discharge for reckless endangerment and for carrying a concealed weapon. Previously, a bad-conduct discharge but not a dishonorable discharge was a portion of the maximum authorized punishment for those offenses.

53. Article 115 (10 U.S.C. 915)—Communicating threats

a. *Text of statute.*

(a) COMMUNICATING THREATS GENERALLY.—Any person subject to this chapter who wrongfully communicates a threat to injure the person, property, or reputation of another shall be punished as a court-martial may direct.

(b) COMMUNICATING THREAT TO USE EXPLOSIVE, ETC.—Any person subject to this chapter who wrongfully communicates a threat to injure the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-martial may direct.

(c) COMMUNICATING FALSE THREAT CONCERNING USE OF EXPLOSIVE, ETC.—Any person subject to this chapter who maliciously communicates a false threat concerning injury to the person or property of another by use of (1) an explosive, (2) a weapon of mass destruction, (3) a biological or chemical agent, substance, or weapon, or (4) a hazardous material, shall be punished as a court-martial may direct. As used in the preceding sentence, the term “false threat” means a threat that, at the time the threat is communicated, is known to be false by the person communicating the threat.

b. *Elements.*

(1) *Threats generally.*

(a) That the accused communicated certain language expressing a present determination or intent to injure the person, property, or reputation of another person, presently or in the future;

- and
- (b) That the communication was made known to that person or to a third person;
 - (c) That the communication was wrongful.
- (2) *Threat to use explosive, etc.*
- (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; and
 - (d) That the communication was wrongful.
- (3) *False threats concerning use of explosives, etc.*
- (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; and
 - (d) That the communication of the information by the accused was malicious.

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. The communication must be one that a reasonable person would understand as expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage or destroy is not required.

(2) *Wrongful.* A communication must be wrongful in order to constitute this offense. The wrongfulness of the communication relates to the accused's subjective intent. For purposes of this paragraph, the mental state requirement is satisfied if the accused transmitted the communication for the purpose of issuing a threat or with knowledge that the communication will be viewed as a threat. A statement made under circumstances that reveal it to be in jest or for an innocent or legitimate purpose that contradicts the expressed intent to commit the act is not wrongful. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving a threat.

(3) *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.

(4) *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.

(5) *Biological agent.* The term "biological agent" means any microorganism (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.

(6) *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.

(7) *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.

(8) *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. *Maximum punishment.*

(1) *Threats and false threats generally.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) *Threats and false threats concerning use of explosives, etc.* Dishonorable discharge, forfeitures of all pay and allowances, and confinement for 10 years.

e. *Sample specifications.*

(1) *Threats generally.*

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 (to injure ____ by ____) (to accuse ____ of having committed the offense of ____) (____).

(2) *Threats concerning use of explosives, etc.*

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), 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)].

(3) *False threats concerning use of explosives, etc.*

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, maliciously (communicate) (convey) certain information concerning an attempt being made or to be made to unlawfully [(kill) (injure) (intimidate) _____] [(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.

Analysis

53. Article 115—Communicating threats

This paragraph is taken from paragraphs 109 (Article 134—Threat or hoax designed or intended to cause panic or public fear) and 110 (Article 134—Threat, communicating) of MCM (2016 edition). These offenses are consolidated and relocated to their current position in conjunction with the reorganization of the punitive articles in the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Proof of the Article 134 terminal element is no longer required for the relocated offenses. The explanations for threat and wrongful are amended and are consistent with *Elonis v. United States*, 135 S.Ct. 2001 (2015), and *United States v. Rapert*, 75 M.J. 164 (C.A.A.F. 2016).

54. Article 116 (10 U.S.C. 916)—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.* A 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. *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.

e. *Sample specifications*.

(1) *Riot*.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, (cause) (participate in) a riot by unlawfully assembling with _____ (and _____) (and) (others to the number of about _____ whose names are unknown) for the purpose of (resisting the police of _____) (assaulting passers-by) (_____), and in furtherance of said purpose did (fight with said police) (assault certain persons, to wit: _____) (_____), to the terror and disturbance of _____.

(2) *Breach of the peace*.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, (cause) (participate in) a breach of the peace by (wrongfully engaging in a fist fight in the dayroom with _____) (using the following provoking language (toward _____), to wit: “_____,” or words to that effect) (wrongfully shouting and singing in a public place, to wit: _____) (_____).

Analysis

54. Article 116—Riot or breach of peace

This paragraph is taken, without substantive change, from paragraph 41 (Article 116—Riot or breach of peace) of MCM (2016 edition).

55. Article 117 (10 U.S.C. 917)—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 UCMJ.

c. *Explanation*.

(1) *In general*. As used in this article, provoking and reproachful describe those words or gestures which are used in the presence of the person to whom they are directed and which a reasonable person would expect to induce a breach of the peace under the circumstances. These words and gestures do not include reprimands, censures, reproofs and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces.

(2) *Knowledge*. It is not necessary that the accused have knowledge that the person toward whom the words or gestures are directed is a person subject to the UCMJ.

d. *Maximum punishment*. Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

e. *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) (_____).

Analysis

55. Article 117—Provoking speeches or gestures

This paragraph is taken without substantive change from paragraph 42 (Article 117—Provoking speeches or gestures) of MCM (2016 edition).

56. Article 118 (10 U.S.C. 918)—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 which 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, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of 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, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of 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 premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances.

(b) *Transferred premeditation.* When an accused with a premeditated design attempted to unlawfully kill a certain person, but, by mistake or inadvertence, killed another person, the accused is still criminally responsible for a premeditated murder, because the premeditated design to kill is transferred from the intended victim to the actual victim.

(c) *Intoxication.* Voluntary intoxication (*see* R.C.M. 916(1)(2)) not amounting to legal insanity may reduce premeditated murder (Article 118(1)) to unpremeditated murder (Article 118(2) or (3)) but it does not reduce either premeditated murder or unpremeditated murder to manslaughter (Article 119) or any other lesser offense.

(3) *Intent to kill or inflict great bodily harm.*

(a) *Intent.* An unlawful killing without premeditation is also murder when the accused had either an intent to kill or inflict great bodily harm. It may be inferred that a person intends the natural and probable consequences of an act purposely done. Hence, if a person does an intentional act likely to result in death or great bodily injury, it may be inferred that death or great bodily injury was intended. The intent need not be directed toward the person killed, or exist for any particular time before commission of the act, or have previously existed at all. It is sufficient that it existed at the time of the act or omission (except if death is inflicted in the heat of a sudden passion caused by adequate provocation – *see* paragraph 57). For example, a person committing housebreaking who strikes and kills the householder attempting to prevent flight can be guilty of murder even if the householder was not seen until the moment before striking the fatal blow.

(b) *Great bodily harm.* Great bodily harm means serious injury; it does not include minor injuries such as a black eye or a bloody nose, but it does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries. It is synonymous with the term “grievous bodily harm.”

(c) *Intoxication.* Voluntary intoxication not amounting to legal insanity does not reduce unpremeditated murder to manslaughter (Article 119) or any other lesser offense.

(4) *Act inherently dangerous to others.*

(a) *Wanton disregard of human life.* Intentionally engaging in an act inherently dangerous to another—although without an intent to cause the death of or great bodily harm to any particular person, or even with a wish that death will not be caused—may also constitute murder if the act shows wanton disregard of human life. Such disregard is characterized by heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm. Examples include throwing a live grenade toward another in jest or flying an aircraft very low over one or more persons to cause alarm.

(b) *Knowledge.* The accused must know that death or great bodily harm was a probable consequence of the inherently dangerous act. Such knowledge may be proved by circumstantial evidence.

(5) *During certain offenses.*

(a) *In general.* The commission or attempted commission of any of the offenses listed in Article 118(4) is likely to result in homicide, and when an unlawful killing occurs as a consequence of the perpetration or attempted perpetration of one of these offenses, the killing is murder. Under these circumstances it is not a defense that the killing was unintended or accidental.

(b) *Separate offenses.* The perpetration or attempted perpetration of the burglary, rape, rape of a child, sexual assault, sexual assault of a child, aggravated sexual contact, sexual abuse of a child, robbery, or aggravated arson may be charged separately from the homicide.

d. *Maximum punishment.*

(1) Article 118(1) or (4)—death. Mandatory minimum—imprisonment for life with the eligibility for parole.

(2) Article 118(2) or (3)—such punishment other than death as a court-martial may direct.

e. *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) (_____).

Analysis

56. Article 118—Murder

This paragraph is taken from paragraph 43 (Article 118—Murder) of MCM (2016 edition).

2017 Amendment: c. Explanation (5)(b) Separate offenses. This subparagraph is amended and conforms to the amendments to Articles 120 and 125 from Sections 5430 and 5439 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). The specific listing of offenses that may be charged separately also is amended to reflect the list of felony-murder offenses contained at Article 118(4).

57. Article 119 (10 U.S.C. 919)—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

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

[Note: Add the following if applicable]

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

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.

(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.

(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 an offense 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.

(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.

d. *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.

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

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

e. *Sample specification.*

(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

_____, (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 ____ 20 ____, (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 _____.

Analysis

57. Article 119—Manslaughter

This paragraph is taken, without substantive change, from paragraph 44 (Article 119—Manslaughter) of MCM (2016 edition).

2017 Amendment: b. *Elements* (2)(d) clarifies the relationship between involuntary manslaughter and murder perpetrated during the commission of certain offenses and conforms to the amendments to Articles 118 and 120 from Sections 5428 and 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Forcible sexual misconduct previously addressed under Article 125 (MCM 2016) is now addressed in Articles 120 and 134 (Animal abuse).

58. Article 119a (10 U.S.C. 919a)—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, 928a, 926, and 928 of this title (articles 118, 119(a), 119(b)(2), 120(a), 122, 128a, 126, and 128).

(c) Nothing in this section shall be construed to permit the prosecution—

(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

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

(3) of any woman with respect to her unborn child.

(d) In this section, the term “unborn child” means a child in utero, and the term “child in utero” or “child, who is in utero” means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

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(a))), (robbery (article 122)), (maiming (article 128a)), (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 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(a))), (robbery (article 122)), (maiming (article 128a)), (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 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(a))), (robbery (article 122)), (maiming (article 128a)), (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(a))), (robbery (article 122)), (maiming (article 128a)), (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 128a, 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 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* subparagraph b.(3)(c) of this paragraph).

(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. *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.

d. *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 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.

Analysis

58. Article 119a—Death or injury of an unborn child

This paragraph is taken from paragraph 44a (Article 119a—Death or injury of an unborn child) of MCM 2016.

2017 Amendment: a. *Text of statute.* The phrase “authorized by state or federal law to perform abortions” was removed from this subparagraph’s recital of the text of Article 119a because that phrase does not appear in the statute. *See* Pub. L. No. 1018-212, § 3; 118 Stat. 568 (April 1, 2004).

59. Article 119b (10 U.S.C. 919b)—Child endangerment

a. *Text of statute.*

Any person subject to this chapter—

(1) who has a duty for the care of a child under the age of 16 years; and

(2) who, through design or culpable negligence, endangers the child’s mental or physical health, safety, or welfare;
shall be punished as a court-martial may direct.

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; and

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

c. *Explanation.*

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

(2) *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. 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.

(3) *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 subparagraph 77.c.(1)(c) for an explanation of grievous bodily harm.

(4) *Endangerer*. Endangerer means to subject one to a reasonable probability of harm.

(5) *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.

(6) *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 not charged with the care of a child does not prevent the child from running and playing in the street.

d. *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.

e. *Sample specifications*.

(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) (her) 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) (her) 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 (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) (her) 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).

Analysis

59. Article 119b—Child endangerment

This paragraph is taken from paragraph 68a (Article 134—Child endangerment) of MCM (2016 edition). The offense remains the same substantively, except proof of the Article 134 terminal element is no longer required.

2017 Amendment: c. Explanation. (2) The phrase “even though such harm would not necessarily be the natural and probable consequences of such acts. In this regard,” was removed from this subparagraph.

60. Article 120 (10 U.S.C. 920)—Rape and sexual assault generally

[**Note: This statute applies to offenses committed on or after 1 January 2019. Previous versions of Article 120 are located as follows: for offenses committed on or before 30 September 2007, see Appendix 27; for offenses committed during the period 1 October 2007 through 27 June 2012, see Appendix 28; for offenses committed during the period 28 June 2012 through 31 December 2018, see Appendix 29.**]

a. *Text of statute.*

(a) **RAPE.**—Any person subject to this chapter who commits a sexual act upon another person by—

- (1) using unlawful force against that other person;
- (2) using force causing or likely to cause death or 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) first rendering that other person unconscious; or
- (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing 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) **SEXUAL ASSAULT.**—Any person subject to this chapter who—

- (1) commits a sexual act upon another person by—
 - (A) threatening or placing that other person in fear;

(B) making a fraudulent representation that the sexual act serves a professional purpose; or

(C) inducing a belief by any artifice, pretense, or concealment that the person is another person;

(2) commits a sexual act upon another person—

(A) without the consent of the other person; or

(B) when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring;

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

is guilty of sexual assault and shall be punished as a court-martial may direct.

(c) **AGGRAVATED SEXUAL CONTACT.**—Any person subject to this chapter who commits or causes sexual contact upon 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.

(d) **ABUSIVE SEXUAL CONTACT.**—Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (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.

(e) **PROOF OF THREAT.**—In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) **DEFENSES.**—An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(g) **DEFINITIONS.**—In this section:

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

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or 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 touching, or causing another person to touch, either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.

(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.

(4) **FORCE.**—The term “force” means—

(A) the use of a weapon;
(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

(5) **UNLAWFUL FORCE.**—The term “unlawful force” means an act of force done without legal justification or excuse.

(6) **THREATENING OR PLACING THAT OTHER PERSON IN FEAR.**—The term “threatening or placing that other person in fear” 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 the wrongful action contemplated by the communication or action.

(7) **CONSENT.**—

(A) The term “consent” means a freely given agreement to the 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 does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.

(B) A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or in fear or under the circumstances described in subparagraph (B) or (C) of subsection (b)(1).

(C) All the surrounding circumstances are to be considered in determining whether a person gave consent.

(8) **INCAPABLE OF CONSENTING.**—The term “incapable of consenting” means the person is—

(A) incapable of appraising the nature of the conduct at issue; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act at issue.

b. *Elements.*

(1) *Rape.*

(a) *By unlawful force.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so with unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm.*

(i) That the accused committed a sexual act upon another person; and

(ii) That the accused did so by using force causing or likely to cause death or grievous bodily harm to any person.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.*

(i) That the accused committed a sexual act upon 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 death, grievous bodily harm, or kidnapping.

(d) *By first rendering that other person unconscious.*

(i) That the accused committed a sexual act upon another person; and

unconscious.

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

(e) *By administering a drug, intoxicant, or other similar substance.*

- (i) That the accused committed a sexual act upon another person; and
- (ii) That the accused did so by administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct.

(2) *Sexual assault.*

(a) *By threatening or placing that other person in fear.*

- (i) That the accused committed a sexual act upon another person; and
- (ii) That the accused did so by threatening or placing that other person in fear.

(b) *By fraudulent representation.*

- (i) That the accused committed a sexual act upon another person; and
- (ii) That the accused did so by making a fraudulent representation that the sexual act served a professional purpose.

(c) *By artifice, pretense, or concealment.*

- (i) That the accused committed a sexual act upon another person; and
- (ii) That the accused did so by inducing a belief by any artifice, pretense, or concealment that the accused was another person.

(d) *Without consent.*

- (i) That the accused committed a sexual act upon another person; and
- (ii) That the accused did so without the consent of the other person.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring.*

- (i) That the accused committed a sexual act upon another person;
- (ii) That the other person was (asleep) (unconscious) (otherwise unaware that the sexual act was occurring); and
- (iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual act was occurring.

(f) *When the other person is incapable of consenting.*

- (i) That the accused committed a sexual act upon another person; and
- (ii) That the other person was incapable of consenting to the sexual act due

to:

- (A) Impairment by any drug, intoxicant or other similar substance;

or

- (B) A mental disease or defect, or physical disability; and
- (iii) That the accused knew or reasonably should have known of that

condition.

(3) *Aggravated sexual contact.*

(a) *By force.*

- (i) That the accused committed sexual contact upon or by another person;
- (ii) That the accused did so with unlawful force.

and

(b) *By force causing or likely to cause death or grievous bodily harm.*

(i) That the accused committed sexual contact upon another person; and
(ii) That the accused did so by using force causing or likely to cause death or grievous bodily harm to any person.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.*

(i) That the accused committed sexual contact upon 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 death, grievous bodily harm, or kidnapping.

(d) *By first rendering that other person unconscious.*

(i) That the accused committed sexual contact upon another person; and
(ii) That the accused did so by first rendering that other person unconscious.

(e) *By administering a drug, intoxicant, or other similar substance.*

(i) That the accused committed sexual contact upon another person; and
(ii) That the accused did so by administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct.

(4) *Abusive sexual contact.*

(a) *By threatening or placing that other person in fear.*

(i) That the accused committed sexual contact upon or by another person;
and
(ii) That the accused did so by threatening or placing that other person in fear.

(b) *By fraudulent representation.*

(i) That the accused committed sexual contact upon another person; and
(ii) That the accused did so by making a fraudulent representation that the sexual act served a professional purpose.

(c) *By artifice, pretense, or concealment.*

(i) That the accused committed sexual contact upon another person; and
(ii) That the accused did so by inducing a belief by any artifice, pretense, or concealment that the accused was another person.

(d) *Without consent.*

(i) That the accused committed sexual contact upon another person; and
(ii) That the accused did so without the consent of the other person.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the contact is occurring.*

(i) That the accused committed sexual contact upon another person;
(ii) That the other person was asleep, unconscious, or otherwise unaware that the sexual contact was occurring; and
(iii) That the accused knew or reasonably should have known that the other person was asleep, unconscious, or otherwise unaware that the sexual contact was occurring.

(f) *When the other person is incapable of consenting.*

(i) That the accused committed sexual contact upon another person;

due to: (ii) That the other person was incapable of consenting to the sexual contact

(A) Impairment by any drug, intoxicant or other similar substance;
or

(B) A mental disease or defect, or physical disability; and
(iii) That the accused knew or reasonably should have known of that condition.

c. *Explanation.*

(1) *In general.* Sexual offenses have been separated into three statutes: offenses against adults (Art. 120), offenses against children (Art. 120b), and other offenses (Art. 120c).

(2) *Definitions.* The terms are defined in subparagraph 60.a.(g).

(3) *Victim sexual behavior or predisposition and privilege.* See Mil. R. Evid. 412 concerning rules of evidence relating to the sexual behavior or predisposition of the victim of an alleged sexual offense. See Mil. R. Evid. 514 concerning rules of evidence relating to privileged communications between the victim and victim advocate.

(4) *Scope of “threatening or placing that other person in fear.”* For purposes of this offense, the phrase wrongful action within the definition of Article 120(g)(6), threatening or placing that other person in fear includes an abuse of military rank, position, or authority in order to engage in a sexual act or sexual contact with a victim. This includes, but is not limited to, threats to initiate an adverse personnel action unless the victim submits to the accused’s requested sexual act or contact; and, threats to withhold a favorable personnel action unless the victim submits to the accused’s requested sexual act or sexual contact. Superiority in rank is a factor in, but not dispositive of, whether a reasonable person in the position of the victim would fear that his or her noncompliance with the accused’s desired sexual act or sexual contact would result in the threatened wrongful action contemplated by the communication or action.

d. *Maximum punishment.*

(1) *Rape.* Forfeiture of all pay and allowances and confinement for life without eligibility for parole. Mandatory minimum – Dismissal or dishonorable discharge.

(2) *Sexual assault.* Forfeiture of all pay and allowances, and confinement for 30 years. Mandatory minimum – Dismissal or dishonorable discharge.

(3) *Aggravated sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

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

e. *Sample specifications.*

(1) *Rape.*

(a) *By force.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, commit a sexual act upon _____ by [penetrating _____’s (vulva) (anus) (mouth) with _____’s penis] [causing contact between _____’s mouth and _____’s (penis) (vulva) (scrotum) (anus)] [penetrating _____’s (vulva) (penis) (anus) with (_____’s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by using unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, commit a sexual act upon _____ by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by using force likely to cause death or grievous bodily harm to _____, to wit: _____.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, commit a sexual act upon _____ by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by (threatening _____) (placing _____ in fear) that _____ would be subjected to (death) (grievous bodily harm) (kidnapping).

(d) *By first rendering that other person unconscious.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, commit a sexual act upon _____ by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by first rendering _____ unconscious by _____.

(e) *By administering a 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__, commit a sexual act upon _____ by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by administering to _____ (by force) (by threat of force) (without the knowledge or permission of _____) a (drug) (intoxicant) (list other similar substance), to wit: _____, thereby substantially impairing the ability of _____ to appraise or control (his) (her) conduct.

(2) *Sexual assault.*

(a) *By threatening or placing that other person in fear.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by (threatening _____) (placing _____ in fear).

(b) *By fraudulent representation.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by making a fraudulent representation that the sexual act served a professional purpose, to wit:_____.

(c) *By false pretense.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by inducing a belief by (artifice) (pretense) (concealment) that the said accused was another person.

(d) *Without consent.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus),] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], without the consent of _____.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], when (he) (she) knew or reasonably should have known that _____ was (asleep) (unconscious) (unaware the sexual act was occurring due to _____).

(f) *When the other person is incapable of consenting.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____20__, commit a sexual act upon _____, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], when _____was incapable of consenting to the sexual act because (he) (she) [was impaired by (a drug, to wit: _____) (an intoxicant, to wit:_____) (_____)] [had a (mental disease, to wit:_____)] (mental defect, to

wit: _____) (physical disability, to wit: _____)], and the accused (knew) (reasonably should have known) of that condition.

(3) *Aggravated sexual contact.*

(a) *By force.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____] by using unlawful force.

(b) *By force causing or likely to cause death or grievous bodily harm.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by using force likely to cause death or grievous bodily harm to _____, to wit: _____.

(c) *By threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by (threatening _____) (placing _____ in fear) that _____ would be subjected to (death) (grievous bodily harm) (kidnapping).

(d) *By first rendering that other person unconscious.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by rendering _____ unconscious by _____.

(e) *By administering a 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____, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit: _____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by administering to _____ (by force) (by threat of force) (without the knowledge or permission of _____) a (drug) (intoxicant) (_____) thereby substantially impairing the ability of _____ to appraise or control (his) (her) conduct.

(4) *Abusive sexual contact.*

(a) *By threatening or placing that other person in fear.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, (touch) (cause _____ to touch) the

(vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by (threatening _____) (placing _____ in fear).

(b) *By fraudulent representation.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by making a fraudulent representation that the sexual contact served a professional purpose, to wit:

_____.

(c) *By false pretense.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], by inducing a belief by (artifice) (pretense) (concealment) that the said accused was another person.

(d) *Without consent.*

In that _____ (person jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____] without the consent of _____.

(e) *Of a person who is asleep, unconscious, or otherwise unaware the act is occurring.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], when (he) (she) (knew) (reasonably should have known) that _____ was (asleep) (unconscious) (unaware the sexual contact was occurring due to _____).

(f) *When that person is incapable of consenting.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20__, (touch) (cause _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____'s body part) (an object) to wit:_____] with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____], when _____ was incapable of consenting to the sexual contact because (he) (she) [was impaired by (a drug, to wit:_____) (an intoxicant, to wit:_____) (_____)] [had a (mental disease, to wit:_____) (mental defect, to wit:_____) (physical disability, to wit:_____)] and the accused (knew) (reasonably should have known) of that condition.

Analysis

60. Article 120—Rape and sexual assault generally

This paragraph is taken from paragraph 45 (Article 120—Rape and sexual assault generally) of MCM (2016 edition) with the following amendments that implement Article 120, as amended by Section 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)—

2017 Amendment: a. Text of statute. The definition of sexual act is amended.

b. Elements. The elements are consolidated to eliminate redundancy in repeating the specific intent necessary to accomplish a sexual act and sexual contact because the definitions of sexual act and sexual contact already contain within them the mens rea element of specific intent.

c. Explanation. (4) Consent as an element was removed from the explanation. Section 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) amended Article 120 to include lack of consent as an element in Article 120(b)(2), Sexual Assault.

(5) Scope of threatening or placing that other person in fear emphasizes that threatening or placing that other person in fear explicitly includes, but is not limited to, abuse of military rank, position, or power, in order to engage in a sexual act or contact with a victim. *See United States v. Simpson*, 58 M.J. 368, 377 (C.A.A.F. 2003) (listing seven factors “demonstrating the relationship between the offenses at issue and Appellant’s superior rank and position” in a case involving “constructive force” under the pre-2007 version of Article 120).

e. Sample specifications. The sample specifications are consolidated to include the various acts constituting: (a) rape; (b) sexual assault; (c) aggravated sexual contact; and (d) abusive sexual contact, by consolidating the descriptions of a sexual act or sexual contact within each overarching specification.

61. Article 120a (10 U.S.C. 920a)—Mails: deposit of obscene matter

a. Text of statute.

Any person subject to this chapter who, wrongfully and knowingly, deposits obscene matter for mailing and delivery shall be punished as a court-martial may direct.

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; and

(3) That the matter was obscene.

c. Explanation. Whether something is obscene is a question of fact. Obscene is synonymous with indecent as the latter is defined in subparagraph 103.c. 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. Knowingly depositing obscene matter in the mails is wrongful if it is done without legal justification or authorization.

d. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. 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: _____.

Analysis

61. Article 120a—Mails: deposit of obscene matter

This paragraph is taken from paragraph 94 (Article 134—Mails: depositing or causing to be deposited obscene matters in) of MCM (2016 edition). The offense remains the same substantively, except proof of the Article 134 terminal element is no longer required. See *Miller v. United States*, 413 U.S. 15 (1973), for a discussion of the definition of obscenity.

62. Article 120b (10 U.S.C. 920b)—Rape and sexual assault of a child

[**Note: This statute applies to offenses committed on or after 1 January 2019. Previous versions of child sexual offenses are located as follows: for offenses committed on or before 30 September 2007, see Appendix 27; for offenses committed during the period 1 October 2007 through 27 June 2012, see Appendix 28; for offenses committed during the period 28 June 2012 through 31 December 2018, the previous version of Article 120b applies and is located at Appendix 29.**]

a. *Text of statute.*

(a) **RAPE OF A CHILD.**—Any person subject to this chapter who—

(1) commits a sexual act upon a child who has not attained the age of 12 years; or

(2) commits a sexual act upon a child who has attained the age of 12 years by—

(A) using force against any person;

(B) threatening or placing that child in fear;

(C) rendering that child unconscious; or

(D) administering to that child a drug, intoxicant, or other similar

substance;

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

(b) **SEXUAL ASSAULT OF A CHILD.**—Any person subject to this chapter who commits a sexual act upon a child who has attained the age of 12 years is guilty of sexual assault of a child and shall be punished as a court-martial may direct.

(c) **SEXUAL ABUSE OF A CHILD.**—Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.

(d) **AGE OF CHILD.**—

(1) **UNDER 12 YEARS.**—In a prosecution under this section, it need not be proven that the accused knew the age of the other person engaging in the sexual act or lewd act. It is not a defense that the accused reasonably believed that the child had attained the age of 12 years.

(2) **UNDER 16 YEARS.**—In a prosecution under this section, it need not be proven that the accused knew that the other person engaging in the sexual act or lewd act had not attained the age of 16 years, but it is a defense in a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that

the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.

(e) **PROOF OF THREAT.**—In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) **MARRIAGE.**—In a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), it is a defense, which the accused must prove by a preponderance of the evidence, that the persons engaging in the sexual act or lewd act were at that time married to each other, except where the accused commits a sexual act upon the person when the accused knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring or when the other person is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.

(g) **CONSENT.**—Lack of consent is not an element and need not be proven in any prosecution under this section. A child not legally married to the person committing the sexual act, lewd act, or use of force cannot consent to any sexual act, lewd act, or use of force.

(h) **DEFINITIONS.**—In this section:

(1) **SEXUAL ACT AND SEXUAL CONTACT.**—The terms “sexual act” and “sexual contact” have the meanings given those terms in section 920(g) of this title (article 120(g)), except that the term “sexual act” also includes 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.

(2) **FORCE.**—The term “force” means—

(A) the use of a weapon;

(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a child; or

(C) inflicting physical harm.

In the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force.

(3) **THREATENING OR PLACING THAT CHILD IN FEAR.**—The term “threatening or placing that child in fear” means a communication or action that is of sufficient consequence to cause the child to fear that non-compliance will result in the child or another person being subjected to the action contemplated by the communication or action.

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

(5) **LEWD ACT.**—The term “lewd act” means—

(A) any sexual contact with a child;

(B) intentionally exposing one’s genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person;

(C) intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or

(D) any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

b. Elements

(1) *Rape of a child.*

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

(i) That the accused committed a sexual act upon a child; and

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

(b) *Rape by force of a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon 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 or any other person.

(c) *Rape by threatening or placing in fear a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon 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 the child or another person or placing that child in fear.

(d) *Rape by rendering unconscious a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon 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.

(e) *Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon 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 administering to that child a drug, intoxicant, or other similar substance.

(2) *Sexual assault of a child.*

(a) *Sexual assault of a child who has attained the age of 12.*

(i) That the accused committed a sexual act upon a child; and

(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.

(3) *Sexual abuse of a child.* That the accused committed a lewd act upon a child.

c. Explanation.

(1) *In general.* Sexual offenses have been separated into three statutes: offenses against

adults (120), offenses against children (120b), and other offenses (120c).

(2) *Definitions.* Terms not defined in this paragraph are defined in subparagraph 60.a.(g), *supra*, except that the term “sexual act” also includes 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.

d. *Maximum punishment.*

(1) *Rape of a child.* Forfeiture of all pay and allowances, and confinement for life without eligibility for parole. Mandatory minimum—Dismissal or dishonorable discharge.

(2) *Sexual assault of a child.* Forfeiture of all pay and allowances, and confinement for 30 years. Mandatory minimum—Dismissal or dishonorable discharge.

(3) *Sexual abuse of a child.*

(a) *Cases involving sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(b) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

e. *Sample specifications.*

(1) *Rape of a child.*

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

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had not attained the age of 12 years, by [penetrating _____’s (vulva) (anus) (mouth) with _____’s penis] [causing contact between _____’s mouth and _____’s (penis) (vulva) (scrotum) (anus)] [penetrating _____’s (vulva) (penis) (anus) with (_____’s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]].

(b) *Rape by force of a child who has attained the age of 12 years.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____’s (vulva) (anus) (mouth) with _____’s penis] [causing contact between _____’s mouth and _____’s (penis) (vulva) (scrotum) (anus)] [penetrating _____’s (vulva) (penis) (anus) with (_____’s body part) (an object) to wit: _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by using force against _____, to wit: _____.

(c) *Rape by threatening or placing in fear a child who has attained the age of 12 years.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by

[penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by (threatening _____) (placing _____ in fear).

(d) *Rape by rendering unconscious of a child who has attained the age of 12 years.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by rendering _____ unconscious by _____.

(e) *Rape by administering a drug, intoxicant, or other similar substance to a child who has attained the age of 12 years.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]], by administering to _____ a (drug) (intoxicant) (_____), to wit: _____.

(2) *Sexual assault of a child.*

(a) *Sexual assault of a child who has attained the age of 12 years.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a sexual act upon _____, a child who had attained the age of 12 years but had not attained the age of 16 years, by [penetrating _____'s (vulva) (anus) (mouth) with _____'s penis] [causing contact between _____'s mouth and _____'s (penis) (vulva) (scrotum) (anus)] [penetrating _____'s (vulva) (penis) (anus) with (_____'s body part) (an object) to wit:_____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]] [intentionally touching, not through the clothing, the genitalia of _____, with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____]].

(3) *Sexual abuse of a child.*

(a) *Sexual abuse of a child involving sexual contact.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by (touching) (causing _____ to touch) the (vulva) (penis) (scrotum) (anus) (groin) (breast) (inner thigh) (buttocks) of _____, with [(_____’s body part) (an object) to wit: _____], with an intent to [(abuse) (humiliate) (harass) (degrade) _____] [(arouse) (gratify) the sexual desire of _____].

(b) *Sexual abuse of a child involving indecent exposure.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by intentionally exposing [his (genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)] to _____, with an intent to [(abuse) (humiliate) (degrade) _____] [(arouse) (gratify) the sexual desire of _____].

(c) *Sexual abuse of a child involving indecent communication.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by intentionally communicating to _____ indecent language to wit: _____, with an intent to [(abuse) (humiliate) (degrade) _____] [(arouse) (gratify) the sexual desire of _____].

(d) *Sexual abuse of a child involving indecent conduct.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, commit a lewd act upon _____, a child who had not attained the age of 16 years, by engaging in indecent conduct, to wit: _____, intentionally done (with) (in the presence of) _____, which conduct amounted to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

Analysis

62. Article 120b—Rape and sexual assault of a child

This paragraph is taken from paragraph 47 (Article 120b—Rape and sexual assault of a child) of MCM (2016 edition).

2017 Amendment: a. Text of statute. The definition of sexual act conforms to Article 120(g) as amended by Section 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Consistent with federal civilian law, sexual acts with children under Article 120b include the intentional touching of the genitalia of a child under the age of 16 (committed by a person over the age of 16), when accomplished with either the intent to abuse, humiliate, harass, or degrade the victim, or to arouse or gratify the sexual desire of any person.

b. Elements. The elements are consolidated and eliminate redundancy in repeating the specific intent necessary to accomplish a sexual act and sexual contact. The definitions of sexual act and sexual contact already contain the mens rea element of specific intent.

e. Sample specifications. The sample specifications are consolidated and include the various acts constituting rape of a child and sexual assault of a child, by consolidating the descriptions of a sexual act or sexual contact within each overarching specification.

63. Article 120c (10 U.S.C. 920c)—Other sexual misconduct

[Previous versions of offenses included in Article 120c are located as follows: for the offense of indecent exposure committed on or before 30 September 2007, a previous version of Article 134, Indecent exposure, applies and is located at Appendix 27; for the offense of forcible pandering committed on or before 30 September 2007, a previous version of Article 134, Pandering and prostitution, applies and is located at Appendix 27; for Article 120c offenses committed during the period 1 October 2007 through 27 June 2012, *see* Appendix 28; for Article 120c offenses committed during the period 28 June 2012 through 31 December 2018, the previous version of Article 120c applies and is located at Appendix 29.]

a. Text of Statute

(a) INDECENT VIEWING, VISUAL RECORDING, OR BROADCASTING.—Any person subject to this chapter who, without legal justification or lawful authorization—

(1) knowingly and wrongfully views the private area of another person, without that other person’s consent and under circumstances in which that other person has a reasonable expectation of privacy;

(2) knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person’s consent and under circumstances in which that other person has a reasonable expectation of privacy;
or

(3) knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2);

is guilty of an offense under this section and shall be punished as a court-martial may direct.

(b) FORCIBLE PANDERING.—Any person subject to this chapter who compels another person to engage in an act of prostitution with any person is guilty of forcible pandering and shall be punished as a court-martial may direct.

(c) INDECENT EXPOSURE.—Any person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-martial may direct.

(c) DEFINITIONS.—In this section:

(1) ACT OF PROSTITUTION.—The term “act of prostitution” means a sexual act or sexual contact (as defined in section 920(g) of this title (article 120(g))) on account of which anything of value is given to, or received by, any person.

(2) PRIVATE AREA.—The term “private area” means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.

(3) REASONABLE EXPECTATION OF PRIVACY.—The term “under circumstances in which that other person has a reasonable expectation of privacy” means—

(A) circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured; or

(B) circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.

(4) BROADCAST.—The term “broadcast” means to electronically transmit a visual image with the intent that it be viewed by a person or persons.

(5) DISTRIBUTE.—The term “distribute” means delivering to the actual or constructive possession of another, including transmission by electronic means.

(6) INDECENT MANNER.—The term “indecent manner” means conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

b. *Elements.*

(1) *Indecent viewing.*

(a) That the accused knowingly and wrongfully viewed the private area of another person;

(b) That said viewing was without the other person’s consent; and

(c) That said viewing took place under circumstances in which the other person had a reasonable expectation of privacy.

(2) *Indecent recording.*

(a) That the accused knowingly recorded (photographed, videotaped, filmed, or recorded by any means) the private area of another person;

(b) That said recording was without the other person’s consent; and

(c) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(3) *Broadcasting of an indecent recording.*

(a) That the accused knowingly broadcast a certain recording of another person’s private area;

(b) That said recording was made without the other person’s consent;

(c) That the accused knew or reasonably should have known that the recording was made without the other person’s consent;

(d) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(4) *Distribution of an indecent recording.*

(a) That the accused knowingly distributed a certain recording of another person’s private area;

(b) That said recording was made without the other person’s consent;

(c) That the accused knew or reasonably should have known that said recording was made without the other person’s consent;

(d) That said recording was made under circumstances in which the other person had a reasonable expectation of privacy; and

(e) That the accused knew or reasonably should have known that said recording was made under circumstances in which the other person had a reasonable expectation of privacy.

(5) *Forcible pandering.*

That the accused compelled another person to engage in an act of prostitution with any person.

(6) *Indecent exposure.*

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

(b) That the exposure was in an indecent manner; and

(c) That the exposure was intentional.

c. *Explanation.*

(1) *In general.* Sexual offenses have been separated into three statutes: offenses against adults (120), offenses against children (120b), and other offenses (120c).

(2) *Definitions.*

(a) *Recording.* A recording is a still or moving visual image captured or recorded by any means.

(b) Other terms are defined in subparagraph 60.a.(g), *supra*.

d. *Maximum punishment.*

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

(2) *Indecent recording.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Broadcasting or distribution of an indecent recording.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(4) *Forcible pandering.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(5) *Indecent exposure.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

e. *Sample specifications.*

(1) *Indecent viewing, recording, or broadcasting.*

(a) *Indecent viewing.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, knowingly and wrongfully view the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(b) *Indecent recording.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, knowingly (photograph) (videotape) (film) (make a recording of) the private area of _____, without (his) (her) consent and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(c) *Broadcasting or distributing an indecent recording.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, knowingly (broadcast) (distribute) a recording of the private area of _____, when the said accused knew or reasonably should have known that the said recording was made without the consent of _____ and under circumstances in which (he) (she) had a reasonable expectation of privacy.

(2) *Forcible pandering.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, wrongfully compel

_____ to engage in (a sexual act) (sexual contact) with _____, to wit:
_____, for the purpose of receiving (money) (other compensation) (_____).

(3) *Indecent exposure.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20__, intentionally expose [his (genitalia) (anus) (buttocks)] [her (genitalia) (anus) (buttocks) (areola) (nipple)] in an indecent manner, to wit: _____.

Analysis

63. Article 120c—Other sexual misconduct

This paragraph is taken from paragraph 45c (Article 120c—Other sexual misconduct) of MCM (2016 edition).

2017 Amendment: d. *Maximum punishment.* The maximum punishment for forcible pandering is increased and aligns with federal civilian law. *See* 18 U.S.C. § 2422.

64. Article 121 (10 U.S.C. 921)—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 subparagraph 64.c.(1)(h), 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) of this paragraph. However, acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property or of being an accessory after the fact are not included within the meaning of withholds. Therefore, neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on that basis alone. The taking, obtaining, or withholding must be of specific property. A debtor does not withhold specific property from the possession of a creditor by failing or refusing to pay a debt, for the relationship of debtor and creditor does not give the creditor a possessory right in any specific money or other property of the debtor.

(c) *Ownership of the property.*

(i) *In general.* Article 121 requires that the taking, obtaining, or withholding be from the possession of the owner or of any other person. Care, custody, management, and control are among the definitions of possession.

(ii) *Owner.* Owner refers to the person who, at the time of the taking, obtaining, or withholding, had the superior right to possession of the property in the light of all conflicting interests therein which may be involved in the particular case. For instance, an organization is the true owner of its funds as against the custodian of the funds charged with the larceny thereof.

(iii) *Any other person.* Any other person means any person—even a person who has stolen the property—who has possession or a greater right to possession than the accused. In

pleading a violation of this article, the ownership of the property may be alleged to have been in any person, other than the accused, who at the time of the theft was a general owner or a special owner thereof. A general owner of property is a person who has title to it, whether or not that person has possession of it; a special owner, such as a borrower or hirer, is one who does not have title but who does have possession, or the right of possession, of the property.

(iv) *Person*. Person, as used in referring to one from whose possession property has been taken, obtained, or withheld, and to any owner of property, includes (in addition to a natural person) a government, a corporation, an association, an organization, and an estate. Such a person need not be a legal entity.

(d) *Wrongfulness of the taking, obtaining, or withholding*. The taking, obtaining, or withholding of the property must be wrongful. As a general rule, a taking or withholding of property from the possession of another is wrongful if done without the consent of the other, and an obtaining of property from the possession of another is wrongful if the obtaining is by false pretense. However, such an act is not wrongful if it is authorized by law or apparently lawful superior orders, or, generally, if done by a person who has a right to the possession of the property either equal to or greater than the right of one from whose possession the property is taken, obtained, or withheld. An owner of property who takes or withholds it from the possession of another, without the consent of the other, or who obtains it therefrom by false pretense, does so wrongfully if the other has a superior right—such as a lien—to 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 the 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) of this paragraph. 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) of this paragraph when the taking, obtaining, or withholding is with the intent to return.

(g) *Value.*

(i) *In general.* Value is a question of fact to be determined on the basis of all of the evidence admitted.

(ii) *Government property.* When the stolen property is an item issued or procured from Government sources, the price listed in an official publication for that property at the time of the theft is admissible as evidence of its value. *See* Mil. R. Evid. 803(17). However, the stolen item must be shown to have been, at the time of the theft, in the condition upon which the value indicated in the official price list is based. The price listed in the official publication is not conclusive as to the value of the item, and other evidence may be admitted on the question of its condition and value.

(iii) *Other property.* As a general rule, the value of other stolen property is its legitimate market value at the time and place of the theft. If this property, because of its character or the place where it was stolen, had no legitimate market value at the time and place of the theft or if that value cannot readily be ascertained, its value may be determined by its legitimate market value in the United States at the time of the theft, or by its replacement cost at that time, whichever is less. Market value may be established by proof of the recent purchase price paid for the article in the legitimate market involved or by testimony or other admissible evidence from any person who is familiar through training or experience with the market value in question. The owner of the property may testify as to its market value if familiar with its quality and condition.

The fact that the owner is not an expert of the market value of the property goes only to the weight to be given that testimony, and not to its admissibility. *See* Mil. R. Evid. 701. When the character of the property clearly appears in evidence—for instance, when it is exhibited to the court-martial—the court-martial, from its own experience, may infer that it has some value. If as a matter of common knowledge the property is obviously of a value substantially in excess of \$1,000.00, the court-martial may find a value of more than \$1,000.00. 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) *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 in this paragraph. Retail merchandise of Service exchange stores is not military property under this article.

(i) *Miscellaneous considerations.*

(i) *Lost property.* A taking or withholding of lost property by the finder is larceny if accompanied by an intent to steal and if a clue to the identity of the general or special owner, or through which such identity may be traced, is furnished by the character, location, or marketing of the property, or by other circumstances.

(ii) *Multiple article larceny.* When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several persons or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.

(iii) *Special kinds of property which may also be the subject of larceny.* Included in property which may be the subject of larceny is property which is taken, obtained, or withheld by severing it from real estate and writings which represent value such as commercial paper.

(iv) *Services.* Theft of services may not be charged under this paragraph. *But see* paragraph 66.

(v) *Credit, debit, and electronic transactions.* Wrongfully engaging in a credit, debit, or electronic transaction to obtain goods or money ordinarily should be charged under paragraph 65.

(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. *Maximum punishment.*

(1) *Larceny.*

(a) *Property of a value of \$1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) *Military property of a value of more than \$1,000 or of any military motor vehicle, aircraft, vessel, firearm, or explosive.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(c) *Property other than military property of a value of more than \$1,000 or any motor vehicle, aircraft, vessel, firearm, or explosive not included in subparagraph e.(1)(b).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Wrongful appropriation.*

(a) *Of a value of \$1,000 or less.* Confinement for 3 months, and forfeiture of two-thirds pay per month for 3 months.

(b) *Of a value of more than \$1,000.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(c) *Of any motor vehicle, aircraft, vessel, firearm, explosive, or military property of a value of more than \$1,000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

e. *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 _____.

Analysis

64. Article 121—Larceny and wrongful appropriation

This paragraph is amended and reflects the addition of Article 121a to the UCMJ by Section 5432 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Other than the deletion of portions of the explanation dealing with matters now covered by Article 121a, this section is taken from paragraph 46 of MCM (2016 edition).

2017 Amendment: d. *Maximum punishment.* The maximum punishments for Wrongful appropriation of property of a value more than \$1000 is increased and aligns with corresponding federal civilian practice under 18 U.S.C. § 661 (Theft within special maritime and territorial jurisdiction) and § 641 (Theft of public money, property, or records). The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor

penalties for property offenses in federal civilian law. The difference in the maximum authorized confinement for larceny of military versus non-military property in the lower-value category is eliminated.

65. Article 121a (10 U.S.C. 921a)—Fraudulent use of credit cards, debit cards, and other access devices

a. *Text of statute.*

(a) **IN GENERAL.**—Any person subject to this chapter who, knowingly and with intent to defraud, uses—

(1) a stolen credit card, debit card, or other access device;

(2) a revoked, cancelled, or otherwise invalid credit card, debit card, or other access device; or

(3) a credit card, debit card, or other access device without the authorization of a person whose authorization is required for such use; to obtain money, property, services, or anything else of value shall be punished as a court-martial may direct.

(b) **ACCESS DEVICE DEFINED.**—In this section (article), the term “access device” has the meaning given that term in section 1029 of title 18.

b. *Elements.*

(1) That the accused knowingly used a stolen credit card, debit card, or other access device; or

(2) That the accused knowingly used a revoked, cancelled, or otherwise invalid credit card, debit card; or

(3) That the accused knowingly used a credit card, debit card, or other access device without the authorization of a person whose authorization was required for such use; and

(4) The use by the accused was with the intent to defraud.

c. *Explanation.*

(1) *In general.* This offense focuses on the intent of the accused and the technology used by the accused.

(2) *Intent to defraud.* See subparagraph 70.c.(14).

(3) *Inference of intent.* An intent to defraud may be proved by circumstantial evidence.

(4) *Use of a credit card, debit card, or other access device without the authorization of a person whose authorization was required for such use.* This provision applies to situations where an accused has no authorization to use the access device from a person whose authorization is required for such use, as well as situations where an accused exceeds the authorization of a person whose authorization is required for such use.

d. *Maximum punishment.*

(1) *Fraudulent use of a credit card, debit card, or other access device to obtain property of a value of \$1,000 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Fraudulent use of a credit card, debit card, or other access device to obtain property during any 1 year period the aggregate value of which is more than \$1000.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

e. *Sample specification.*

Fraudulent use of credit card, debit card, or other access device.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about ____ 20 __, knowingly and with the intent to

defraud, use a (debit card) (credit card) (access device, to wit: _____) (that was stolen) (that was revoked, cancelled, or otherwise invalid) (without the authorization of _____, a person whose authorization was required for such use), to obtain (money) (property) (services) (_____) (of a value of about \$ _____).

Analysis

65. Article 121a—Fraudulent use of credit cards, debit cards, and other access devices

This offense addresses misconduct previously charged as an obtaining-type larceny offense under paragraph 46 (Article 121—Larceny) MCM (2016 edition), and is similar to 18 U.S.C. § 1029. This offense focuses on the intent of the accused and technology used. This punitive article applies to situations where an accused has no authorization to use the access device from a person whose authorization is required, as well as situations where an accused exceeds the authorization of a person whose authorization is required for such use. *See United States v. Lubasky*, 68 M.J. 260 (C.A.A.F. 2010).

66. Article 121b (10 U.S.C. 921b)—False pretenses to obtain services

a. *Text of statute.*

Any person subject to this chapter who, with intent to defraud, knowingly uses false pretenses to obtain services shall be punished as a court-martial may direct.

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; and
- (5) That the services were of a certain value, or of some value.

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 64.c. *See* paragraph 70.c.(14) for a definition of intent to defraud.

d. *Maximum punishment.* Obtaining services under false pretenses.

(1) *Of a value of \$1,000.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Of a value of more than \$1,000.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, with intent to defraud, falsely pretend to _____ that _____, then knowing that the pretenses were false, and by means thereof did wrongfully obtain from _____ services, of a value of (about) \$ _____, to wit: _____.

Analysis

66. Article 121b—False pretenses to obtain services

This paragraph is taken from paragraph 78 (Article 134—False pretenses: obtaining services under) of the MCM (2016 edition). The offense remains substantively the same with the exception that proof of the Article 134 terminal element is no longer required.

2017 Amendment: d. Maximum punishment. The maximum punishment for the lower-value category is increased, and aligns with federal civilian practice under 18 U.S.C. § 661 (Theft within special maritime and territorial jurisdiction). The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in federal civilian law.

67. Article 122 (10 U.S.C. 922)—Robbery

a. Text of statute.

Any person subject to this chapter who 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; and

(5) That the property was of a certain or of some value.

[Note: If the robbery was committed with a dangerous weapon, add the following element]

(6) That the means of force or violence or of putting the person in fear was a dangerous weapon.

c. Explanation.

(1) *Taking in the presence of the victim.* It is not necessary that the property taken be located within any certain distance of the victim. If persons enter a house and force the owner by threats to disclose the hiding place of valuables in an adjoining room, and, leaving the owner tied, go into that room and steal the valuables, they have committed robbery.

(2) *Force or violence.* For a robbery to be committed by force or violence, there must be actual force or violence to the person, preceding or accompanying the taking against the person's will, and it is immaterial that there is no fear engendered in the victim. Any amount of force is enough to constitute robbery if the force overcomes the actual resistance of the person robbed, puts the person in such a position that no resistance is made, or suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. The offense is not robbery if an article is merely snatched from the hand of another or a pocket is picked by stealth, no other force is used, and the owner is not put in fear. But if resistance is overcome in snatching the article, there is sufficient violence, as when an earring is torn from a person's ear. There is sufficient violence when a person's attention is diverted by being jostled by a confederate of a pickpocket, who is thus enabled to steal the person's watch, even though the person had no knowledge of the act; or when a person is knocked insensible and that person's

pockets rifled; or when a guard steals property from the person of a prisoner in the guard's charge after handcuffing the prisoner on the pretext of preventing escape.

(3) *Fear*. For a robbery to be committed by putting the victim in fear, there need be no actual force or violence, but there must be a demonstration of force or menace by which the victim is placed in such fear that the victim is warranted in making no resistance. The fear must be a reasonable apprehension of present or future injury, and the taking must occur while the apprehension exists. The injury apprehended may be death or bodily injury to the person or to a relative or family member, or to anyone in the person's company at the time, or it may be the destruction of the person's habitation or other property or that of a relative or family member or anyone in the person's company at the time of sufficient gravity to warrant giving up the property demanded by the assailant.

(4) *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.

(5) *"Dangerous weapon."* For purposes of qualifying for the maximum punishment for this offense as specified in subparagraph e.(1), the term "dangerous weapon" has the same meaning as that ascribed to the term in subparagraph 77.c.(5)(a)(iii).

d. *Maximum punishment*.

(1) *When committed with a dangerous weapon*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) *All other cases*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *Sample specification*.

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 dangerous weapon, to wit: _____] seize from the (person) (presence) of _____, against (his) (her) will, (a watch) (_____) of value of (about) \$_____, the property of _____.

Analysis

67. Article 122—Robbery

This paragraph is taken from paragraph 47 (Article 122—Robbery) of the MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

2017 Amendment: a. Statutory Text. Consistent with equivalent misconduct under federal civilian law (see 18 U.S.C. § 2111), the element of "with the intent to deprive permanently" is removed from the offense of Article 122—Robbery. The gravamen of the offense is the forcible taking of a victim's property in the presence of a victim.

d. *Maximum Punishment*. The maximum punishment categories of robbery are aligned with federal civilian law to authorize a maximum punishment of 15 years confinement for any robbery committed with a "dangerous weapon," not limited to firearms.

68. Article 122a (10 U.S.C. 922a)—Receiving stolen property

a. *Text of statute*.

Any person subject to this chapter who wrongfully receives, buys, or conceals stolen property, knowing the property to be stolen property, shall be punished as a court-martial may direct.

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; and
- (4) That the accused knew that the property had been stolen.

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. *Maximum punishment.*

(1) *Receiving, buying, or concealing stolen property of a value of \$1000.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Receiving, buying, or concealing stolen property of a value of more than \$1000.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *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.

Analysis

68. Article 122a—Receiving stolen property

This paragraph is taken from paragraph 106 (Article 134—Stolen property: knowingly receiving, buying, or concealing) of the MCM (2016 edition). This offense is relocated from Article 134 to its current location in the enumerated punitive articles in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles. The offense remains substantively the same, with the exception that proof of the Article 134 terminal element is no longer required.

2017 Amendment: d. *Maximum punishment.* The maximum punishments are increased, and align with corresponding federal civilian practice under 18 U.S.C. § 662 (Receiving stolen property within special maritime and territorial jurisdiction). The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in federal civilian law.

69. Article 123 (10 U.S.C. 923)—Offenses concerning Government computers

a. Text of statute.

(a) IN GENERAL.—Any person subject to this chapter who—

(1) knowingly accesses a Government computer, with an unauthorized purpose, and by doing so obtains classified information, with reason to believe such information could be used to the injury of the United States, or to the advantage of any foreign nation, and intentionally communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted such information to any person not entitled to receive it;

(2) intentionally accesses a Government computer, with an unauthorized purpose, and thereby obtains classified or other protected information from any such Government computer; or

(3) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a Government computer;

shall be punished as a court-martial may direct.

(b) DEFINITIONS.—In this section:

(1) The term “computer” has the meaning given that term in section 1030 of title 18.

(2) The term “Government computer” means a computer owned or operated by or on behalf of the United States Government.

(3) The term “damage” has the meaning given that term in section 1030 of title 18.

b. Elements.

(1) Unauthorized distribution of classified information obtained from a Government computer.

(a) That the accused knowingly accessed a Government computer with an unauthorized purpose;

(b) That the accused obtained classified information;

(c) That the accused had reason to believe the information could be used to injure the United States or benefit a foreign nation; and

(d) That the accused intentionally communicated, delivered, transmitted, or caused to be communicated, delivered, or transmitted, such information to any person not entitled to receive it.

(2) Unauthorized access of a Government computer and obtaining classified or other protected information.

(a) That the accused intentionally accessed a Government computer with an unauthorized purpose; and

(b) That the accused thereby obtained classified or other protected information from any such Government computer.

(3) Causing damage to a Government computer.

(a) That the accused knowingly caused the transmission of a program, information, code, or command; and

(b) That the accused, as a result, intentionally and without authorization caused damage to a Government computer.

c. Explanation.

(1) *Access.* Access means to gain entry to, instruct, cause input to, cause output from, cause data processing with, or communicate with, the logical, arithmetical, or memory function resources of a computer.

(2) *With an unauthorized purpose.* The term “with an unauthorized purpose” may refer to more than one unauthorized purpose, or an unauthorized purpose in conjunction with an authorized purpose. The term covers persons accessing Government computers without any authorization, i.e. “outsiders,” as well as persons with authorization who access Government computers for an improper purpose or who exceed their authorization, i.e. “insiders.” The key criterion to determine criminality is whether the person intentionally used the computer for a purpose that was clearly contrary to the interests or intent of the authorizing party.

(3) *Classified Information.* See 10 U.S.C. § 801(15).

(4) *Protected Information.* Non-classified protected information includes Personally Identifiable Information (PII), as well as information designated as Controlled Unclassified Information (CUI) by the Secretary of Defense, and information designated as For Official Use Only (FOUO), Law Enforcement Sensitive (LES), Unclassified Nuclear Information (UCNI), and Limited Distribution.

(5) *Damage.* The definition of damage is taken from 18 U.S.C. §1030 and means any impairment to the integrity or availability of data, a program, a system, or information.

(6) *Computer.* The definition of computer is taken from 18 U.S.C. §1030 and means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device. A portable computer, to include a smartphone, is a computer.

d. *Maximum punishment*

(1) *Unauthorized distribution of classified information obtained from a Government computer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Unauthorized access of a Government computer and obtaining classified or other protected information.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Causing damage to a Government computer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *Sample specification*

(1) *Unauthorized distribution of classified information obtained from a Government computer.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), (on or about ____ 20 __) (from about _____ to about ____ 20 __), knowingly access a government computer with an unauthorized purpose and obtained classified information, to wit:_____, with reason to believe the information could be used to injure the United States or benefit a foreign nation, and intentionally (communicated) (delivered) (transmitted) (caused to be communicated/delivered/transmitted) such information to _____, a person not entitled to receive it.

(2) *Accessing a computer and obtaining information.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), (on or about ____ 20 __) (from about _____ to about ____ 20 __), intentionally access a government computer with an unauthorized purpose and thereby knowingly obtained (classified) (protected) information, to wit:_____ from such government computer.

(3) *Causing damage by computer contaminant.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), (on or about _____ 20 __) (from about _____ to about _____ 20 __), knowingly cause the transmission of a program, information, code, or command, and as a result, intentionally and without authorization caused damage to a government computer.

Analysis

69. Article 123—Offenses concerning Government computers

This offense is similar to 18 U.S.C. § 1030, but does not supersede or preempt the assimilation of 18 U.S.C. § 1030 or other Title 18 offenses under Article 134, clause 3. Also, this offense does not supersede or preempt Department of Defense and Service regulations applicable to offenses concerning Government computers, applied via Article 92. This offense is directed at certain types of criminal conduct concerning Government computers. For other types of criminal conduct concerning computers, including private computers, persons subject to this chapter may also be subject to 18 U.S.C. § 1030, and other criminal statutes, via clause 3 of Article 134, as well as orders and regulations via Article 92. *See* Report of the Military Justice Review Group Part I: UCMJ Recommendations (December 22, 2015). For explanation of Controlled Unclassified Information, see DoDM 5200.01-V4 (February 24, 2012).

70. Article 123a (10 U.S.C. 923a)—Making, drawing, or uttering check, draft, or order without sufficient funds

a. Text of statute.

Any person subject to this chapter who—

(1) for the procurement of any article or thing of value, with intent to defraud; or

(2) for the payment of any past due obligation, or for any other purpose, with intent to deceive;

makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. The making, drawing, uttering, or delivering by a maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment. In this section, the word "credit" means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order.

b. Elements.

(1) For the procurement of any article or thing of value, with intent to defraud.

(a) That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;

(b) That the accused did so for the purpose of procuring an article or thing of value;

(c) That the act was committed with intent to defraud; and

(d) That at the time of making, drawing, uttering, or delivery of the instrument the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

(2) *For the payment of any past due obligation, or for any other purpose, with intent to deceive.*

(a) That the accused made, drew, uttered, or delivered a check, draft, or order for the payment of money payable to a named person or organization;

(b) That the accused did so for the purpose or purported purpose of effecting the payment of a past due obligation or for some other purpose;

(c) That the act was committed with intent to deceive; and

(d) That at the time of making, drawing, uttering, or delivering of the instrument, the accused knew that the accused or the maker or drawer had not or would not have sufficient funds in, or credit with, the bank or other depository for the payment thereof upon presentment.

c. *Explanation.*

(1) *Written instruments.* The written instruments covered by this article include any check, draft (including share drafts), or order for the payment of money drawn upon any bank or other depository, whether or not the drawer bank or depository is actually in existence. It may be inferred that every check, draft, or order carries with it a representation that the instrument will be paid in full by the bank or other depository upon presentment by a holder when due.

(2) *Bank or other depository.* Bank or other depository includes any business regularly but not necessarily exclusively engaged in public banking activities.

(3) *Making or drawing.* Making and drawing are synonymous and refer to the act of writing and signing the instrument.

(4) *Uttering or delivering.* Uttering and delivering have similar meanings. Both mean transferring the instrument to another, but uttering has the additional meaning of offering to transfer. A person need not personally be the maker or drawer of an instrument in order to violate this article if that person utters or delivers it. For example, if a person holds a check which that person knows is worthless, and utters or delivers the check to another, that person may be guilty of an offense under this article despite the fact that the person did not personally draw the check.

(5) *For the procurement.* For the procurement means for the purpose of obtaining any article or thing of value. It is not necessary that an article or thing of value actually be obtained, and the purpose of the obtaining may be for the accused's own use or benefit or for the use or benefit of another.

(6) *For the payment.* For the payment means for the purpose or purported purpose of satisfying in whole or in part any past due obligation. Payment need not be legally effected.

(7) *For any other purpose.* For any other purpose includes all purposes other than the payment of a past due obligation or the procurement of any article or thing of value. For example, it includes paying or purporting to pay an obligation which is not yet past due. The check, draft, or order, whether made or negotiated for the procurement of an article or thing of value or for the payment of a past due obligation or for some other purpose, need not be intended or represented as payable immediately. For example, the making of a postdated check, delivered at the time of entering into an installment purchase contract and intended as payment for a future installment, would, if made with the requisite intent and knowledge, be a violation of this article.

(8) *Article or thing of value.* Article or thing of value extends to every kind of right or interest in property, or derived from contract, including interests and rights which are intangible or contingent or which mature in the future.

(9) *Past due obligation.* A past due obligation is an obligation to pay money, which obligation has legally matured before making, drawing, uttering, or delivering the instrument.

(10) *Knowledge.* The accused must have knowledge, at the time the accused makes, draws, utters, or delivers the instrument, that the maker or drawer, whether the accused or another, has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of the instrument in full upon its presentment. Such knowledge may be proved by circumstantial evidence.

(11) *Sufficient funds.* Sufficient funds refers to a condition in which the account balance of the maker or drawer in the bank or other depository at the time of the presentment of the instrument for payment is not less than the face amount of the instrument and has not been rendered unavailable for payment by garnishment, attachment, or other legal procedures.

(12) *Credit.* Credit means an arrangement or understanding, express or implied, with the bank or other depository for the payment of the check, draft, or order. An absence of credit includes those situations in which an accused writes a check on a nonexistent 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. *Maximum punishment.*

(1) *For the procurement of any article or thing of value, with intent to defraud, in the face amount of:*

(a) *\$1000.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *More than \$1000.00.* 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.

e. *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.

Analysis

70. Article 123a—Making, drawing, or uttering check, draft, or order without sufficient funds

This paragraph is taken, without substantive change, from paragraph 49 (Article 123a—Making, drawing, or uttering check, draft, or order without sufficient funds) of the MCM (2016 edition). The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in federal civilian law.

71. Article 124 (10 U.S.C. 924)—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 approval, allowance, or payment of any claim against the United States or any officer thereof—**
 - (A) makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;**
 - (B) makes any oath to any fact or to any writing or other paper knowing the oath to be false; or**
 - (C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited;**
 - (3) who, having charge, possession, custody or control of any money, or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive it, any amount thereof less than that for which he receives a certificate or receipt; or**
 - (4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States;**
- shall, upon conviction, be punished as a court-martial may direct.**

b. *Elements.*

- (1) Making a false or fraudulent claim.*
 - (a) That the accused made a certain claim against the United States or an officer thereof;
 - (b) That the claim was false or fraudulent in certain particulars; and
 - (c) That the accused then knew that the claim was false or fraudulent in these particulars.
- (2) Presenting for approval or payment a false or fraudulent claim.*
 - (a) That the accused presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States or an officer thereof;
 - (b) That the claim was false or fraudulent in certain particulars; and
 - (c) That the accused then knew that the claim was false or fraudulent in these particulars.
- (3) Making or using a false writing or other paper in connection with claims.*
 - (a) That the accused made or used a certain writing or other paper;
 - (b) That certain material statements in the writing or other paper were false or fraudulent;
 - (c) That the accused then knew the statements were false or fraudulent; and
 - (d) That the act of the accused was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.
- (4) False oath in connection with claims.*
 - (a) That the accused made an oath to a certain fact or to a certain writing or other paper;
 - (b) That the oath was false in certain particulars;
 - (c) That the accused then knew it was false; and

(d) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

(5) *Forgery of signature in connection with claims.*

(a) That the accused forged or counterfeited the signature of a certain person on a certain writing or other paper; and

(b) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

(6) *Using forged signature in connection with claims.*

(a) That the accused used the forged or counterfeited signature of a certain person;

(b) That the accused then knew that the signature was forged or counterfeited; and

(c) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

(7) *Delivering less than amount called for by receipt.*

(a) That the accused had charge, possession, custody, or control of certain money or property of the United States furnished or intended for the armed forces thereof;

(b) That the accused obtained a certificate or receipt for a certain amount or quantity of that money or property;

(c) That for the certificate or receipt the accused knowingly delivered to a certain person having authority to receive it, an amount or quantity of 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 c.(2).

(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) of this paragraph.

(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 subparagraphs (1) and (2) of this paragraph.

(4) *False oath in connection with claims.* *See* subparagraphs (1) and (2) of this paragraph.

(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* subparagraph 37.c. and subparagraphs (1) and (2) of this paragraph.

(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. *Maximum punishment.*

(1) *Article 124 (1) and (2).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Article 124 (3) and (4).*

(a) *When amount is \$1,000.00 or less.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *When amount is more than \$1,000.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Making false claim.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, (by preparing (a voucher) (_____) for presentation for approval or payment) (_____), make a claim against the (United States) (finance officer at _____) (_____) in the amount of \$_____ for (private property alleged to have been (lost) (destroyed) in the military service) (_____), which claim was (false) (fraudulent) (false and fraudulent) in the amount of \$_____ in that _____ and was then known by the said _____ to be (false) (fraudulent) (false and fraudulent).

(2) *Presenting false claim.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, by presenting (a voucher) (_____) to _____, an officer of the United States duly authorized to (approve) (pay) (approve and pay) such claim, present for (approval) (payment) (approval and payment) a claim against the (United States) (finance officer at _____) (_____) in the amount of \$_____ for (services alleged to have been rendered to the United States by _____ during _____) (_____), which claim was (false) (fraudulent) (false and fraudulent) in the amount of \$_____ in that _____, and was then known by the said _____ to be (false) (fraudulent) (false and fraudulent).

(3) *Making or using false writing.*

In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment), of a claim against the United States in the amount of \$_____, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, (make) (use) (make and use) a certain (writing) (paper), to wit: _____, which said (writing) (paper), as (he) (she), the said _____, then knew, contained a statement that _____, which statement was (false) (fraudulent) (false and fraudulent) in that _____, and was then known by the said _____ to be (false) (fraudulent) (false and fraudulent).

(4) *Making false oath.*

In that _____ (personal jurisdiction data), for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, make an oath (to the fact that _____) (to a certain (writing) (paper), to wit: _____), to the effect that _____, which said oath was false in 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 _____ (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____, 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 a receipt.*

In that _____ (personal jurisdiction data), having (charge) (possession) (custody) (control) of (money) (_____) of the United States, (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, knowingly deliver to _____, the said _____ having authority to receive the same, (an amount) (_____), which, as (he) (she), _____, then knew, was (\$_____) (_____) less than the (amount) (_____) for which (he) (she) received a (certificate) (receipt) from the said _____.

(8) *Making receipt without knowledge of the facts.*

In that _____ (personal jurisdiction data), being authorized to (make) (deliver) (make and deliver) a paper certifying the receipt of property of the United States (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20____, without having full knowledge of the statement therein contained and with intent to defraud the United States, (make) (deliver) (make and deliver) to _____, such a writing, in words and figures as follows: _____, the property therein certified as received being of a value of about \$_____.

Analysis

71. Article 124—Frauds against the United States

This paragraph is taken from paragraph 58 (Article 132—Frauds against the United States) of MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

2017 Amendment: d. Maximum punishment. The threshold amount for purposes of the maximum punishment in relation to the qualifying value of the property concerned is amended to \$1,000 and aligns with the division between felony and misdemeanor penalties for property offenses in federal civilian law.

72. Article 124a (10 U.S.C. 924a)—Bribery

a. *Text of statute.*

(a) **ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—**

(1) **who occupies an official position or who has official duties; and**

(2) **who wrongfully asks, accepts, or receives a thing of value with the intent to have the person’s decision or action influenced with respect to an official matter in which the United States is interested;**

shall be punished as a court-martial may direct.

(b) **PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who**

occupies an official position or who has official duties, with the intent to influence the decision or action of the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.

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; and

(d) That this certain matter was an official matter in which the United States was interested.

(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; and

(d) That this matter was an official matter in which the United States was interested.

c. *Explanation.* Bribery requires an intent to influence or be influenced in an official matter.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specifications.*

(1) *Asking, accepting, or receiving.*

In that _____ (personal jurisdiction data), being at the time (a contracting officer for _____) (the personnel officer of _____) (_____), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, wrongfully (ask) (accept) (receive) from _____, (a contracting company engaged in _____) (_____), (the sum of \$_____) (_____, of a value of (about) \$_____) (_____), (with intent to have (his) (her) (decision) (action) influenced with respect to) ((as compensation for) (in recognition of)) service (rendered) (to be rendered).

(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).

Analysis

72. Article 124a—Bribery

This paragraph is taken from portions of paragraph 66 (Article 134—Bribery and graft) of the MCM (2016 edition), related to the offense of bribery; proof of the Article 134 terminal element is no longer required.

73. Article 124b (10 U.S.C. 924b)—Graft

a. *Text of statute.*

(a) ASKING, ACCEPTING, OR RECEIVING THING OF VALUE.—Any person subject to this chapter—

(1) who occupies an official position or who has official duties; and

(2) who wrongfully asks, accepts, or receives a thing of value as compensation for or in recognition of services rendered or to be rendered by the person with respect to an official matter in which the United States is interested;
shall be punished as a court-martial may direct.

(b) PROMISING, OFFERING, OR GIVING THING OF VALUE.—Any person subject to this chapter who wrongfully promises, offers, or gives a thing of value to another person, who occupies an official position or who has official duties, as compensation for or in recognition of services rendered or to be rendered by the other person with respect to an official matter in which the United States is interested, shall be punished as a court-martial may direct.

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 as compensation for or in recognition of services rendered, to be rendered, or both, by the accused in relation to a certain matter; and

(d) That this certain matter was an official matter in which the United States was interested.

(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 as compensation for or in recognition of services rendered, to be rendered, or both, by this person in relation to a certain matter; and

(d) That this matter was an official matter in which the United States was interested.

c. *Explanation.* Graft does not require an intent to influence or be influenced in an official matter. Graft involves compensation for services performed in an official matter when no compensation is due.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specifications.*

(1) *Asking, accepting, or receiving.*

In that _____ (personal jurisdiction data), being at the time (a contracting officer for _____) (the personnel officer of _____) (_____), did,(at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, wrongfully (ask) (accept) (receive) from _____, (a contracting company engaged in _____) (_____), (the sum of \$_____) (_____), of a value of (about) \$_____) (_____), (rendered or to be rendered) by (him) (her) the said _____ in relation to) an official matter in which the United States was interested, to wit: (the purchasing of military supplies from _____) (the transfer of _____ to duty with _____) (_____).

(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) \$ _____) (_____, (rendered or to be rendered) by the said ____ in relation to) an official matter in which the United States was interested, to wit: (the granting of leave to _____) (the processing of a claim against the United States in favor of _____) (_____).

Analysis

73. Article 124b—Graft

This paragraph is taken from portions of paragraph 66 (Article 134—Bribery and graft) of MCM (2016 edition), related to the offense of graft, proof of the Article 134 terminal element is no longer required.

74. Article 125 (10 U.S.C. 925)—Kidnapping

a. *Text of statute.*

Any person subject to this chapter who wrongfully—

(1) seizes, confines, inveigles, decoys, or carries away another person; and

(2) holds the other person against that person’s will;

shall be punished as a court-martial may direct.

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; and

(3) That the accused did so willfully and wrongfully.

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 25.

d. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

e. *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.

Analysis

74. Article 125—Kidnapping

This paragraph is taken from paragraph 92 (Article 134—Kidnapping) of the MCM (2016 edition). Proof of the Article 134 terminal element is no longer required.

75. Article 126 (10 U.S.C. 926)—Arson; burning property with intent to defraud

a. *Text of statute*.

(a) **AGGRAVATED ARSON.—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 that person, there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.**

(b) **SIMPLE ARSON.—Any person subject to this chapter who, willfully and maliciously, burns or sets fire to the property of another is guilty of simple arson and shall be punished as a court-martial may direct.**

(c) **BURNING PROPERTY WITH INTENT TO DEFRAUD.—Any person subject to this chapter who, willfully, maliciously, and with intent to defraud, burns or sets fire to any property 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; and

(ii) 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; and

(iv) That the accused knew that there was a human being in the structure at the time.

(2) *Simple arson*.

- (a) That the accused burned or set fire to certain property of another; and
- (b) That the act was willful and malicious.

[Note: if the property is of a value of more than \$1,000, add the following element:]

- (c) That the property is of a value of more than \$1,000.

(3) *Burning with the intent to defraud.*

- (a) That the accused willfully and maliciously burned or set fire to certain property; and
- (b) That such burning or setting on fire was with the intent to defraud a certain person or

organization.

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. In burning with intent to defraud, it is the fraudulent intent motivating the burning of any property that is the essential element. It is immaterial whom the property belonged to; the focus is that the burning of that property was for a fraudulent purpose (e.g., the intent to file a false insurance claim for the property burned by the accused).

(2) *Aggravated arson.*

(a) *Inhabited dwelling.* An inhabited dwelling means the structure must be used for habitation, not that a human being must be present therein at the time the dwelling is burned or set on fire. It 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 may 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 subparagraph 75.c.(1) for discussion of willful and malicious.

(4) *Burning with the intent to defraud.* See subparagraph 70.c.(14) for a discussion of intent to defraud.

d. *Maximum punishment.*

(1) *Aggravated arson.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 25 years.

(2) *Simple arson*—

(a) *Where the property is of some value.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(b) *Where the property is of a value of more than \$1,000.00.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) *Burning with intent to defraud.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *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: (a house) (an apartment) (_____).

(b) *Structure.*

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), knowing that a human being was therein at the time, (the Post Theater) (_____).

(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) (_____), (of some value) (of a value of more than \$1,000), the property of another.

(3) *Burning with intent to defraud.*

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), with intent to defraud (the insurer thereof, to wit: _____) (_____).

Analysis

75. Article 126—Arson; burning property with intent to defraud

This paragraph is taken from paragraphs 52 (Article 126—Arson) and 67 (Article 134—Burning with intent to defraud) of the MCM (2016 edition).

2017 Amendment: Article 126 is amended and incorporates burning with intent to defraud in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles. The offense of burning with intent to defraud remains substantively the same, except proof of the Article 134 terminal element is no longer required.

b.(1). The elements of aggravated arson were amended and proof that the property belonged to a certain person and was of a certain value is not required. *See United States v. Desha*, 23 M.J. 66 (C.A.A.F. 1986) (affirming an aggravated arson conviction holding that Congress eliminated the common-law requirement that the property burned be “of another”).

b.(2). The element of simple arson that required that the dwelling or structure be of a certain value was removed. An enhanced punishment is available for property of a value of more than \$1,000.

c.(2)(a). The definition of “inhabited dwelling” aligns with *United States v. Duke*, 16 C.M.A. 460 (C.M.A. 1966).

d. *Maximum punishment.* The maximum authorized confinement for both aggravated arson and simple arson are increased.

76. Article 127 (10 U.S.C. 927)—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. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specifications.*

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, to wit: _____) (an acquittance) (an advantage, to wit: _____) (an immunity, to wit: _____), communicate to _____ a threat to (here describe the threat).

Analysis

76. Article 127—Extortion

This paragraph is taken without substantive change from paragraph 53 (Article 127—Extortion) of the MCM (2016 edition).

77. Article 128 (10 U.S.C. 928)—Assault

a. *Text of statute.*

(a) ASSAULT.—Any person subject to this chapter who, unlawfully and with force or violence—

- (1) attempts to do bodily harm to another person;
- (2) offers to do bodily harm to another person; or
- (3) does bodily harm to another person;

is guilty of assault and shall be punished as a court-martial may direct.

(b) **AGGRAVATED ASSAULT.**—Any person subject to this chapter—

(1) who, with the intent to do bodily harm, offers to do bodily harm with a dangerous weapon; or

(2) who, in committing an assault, inflicts substantial bodily harm, or grievous bodily harm on another person;

is guilty of aggravated assault and shall be punished as a court-martial may direct.

(c) **ASSAULT WITH INTENT TO COMMIT SPECIFIED OFFENSES.**—

(1) **IN GENERAL.**—Any person subject to this chapter who commits assault with intent to commit an offense specified in paragraph (2) shall be punished as a court-martial may direct.

(2) **OFFENSES SPECIFIED.**—The offenses referred to in paragraph (1) are murder, voluntary manslaughter, rape, sexual assault, rape of a child, sexual assault of a child, robbery, arson, burglary, and kidnapping.

b. *Elements.*

(1) *Simple assault.*

- (a) That the accused attempted to do or offered to do bodily harm to a certain person;
- (b) That the attempt or offer was done unlawfully; and
- (c) That the attempt or offer was done with force or violence.

(2) *Assault consummated by a battery.*

- (a) That the accused did bodily harm to a certain person;
- (b) That the bodily harm was done unlawfully; and
- (c) That the bodily harm was done with 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 unlawfully;
- (iii) That the attempt, offer, or bodily harm was done with force or violence;
- (iv) That the person was a commissioned, warrant, noncommissioned, or petty officer;

and

(v) 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 unlawfully;
- (iii) That the attempt, offer, or bodily harm was done with force or violence;
- (iv) 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

(v) 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, a spouse, intimate partner, or immediate family member.*

(i) That the accused did bodily harm to a certain person;

(ii) That the bodily harm was done unlawfully;

(iii) That the bodily harm was done with force or violence; and

(iv) That the person was then a child under the age of 16 years, or a spouse, intimate partner, or an immediate family member of the accused.

(4) *Aggravated assault.*

(a) *Assault with a dangerous weapon.*

(i) That the accused offered to do bodily harm to a certain person;

(ii) The offer was made with the intent to do bodily harm; and

(iii) That the accused did so with a dangerous weapon.

[Note: Add any of the following elements as applicable:]

(iv) That the dangerous weapon was a loaded firearm.

(v) That the person was a child under the age of 16 years, or a spouse, intimate partner, or an immediate family member of the accused.

(b) *Assault in which substantial bodily harm is inflicted.*

(i) That the accused assaulted a certain person; and

(ii) That substantial bodily harm was thereby inflicted upon such person.

[Note: Add any of the following elements as applicable:]

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

(iv) That the person was a child under the age of 16 years, or a spouse, intimate partner, or an immediate family member of the accused.

(c) *Assault in which grievous bodily harm is inflicted.*

(i) That the accused assaulted a certain person; and

(ii) That grievous bodily harm was thereby inflicted upon such person.

[Note: Add any of the following elements as applicable:]

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

(iv) That the person was a child under the age of 16 years, or a spouse, intimate partner, or an immediate family member of the accused.

(5) *Assault with intent to commit specified offenses.*

(a) That the accused assaulted a certain person; and

(b) That the accused, at the time of the assault, intended to: kill (as required for murder or voluntary manslaughter), commit rape, rape of a child, sexual assault, sexual assault of a child, robbery, arson, burglary, or kidnapping.

c. *Explanation.*

(1) *Definitions of bodily harm.*

(a) Bodily harm means an offensive touching of another, however slight.

(b) Substantial bodily harm means a bodily injury that involves:

(i) a temporary but substantial disfigurement, or

(ii) a temporary but substantial loss or impairment of function of any bodily member, organ, or mental faculty.

(c) Grievous bodily harm means a bodily injury that involves:

(i) a substantial risk of death;
(ii) extreme physical pain;
(iii) protracted and obvious disfigurement; or
(iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(2) *Simple assault.*

(a) *Definition of assault.* An assault is an unlawful attempt or offer with 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.

(b) *Difference between attempt and offer type assaults.*

(i) *Attempt type assault.* An attempt type assault requires a specific intent to inflict bodily harm, and an overt act—that is, an act that amounts to more than mere preparation and apparently tends to effect the intended bodily harm. An attempt type assault may be committed even though the victim had no knowledge of the incident at the time.

(ii) *Offer type assault.* An offer type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or omission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required.

(iii) *Examples.*

(A) If Doe swings a fist at Roe’s head intending to hit Roe but misses, Doe has committed an attempt type assault, whether or not Roe is aware of the attempt.

(B) If Doe swings a fist in the direction 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 67 (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.

(3) *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.

(4) *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 subparagraph 22.c.(1)(d) 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.

(d) *Assault consummated by a battery against a spouse, intimate partner, or an immediate family member.* The maximum punishment is increased when assault consummated by a battery is committed upon an immediate family member; spouse; or intimate partner. For purposes of this paragraph, the terms immediate family member and intimate partner have the same meaning as in subparagraph 80.a.(b)(4) and (5) (Stalking) and include a spouse, a former spouse, or a former intimate partner.

(5) *Aggravated assault.*

(a) *Assault with a dangerous weapon.*

(i) *In general.* It must be proved that the accused specifically intended to do bodily harm. Culpable negligence will not suffice.

(ii) *Proving intent.* Specific intent may be proved by circumstantial evidence. When bodily harm has been inflicted by means of intentionally using force in a manner capable of achieving that result, it may be inferred that bodily harm was intended.

(iii) *Dangerous weapon.* A weapon is dangerous when used in a manner capable of inflicting death or grievous bodily harm. What constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to kill or inflict grievous bodily harm. 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 capable of inflicting death or grievous bodily harm. Furthermore, under the appropriate circumstances, fists, teeth, feet, elbows, etc. may be considered a dangerous weapon when employed in a manner capable of inflicting death or grievous bodily harm.

(iv) *Injury not required.* It is not necessary that bodily harm be actually inflicted to prove assault with a dangerous weapon.

(v) *When committed upon a child under 16 years of age.* The maximum punishment is increased when assault with a dangerous weapon is committed 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.

(vi) *When committed upon a spouse, intimate partner, or an immediate family member.* The maximum punishment is increased when assault with a dangerous weapon is committed upon a spouse; an immediate family member; or intimate partner. For purposes of this paragraph, the terms immediate family member and intimate partner have the same meaning as in subparagraph 80.a.(b)(4) and (5) (Stalking).

(b) *Assault in which substantial or grievous bodily harm is inflicted.*

(i) *In general.* Assault in which substantial or grievous bodily harm is inflicted is a general intent crime which requires that the accused assaulted another person and that the assault resulted in substantial or grievous bodily harm. The offense does not require specific intent to cause substantial or grievous bodily harm. The focus of the offense is the degree of bodily harm resulting from an assault. This contrasts with the offense of assault with a dangerous weapon, where the focus of the offense is the accused's intent to do bodily harm and the use of a dangerous weapon, regardless of whether any bodily harm results.

(ii) *When committed on a child under 16 years of age.* The maximum punishment is increased when assault involving infliction of substantial 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.

(iii) *When committed on a spouse, intimate partner, or an immediate family member.*

The maximum punishment is increased when assault involving infliction of substantial or grievous bodily harm is committed upon a spouse; an immediate family member; or intimate partner. For purposes of this paragraph, the terms immediate family member and intimate partner have the same meaning as in subparagraph 80.a.(b)(4) and (5) (Stalking).

(6) *Assault with intent to commit specified offenses.*

(a) *In general.* An assault with intent to commit any of the offenses referenced below 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 of this Part.

(b) *Assault with intent to murder.* Assault with intent to commit murder is assault with the 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 an assault with intent to murder each member of the group.

(c) *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.

(d) *Assault with intent to commit rape, rape of a child, sexual assault, and sexual assault of a child.* In assault with intent to commit any rape or sexual assault, the accused must have intended to complete the offense. Any lesser intent will not suffice. No actual touching is necessary. Once an assault with intent to commit rape is made, it is no defense that the accused voluntarily desisted.

(e) *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.

d. *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) *Battery.*

(a) *Assault consummated by a battery.* Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *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.

(c) *Assault upon a warrant officer, not in the execution of office.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(d) *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.

(e) *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.

(f) *Assault consummated by a battery upon a child under 16 years, spouse, intimate partner, or an immediate family member.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) *Aggravated assault.*

(a) *Aggravated assault with a dangerous weapon.*

(i) *When committed with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

(ii) *When committed upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member.* Dishonorable discharge, total forfeitures, and confinement for 5 years.

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

(b) *Aggravated assault in which substantial bodily harm is inflicted.*

(i) *When the injury is inflicted with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

(ii) *When the injury is inflicted upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 6 years.

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

(c) *Aggravated assault in which grievous bodily harm is inflicted.*

(i) *When the injury is inflicted with a loaded firearm.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(ii) *When the injury is inflicted upon a child under the age of 16 years, spouse, intimate partner, or an immediate family member.* Dishonorable discharge, total forfeitures, and confinement for 8 years.

(iii) *Other cases.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years

(4) *Assault with intent to commit specified offenses.*

(a) *Assault with intent to commit murder, rape, or rape of a child.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(b) *Assault with intent to commit voluntary manslaughter, robbery, arson, burglary, and kidnapping.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

e. *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 [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, or the spouse, intimate partner or immediate family member of the accused.*

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) (the spouse of the accused) (the intimate partner of the accused) (an immediate family member of the accused), (in) (on) the ____ with _____.

(8) *Assault, aggravated—with a dangerous weapon.*

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) (spouse of the accused) (intimate partner of the accused) (an immediate family member of the accused)] by (shooting) (pointing) (striking) (cutting) (_____) (at (him) (her)) with a dangerous weapon to wit: a (loaded firearm) (pickax) (bayonet) (club) (_____).

(9) *Assault, aggravated—inflicting substantial bodily harm.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about _____ 20 __, did, with the intent to inflict bodily harm, commit an assault upon _____ [(a child under the age of 16 years) (spouse of the accused) (intimate partner of the accused) (an immediate family member of the accused)] by (shooting) (striking) (cutting) (____) (him) (her) (on) the _____ with a (loaded firearm) (club) (rock) (brick) (_____) and did thereby inflict substantial bodily harm upon (him) (her), to wit: (severe bruising of the face) (head concussion) (temporary blindness) (_____).

(10) *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 __, did, with the intent to inflict bodily harm, commit an assault upon _____ [(a child under the age of 16 years) (spouse of the accused) (intimate partner of the accused) (an immediate family member of the accused)] by (shooting) (striking) (cutting) (____) (him) (her) (on) the _____ with a (loaded firearm) (club) (rock) (brick) (_____) and did thereby inflict grievous bodily harm upon (him) (her), to wit: a (broken leg) (deep cut) (fractured skull) (_____).

(11) *Assault with intent to commit specified offenses*

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) (rape of a child) (sexual assault) (sexual assault of a child) (robbery) (arson) (burglary) (kidnapping), assault _____ by (striking at (him) (her) with a _____) (_____).

Analysis

77. Article 128—Assault

This paragraph is taken from paragraphs 54 (Article 128—Assault) and 64 (Article 134—Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking) of the MCM (2016 edition).

2017 Amendment: a. *Text of statute.* (b) *Aggravated Assault.* Two amendments to this statute align it more closely with federal civilian practice under 18 U.S.C. § 113. First, the phrase “or other means or force likely to result in death or grievous bodily harm” has been removed from the statutory definition of “aggravated assault,” and replaced with the phrase “dangerous weapon.” This eliminates the likelihood of harm analysis previously necessary under the MCM (2016 edition) for this offense, and allows the offense to focus solely on the intent of the accused. In turn, the phrase “dangerous weapon” focuses on the capability of any object to inflict death or grievous bodily harm. *See c. Explanation (5)(a)(iii).* Second, the intent necessary to complete an aggravated assault is modified to no longer require the specific intent to commit substantial or grievous bodily harm. This change aligns the specific intent requirement to federal civilian law under 18 U.S.C. § 113.

(c) *Assault with intent to commit specified offenses.* The offense of assault with intent to commit specified offenses is taken from paragraph 64 (Article 134—Assault—with intent to commit murder, voluntary manslaughter, rape, robbery, forcible sodomy, arson, burglary, or housebreaking) of the MCM (2016 edition) in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles. *See Appendix 23, subparagraph 64.c. Explanation of the MCM (2016 edition).* The scope of the offense remains substantively the same with two exceptions: (1) the offense now lists rape of a child, sexual assault, sexual assault of a child, and

kidnapping, as specified offenses; and (2) proof of the terminal element of Article 134 is no longer required.

c. *Explanation.*(1) *Substantial bodily harm.* The definition of substantial bodily harm aligns with 18 U.S.C. § 113(b)(1). It provides a middle tier of harm between bodily harm and grievous bodily harm. The definition of grievous bodily harm aligns with the definition of serious bodily injury under 18 U.S.C. § 113(b)(2), which is the highest tier of bodily injury.

(5)(a)(iii) *Dangerous weapon.* The definition of dangerous weapon focuses attention on the nature of the weapon involved and the accused's intent to commit any bodily harm. To qualify as a dangerous weapon, it is sufficient that "an instrument [is] capable of inflicting death or serious bodily injury." *United States v. Sturgis*, 48 F.3d 784, 787 (4th Cir. 1995). *See also United States v. Bey*, 667 F.2d 7, 11 (5th Cir. 1982) (citation and internal quotation omitted) ("[w]hat constitutes a dangerous weapon depends not on the nature of the object itself but on its capacity, given the manner of its use, to endanger life or inflict great bodily harm.")

(5)(b)(i). Assault resulting in substantial or grievous bodily harm requires only a finding of general intent. *See United States v. Davis*, 237 F.3d 942, 944 (8th Cir. 2001).

d. *Maximum punishment.* Two new maximum punishment categories were added: (1) infliction of substantial bodily harm and (2) assaulting a spouse, intimate partner, or an immediate family member.

78. Article 128a (10 U.S.C. 928a)—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.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

e. *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) (_____).

Analysis

78. Article 128a—Maiming

This paragraph is taken from paragraph 50 (Article 124—Maiming) of the MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

79. Article 129 (10 U.S.C. 929)—Burglary; unlawful entry

a. *Text of statute.*

(a) **BURGLARY.—Any person subject to this chapter who, with intent to commit an offense under this chapter, breaks and enters the building or structure of another shall be punished as a court-martial may direct.**

(b) **UNLAWFUL ENTRY.—Any person subject to this chapter who unlawfully enters—**
(1) **the real property of another; or**
(2) **the personal property of another which amounts to a structure usually used for habitation or storage;**
shall be punished as a court-martial may direct.

b. *Elements.*

(1) *Burglary.*

(a) That the accused unlawfully broke and entered the building or structure of another; and

(b) That the breaking and entering were done with the intent to commit an offense punishable under the UCMJ.

[Note: If the breaking and entering were with the intent to commit an offense punishable under sections 918-920, 920b-921, 922, 925-928a, and 930 of this title (Article 118-120, 120b-121, 122, 125-128a, and 130), add the following element:]

(c) That the breaking and entering were with the intent to commit an offense punishable under Article 118-120, 120b-121, 122, 125-128a, and 130.

(2) *Unlawful entry.*

(a) That the accused entered—

(i) the real property of another; or

(ii) certain personal property of another which amounts to a structure usually used for habitation or storage; and

(b) That the entry was unlawful.

c. *Explanation.*

(1) *In general.* This article combines and consolidates the crimes of burglary, housebreaking, and unlawful entry. There is no requirement that an accused break and enter in the nighttime or that the structure entered constitute the dwelling house of another to commit the offense of burglary.

(2) *Breaking.* There must be a breaking, actual or constructive. Merely entering through a hole left in the wall or roof or through an open window or door will not constitute a breaking; but if a person moves any obstruction to entry of the house without which movement the person could not have entered, the person has committed a breaking. Opening a closed door or window or other similar fixture, opening wider a door or window already partly open but insufficient for the entry, or cutting out the glass of a window or the netting of a screen is a sufficient breaking. The breaking of an inner door by one who has entered the house without breaking, or by a person lawfully within the house who has no authority to enter the particular room, is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with the requisite intent, burglary is not committed. There is a constructive breaking when the entry is gained by a trick, such as concealing oneself in a box; under false pretense, such as impersonating a gas or telephone inspector; by intimidating the occupants through violence or threats into opening the door; through collusion with a confederate, an occupant of the house; or by descending a chimney, even if only a partial descent is made and no room is entered.

(3) *Entry.* An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient. Insertion into the house of a tool or other instrument is also a sufficient entry, unless the insertion is solely to facilitate the breaking or entry. An entry is unlawful if made without consent of any person authorized to consent to entry or without other lawful authority.

(4) *Building, structure.* Building includes 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) *Intent to commit offense.*

(a) *Burglary.* Both the breaking and entry must be done with the intent to commit an offense punishable under the UCMJ in the building or structure. 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. For example, if an accused enters a house with intent to murder a resident, but the resident is not present in the house, the accused may still be found guilty of burglary.

(b) *Unlawful entry.* Neither specific intent to commit an offense, nor breaking is required for this offense.

(6) *Property protected from unlawful entry.* 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, which would usually include vehicles expressly used for habitation, such as mobile homes and recreational vehicles. 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 punishable under Article 134, UCMJ as conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

(7) *Unlawfulness of entry.* An entry is unlawful if made without the consent of any person authorized to consent to entry or without other lawful authority.

d. *Maximum punishment.*

(1) *Burglary (with the intent to commit an offense punishable under Article 118-120, 120b-121, 122, 125-128a, or 130).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Burglary (with intent to commit any other offense punishable under the UCMJ).* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Unlawful entry.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

e. *Sample specifications.*

(1) *Burglary*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, unlawfully break and enter the (building) (structure) of _____, to wit _____, with intent to commit an offense under the Uniform Code of Military Justice therein, to wit: _____.

(2) *Unlawful entry.*

In that _____, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, unlawfully enter the (real property) (personal property) (a structure usually used for habitation or storage) of _____, to wit _____.

Analysis

79. Article 129—Burglary; unlawful entry

This paragraph is taken from paragraphs 55 (Article 129—Burglary), 56 (Article 130—Housebreaking), and 111 (Article 134—Unlawful entry) of the MCM (2016 edition).

2017 Amendment: a. *Text of statute.* The common law elements of nighttime and dwelling house are eliminated as elements of the offense of burglary.

b. *Elements.* The list of offenses that qualify for enhanced maximum punishment is amended to reflect the Military Justice Act of 2016's reorganization of the punitive articles.

c. *Explanation.* The definition of "Building, structure" is taken, without change, from paragraph 56 of the MCM (2016 edition).

f. *Sample specifications.* The sample specifications are modeled after those contained under paragraphs 55, 56, and 111 of the MCM (2016 edition).

80. Article 130 (10 U.S.C. 930)—Stalking

a. *Text of statute.*

(a) **IN GENERAL.—Any person subject to this chapter—**

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

(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, to a member of his or her immediate family, or to his or her intimate partner; and

(3) whose conduct induces reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

is guilty of stalking and shall be punished as a court-martial may direct.

(b) **DEFINITIONS.**—In this section:

(1) The term “conduct” means conduct of any kind, including use of surveillance, the mails, an interactive computer service, an electronic communication service, or an electronic communication system.

(2) The term “course of conduct” means—

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

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

(C) a pattern of conduct composed of repeated acts evidencing a continuity of purpose.

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

(4) The term “immediate family”, in the case of a specific person, means—

(A) that person’s spouse, parent, brother or sister, child, or other person to whom he or she stands in loco parentis; or

(B) any other person living in his or her household and related to him or her by blood or marriage.

(5) The term “intimate partner”, in the case of a specific person, means—

(A) a former spouse of the specific person, a person who shares a child in common with the specific person, or a person who cohabits with or has cohabited as a spouse with the specific person; or

(B) a person who has been in a social relationship of a romantic or intimate nature with the specific person, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

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, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner;

(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, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner; and

(3) That the accused’s conduct induced reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself, to a member of his or her immediate family, or to his or her intimate partner.

c. *Explanation.*

(1) *Bodily Harm.* Bodily harm means any offensive touching of another, however slight, including sexual assault. *See* subparagraph 77.c.(1).

(2) *Threat*. Threat means a communication, by words or conduct, of a present determination or intent to cause bodily harm to a specific person, an immediate family member of that person, or intimate partner of that person, presently or in the future. The threat may be made directly to or in the presence of the person it is directed at or towards, or the threat may be conveyed to such person in some manner. Actual intent to cause bodily harm is not required.

d. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specifications*.

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction, if required), (on or about ____ 20 __) (from about ____ to about ____ 20 __), engage in a course of conduct directed at _____, that would cause a reasonable person to fear (death) (bodily harm, to wit: _____), to (himself) (herself) (a member of (his) (her) immediate family) ((his) (her) intimate partner); that the accused knew or should have known that the course of conduct would place _____ in reasonable fear of (death) (bodily harm, to wit _____) to (himself) (herself) (a member of (his) (her) immediate family) ((his) (her) intimate partner); and that the accused's conduct placed _____ in reasonable fear of (death) (bodily harm, to wit: _____) to (himself) (herself) (a member of (his) (her) immediate family) ((his) (her) intimate partner).

Analysis

80. Article 130—Stalking

This offense is taken from paragraph 45a (Article 120a—Stalking) of the MCM (2016 edition). *2017 Amendment: a. Text of statute*. This statute is amended and extends the conduct covered to include cyberstalking and threats to intimate partners. This aligns the offense with similar misconduct under 18 U.S.C. § 2261A.

c. *Explanation*. The definition of bodily harm is based on subparagraph 77.c.(1)(a).

SUBPART 11—OBSTRUCTION OFFENSES

81. Article 131 (10 U.S.C. 931)—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, subscribes any false statement material to the issue or matter of inquiry;

is guilty of perjury and shall be punished as a court-martial may direct.

b. *Elements*.

(1) *Giving false testimony*.

(a) That the accused took an oath or affirmation in a certain judicial proceeding or course of justice;

- (b) That the oath or affirmation was administered to the accused in a matter in which an oath or affirmation was required or authorized by law;
- (c) That the oath or affirmation was administered by a person having authority to do so;
- (d) That upon the oath or affirmation that accused willfully gave certain testimony;
- (e) That the testimony was material;
- (f) That the testimony was false; and
- (g) That the accused did not then believe the testimony to be true.

(2) *Subscribing false statement.*

- (a) That the accused subscribed a certain statement in a judicial proceeding or course of justice;
- (b) That in the declaration, certification, verification, or statement under penalty of perjury, the accused declared, certified, verified, or stated the truth of that certain statement;
- (c) That the accused willfully subscribed the statement;
- (d) That the statement was material;
- (e) That the statement was false; and
- (f) That the accused did not then believe the statement to be true.

c. *Explanation.*

(1) *In general.* Judicial proceeding includes a trial by court-martial, and course of justice includes preliminary hearings 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 preliminary hearing. 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. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *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.

Analysis

81. Article 131—Perjury

This paragraph is taken without substantive change from paragraph 57 (Article 131—Perjury) of MCM (2016 edition).

82. Article 131a (10 U.S.C. 931a)—Subornation of perjury

a. *Text of statute*.

(a) **IN GENERAL.—Any person subject to this chapter who induces and procures another person—**

(1) to take an oath; and

(2) to falsely testify, depose, or state upon such oath;
shall, if the conditions specified in subsection (b) are satisfied, be punished as a court-martial may direct.

(b) **CONDITIONS.**—The conditions referred to in subsection (a) are the following:

(1) The oath is administered with respect to a matter for which such oath is required or authorized by law.

(2) The oath is administered by a person having authority to do so.

(3) Upon the oath, the other person willfully makes or subscribes a statement.

(4) The statement is material.

(5) The statement is false.

(6) When the statement is made or subscribed, the person subject to this chapter and the other person do not believe that the statement is true.

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; and

(7) That the accused and the said person did not then believe that the statement was true.

c. *Explanation.*

(1) See subparagraph 81.c for applicable principles.

(2) Induce and procure means to influence, persuade, or cause.

(3) The word oath includes affirmation, and sworn includes affirmed. *See* 1 U.S.C. § 1.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, procure _____ to commit perjury by inducing (him) (her), the said _____, to take a lawful (oath) (affirmation) in a (trial by court-martial of _____) (trial by a court of competent jurisdiction, to wit: _____ of _____) (deposition for use in a trial by _____ of _____) (_____ that (he) (she), the said _____, would (testify) (depose) (_____ truly, and to (testify) (depose) (_____ willfully, corruptly, and contrary to such (oath) (affirmation) in substance that _____, which (testimony) (deposition) (_____ was upon a material matter and which the accused and the said _____ did not then believe to be true.

Analysis

82. Article 131a—Subornation of perjury

This paragraph is taken from paragraph 98 (Article 134—Perjury: subornation of) of MCM (2016 edition). The offense remains substantively the same, except that proof of the Article 134 terminal element is no longer required.

83. Article 131b (10 U.S.C. 931b)—Obstructing justice

a. Text of statute.

Any person subject to this chapter who engages in conduct in the case of a certain person against whom the accused had reason to believe there were or would be criminal or disciplinary proceedings pending, with intent to influence, impede, or otherwise obstruct the due administration of justice shall be punished as a court-martial may direct.

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 or disciplinary proceedings pending; and
- (3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice.

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. Criminal proceedings include general courts-martial, special courts-martial, and all other criminal proceedings. For purposes of this paragraph, disciplinary proceedings include summary courts-martial as well as 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, a preliminary hearing officer, 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 87 and Article 37.

d. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, wrongfully do a certain act, to wit: _____, with intent to (influence) (impede) (obstruct) the due administration of justice in the case of _____, against whom the accused had reason to believe that there were or would be (criminal) (disciplinary) proceedings pending.

Analysis

83. Article 131b—Obstructing justice

This paragraph is taken from paragraph 96 (Article 134—Obstructing justice) of MCM (2016 edition). The offense remains substantively the same, except that proof of the Article 134 terminal element is no longer required.

84. Article 131c (10 U.S.C. 931c)—Misprision of serious offense

a. Text of statute.

IN GENERAL.—Any person subject to this chapter—

- (1) who knows that another person has committed a serious offense; and**

(2) wrongfully conceals the commission of the offense and fails to make the commission of the offense known to civilian or military authorities as soon as possible;

shall be punished as a court-martial may direct.

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; and
- (3) That, thereafter, the accused wrongfully concealed the serious offense and failed to make it known to civilian or military authorities as soon as possible.

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 2. 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 UCMJ 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. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *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.

Analysis

84. Article 131c—Misprision of serious offense

This paragraph is taken from paragraph 95 (Article 134—Misprision of a serious offense) of MCM (2016 edition). The offense remains substantively the same, except that proof of the Article 134 terminal element is no longer required.

85. Article 131d (10 U.S.C. 931d)—Wrongful refusal to testify

a. *Text of statute.*

Any person subject to this chapter who, in the presence of a court-martial, a board of officers, a military commission, a court of inquiry, preliminary hearing, or an officer taking a deposition, of or for the United States, wrongfully refuses to qualify as a witness or to answer a question after having been directed to do so by the person presiding shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused was in the presence of a court-martial, board of officers, military commission, court of inquiry, an officer conducting a preliminary hearing 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; and

(4) That the refusal was wrongful.

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 incorrect belief in the right to remain silent does not constitute a defense to a charge of wrongful refusal to testify. *See also* Mil. R. Evid. 301 and Section V of the Military Rules of Evidence.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), being in the presence of (a) (an) ((general) (special) (summary) court-martial) (board of officers) (military commission) (court of inquiry) (officer conducting a preliminary hearing 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) (subject-matter jurisdiction, if required), on or about _____ 20 __, wrongfully refuse (to qualify as a witness) (to answer said question(s)).

Analysis

85. Article 131d—Wrongful refusal to testify

This paragraph is taken from paragraph 108 (Article 134—Testify: wrongful refusal) of MCM (2016 edition). The offense remains substantively the same, except that proof of the Article 134 terminal element is no longer required.

86. Article 131e (10 U.S.C. 931e)—Prevention of authorized seizure of property

a. *Text of statute.*

Any person subject to this chapter who, knowing that one or more persons authorized to make searches and seizures are seizing, are about to seize, or are endeavoring to seize property, destroys, removes, or otherwise disposes of the property with intent to prevent the seizure thereof shall be punished as a court-martial may direct.

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; and

(3) That the accused then knew that person(s) authorized to make searches were seizing, about to seize, or endeavoring to seize the property.

c. *Explanation.* *See* Mil. R. Evid. 316 concerning military personnel who may make seizures. It is not a defense that a search or seizure was technically defective.

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *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).

Analysis

86. Article 131e—Prevention of authorized seizure of property

This paragraph is taken from paragraph 103 (Article 134—Seizure: destruction, removal, or disposal of property to prevent) of MCM (2016 edition). The offense remains substantively the same, except that proof of the Article 134 terminal element is no longer required.

2017 Amendment: d. *Maximum punishment.* The authorized punishment for the offense is modified and aligns with federal civilian law for similar misconduct. *See* 18 U.S.C. § 2232.

87. Article 131f (10 U.S.C. 931f)—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 UCMJ;

(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 UCMJ.*

(a) That the accused failed to enforce or comply with a certain provision of the UCMJ 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 UCMJ;

(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 131f is to ensure expeditious disposition of cases of persons accused of offenses under the UCMJ. A person may be responsible for delay in the disposition of a case only when that person's duties require action with respect to the disposition of that case.

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the UCMJ.* Section (2) of Article 131f 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 UCMJ 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. *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 UCMJ.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *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) (subject-matter jurisdiction, if required), 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 UCMJ.*

In that _____ (personal jurisdiction data), being charged with the duty of _____, did, (at/on board—location) (subject-matter jurisdiction, if required), on or about _____ 20 __, knowingly and intentionally fail to (enforce) (comply with) Article _____, Uniform Code of Military Justice, in that (he) (she) _____.

Analysis

87. Article 131f—Noncompliance with procedural rules

This paragraph is taken from paragraph 22 (Article 98—Noncompliance with procedural rules) of MCM (2016 edition). This offense is relocated to its current position, without substantive change, in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

88. Article 131g (10 U.S.C. 931g)—Wrongful interference with adverse administrative proceeding

a. *Text of statute.*

Any person subject to this chapter who, having reason to believe that an adverse administrative proceeding is pending against any person subject to this chapter, wrongfully acts with the intent—

(1) to influence, impede, or obstruct the conduct of the proceeding; or

(2) otherwise to obstruct the due administration of justice;

shall be punished as a court-martial may direct.

b. *Elements.*

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there was or would be an adverse administrative proceeding pending; and

(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.

c. *Explanation.* For purposes of this paragraph an 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. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *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)] [_____].

Analysis

88. Article 131g—Wrongful interference with adverse administrative This paragraph is taken from paragraph 96a (Article 134—Wrongful interference with an adverse administrative proceeding) of MCM (2016 edition). The offense remains substantively the same, except that proof of the Article 134 terminal element is no longer required.

89. Article 132 (10 U.S.C. 932)—Retaliation

a. *Text of statute.*

(a) **IN GENERAL.—Any person subject to this chapter who, with the intent to retaliate against any person for reporting or planning to report a criminal offense, or making or planning to make a protected communication, or with the intent to discourage any person from reporting a criminal offense or making or planning to make a protected communication—**

(1) wrongfully takes or threatens to take an adverse personnel action against any person; or

(2) wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person;

shall be punished as a court-martial may direct.

(b) **DEFINITIONS.—In this section:**

(1) **The term “protected communication” means the following:**

(A) **A lawful communication to a Member of Congress or an Inspector General.**

(B) **A communication to a covered individual or organization in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following:**

(i) **A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination.**

(ii) **Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.**

(2) **The term “Inspector General” has the meaning given that term in section 1034(h) of this title.**

(3) **The term “covered individual or organization” means any recipient of a communication specified in clauses (i) through (v) of section 1034(b)(1)(B) of this title.**

(4) **The term “unlawful discrimination” means discrimination on the basis of race, color, religion, sex, or national origin.**

b. *Elements.*

(1) *Retaliation*

(a) That the accused wrongfully

(i) took or threatened to take an adverse personnel action against any person, or

(ii) withheld or threatened to withhold a favorable personnel action with respect to any person; and

(b) That, at the time of the action, the accused intended to retaliate against any person for reporting or planning to report a criminal offense, or for making or planning to make a protected communication.

(2) *Discouraging a report of criminal offense or protected communication.*

(a) That the accused wrongfully

(i) took or threatened to take an adverse personnel action against any person, or

(ii) withheld or threatened to withhold a favorable personnel action with respect to any person; and

(b) That, at the time of the action, the accused intended to discourage any person from reporting a criminal offense or making a protected communication.

c. *Explanation.*

(1) *In general.* This offense focuses upon the abuse of otherwise lawful military authority for the purpose of retaliating against any person for reporting or planning to report a criminal offense or for making or planning to make a protected communication or to discourage any person from reporting a criminal offense or for making or planning to make a protected communication. The offense prohibits personnel actions, either favorable or adverse, taken or withheld, or threatened to be taken or withheld, with the specific intent to retaliate against any person for reporting or planning to report a criminal offense or for making or planning to make a protected communication or to discourage any person from reporting a criminal offense or for making or planning to make a protected communication. The offense may be committed by any

person subject to the UCMJ with the authority to initiate, forward, recommend, decide, or otherwise act on a favorable or adverse personnel action who takes such action wrongfully and with the requisite specific intent. This offense does not prohibit the lawful and appropriate exercise of command authority to discipline or reward Servicemembers.

(2) *Personnel action*. For purposes of this offense, personnel action means any action taken on a Servicemember that affects, or has the potential to affect, that Servicemember's current position or career, including promotion, disciplinary or other corrective action, transfer or reassignment, performance evaluations, and decisions concerning pay, benefits, awards, or training, relief and removal; separation; discharge; referral for mental health evaluations, and any other personnel actions as defined by law or regulation, such as 5 U.S.C. § 2302 and DoD Directive 7050.06 (17 April 2015).

(3) *Intent to retaliate*. An action is taken with the intent to retaliate when the personnel action taken or withheld, or threatened to be taken or withheld, is done for the purpose of reprisal, retribution, or revenge for reporting or planning to report a criminal offense or for making or planning to make a protected communication.

(4) *Threatens to take or withhold*. This offense requires that the accused had the intent to retaliate, but proof that the accused actually intended to take an adverse personnel action, or to withhold a favorable personnel action, is not required. 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 a favorable or adverse personnel action.

(5) *Criminal offense*. Criminal offense for purposes of this offense includes violations of the UCMJ, the United States Code, or state law.

(6) *Wrongful*. Taking or threatening to take adverse personnel action, or withholding or threatening to withhold favorable personnel action, is wrongful when used for purpose of reprisal, rather than for purposes of lawful personnel administration.

(7) *Other retaliatory actions*. This offense does not prohibit the Secretary of Defense and Secretaries of the Military Services from proscribing other types or categories of prohibited retaliatory actions by regulation, which may be punished as violations of Article 92.

d. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specifications*.

(1) *Retaliation*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about ____ 20 __, with intent to retaliate against _____ for [(reporting) (planning to report) a criminal offense] [(making) (planning to make) a protected communication], wrongfully [(took) (threatened to take) an adverse personnel action against _____ to wit: _____][(withheld) (threatened to withhold) a favorable personnel action with respect to _____ to wit: _____].

(2) *Discouraging a report of criminal offense or protected communication*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject matter jurisdiction data, if required), on or about ____ 20 __, with intent to discourage _____ from (reporting a criminal offense) (making a protected communication), wrongfully [(took) (threatened to take) an adverse personnel action against

_____, to wit : _____] [(withheld) (threatened to withhold) a favorable personnel action with respect to _____, to wit: _____].

Analysis

89. Art. 132. —Retaliation

This is a new enumerated offense, which supplements and does not preempt Service regulations that address other types or categories of prohibited retaliatory actions. *See also* 10 U.S.C. § 1034, 18 U.S.C. § 1513. Service regulations may specify additional types of retaliatory conduct punishable at court-martial under Article 92 or Article 134.

SUBPART 12—OFFENSES OF GENERAL APPLICATION

90. Article 133 (10 U.S.C. 933)—Conduct unbecoming an officer and a 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 a certain act;

(2) That, under the circumstances, the act or omission 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. The term “gentleman” connotes failings in an officer’s personal character, regardless of gender.

(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. *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.

e. *Sample specifications.*

(1) *Copying or using examination paper.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), 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) (subject-matter jurisdiction data, if required), 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.

Analysis

90. Art. 133—Conduct unbecoming an officer and a gentleman

This paragraph is taken from paragraph 59 (Article 133—Conduct unbecoming an officer and a gentleman) of MCM (2016 edition), without substantive change. The offense is relocated to its current position in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

2017 Amendment: c. Explanation (1) *Gentleman.* This subparagraph is amended to emphasize that the term "gentleman" connotes failings in an officer's personal character, regardless of gender.

91. Article 134 (10 U.S.C. 934)—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. As used in the preceding sentence, the term "crimes and offenses not capital" includes any conduct engaged in outside the United States, as defined in section 5 of title 18, that would constitute a crime or offense not capital if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of title 18.

Discussion

The terminal element is merely the expression of one of the clauses under Article 134. See subparagraph c. for an explanation of the clauses and rules for drafting specifications. More than one clause may be alleged and proven;

however, proof of only one clause will satisfy the terminal element. For clause 3 offenses, the military judge may judicially notice whether an offense is capital. *See* Mil. R. Evid. 202.

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. All offenses under Article 134 require proof of a single terminal element.

(1) For clause 1 offenses under Article 134, the following proof is required:

(a) That the accused did or failed to do certain acts; and

(b) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces

(2) For clause 2 offenses under Article 134, the following proof is required:

(a) That the accused did or failed to do certain acts; and

(b) That, under the circumstances, the accused's conduct was of a nature to bring discredit upon the armed forces.

(3) For clause 3 offenses under Article 134, the following proof is required:

(a) That the accused did or failed to do certain acts that satisfy each element of the federal statute (including, in the case of a prosecution under 18 U.S.C. § 13, each element of the assimilated State, Territory, Possession, or District law); and

(b) That the offense charged was an offense not capital.

c. *Explanation.*

(1) *In general.* Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the UCMJ. 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 civilian law including law made applicable through the Federal Assimilative Crimes Act, *see* subparagraph c.(4). If any conduct of this nature is specifically made punishable by another article of the UCMJ, it must be charged as a violation of that article. *See* subparagraph c.(5)(a). However, *see* subparagraph 90.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 article does not include these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable. An act in violation of a local civil law or of a foreign law may be punished if it constitutes a disorder or neglect to the prejudice of good order and discipline in the armed forces. However, *see* R.C.M. 203 concerning subject-matter jurisdiction.

(b) *Breach of custom of the Service.* A breach of a custom of the Service may result in a violation of clause 1 of Article 134. In its legal sense, "custom" means more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common usage have attained the force of law in the military or other community affected by them. No custom may be contrary to

existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been generally abandoned. Many customs of the Service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear if the regulation is punitive. *See* subparagraph 18.b.(1).

(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 (Article 134, clause 3)*.

(a) *In general*. For the purpose of court-martial jurisdiction, the laws which may be applied under clause 3 of Article 134 are divided into two categories:

(1) Federal crimes and offenses according to the terms of jurisdiction set forth in the applicable federal criminal statute.

(i) Noncapital crimes and offenses prohibited by the United States Code that are punishable regardless where the wrongful act or omission occurred.

Discussion

Counterfeiting is an example of a crime punishable regardless where the wrongful act or omission occurred. *See* 18 U.S.C. § 471.

(ii) Noncapital crimes and offenses prohibited by the United States Code within a limited jurisdiction that are punishable when committed within a specified area.

(iii) The Federal Assimilative Crimes Act (18 U.S.C. § 13) 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.”

(2) Conduct engaged in outside the United States that would constitute a noncapital federal crime or offense if the conduct had been engaged in “within the special maritime and territorial jurisdiction of the United States.” For purposes of this provision, the term “United

States” is defined in section 5 of title 18, United States Code, and the term “special maritime and territorial jurisdiction of the United States” is defined in section 7 of title 18, United States Code.

Discussion

If the direct prosecution of state and federal crimes under Article 134, clause 3 is unavailable because the offense is committed outside of otherwise applicable areas of jurisdiction, the substance of these crimes may still be prosecuted, in an appropriate case, under clause 1 or clause 2 of Article 134. In such a case, the Government would be required to prove the terminal element under clause 1 or clause 2 that the underlying misconduct was either prejudicial to good order and discipline; of a nature to bring discredit upon the armed forces; or both.

18 U.S.C. § 5 provides, “The term ‘United States’, as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone.”

18 U.S.C. § 7 provides,

“The term “special maritime and territorial jurisdiction of the United States”, as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

(9) With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—

(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts. This paragraph does not apply with respect to an offense committed by a person described in section 3261(a) of this title.”

(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.

Discussion

Although the preemption doctrine generally does not preclude charging Article 134, clause 3 offenses (crimes or offense, not capital), the preemption doctrine does preclude charging a federal “crime or offense, not capital” under Article 134 clause 3 where either direct legislative language or direct legislative history demonstrate that Congress intended a factually similar UCMJ punitive article to cover a class of offenses in a complete way.

(b) *Capital offense.* A capital offense may not be tried under Article 134.

(6) *Drafting specifications for Article 134 offenses.*

(a) *Specifications under clause 1 or 2.* When alleging a clause 1 or 2 violation, the specification must expressly allege that the conduct was “to the prejudice of good order and discipline” or that it was “of a nature to bring discredit upon the armed forces.” The same conduct may be prejudicial to good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces. Both clauses may be alleged; however, only one must be proven to satisfy the terminal element. If conduct by an accused does not fall under any of the enumerated Article 134 offenses (paragraphs 92 through 109 of this Part), a specification not listed in this Manual may be used to allege the offense.

Discussion

Clauses 1 and 2 are theories of liability that must be expressly alleged in a specification so that the accused will have notice as to which clause or clauses to defend against. The words “to the prejudice of good order and discipline in the armed forces” encompass both subparagraph c.(2)(a), prejudice to good order and discipline, and subparagraph c.(2)(b), breach of custom of the Service.

If clauses 1 and 2 are alleged together in the terminal element, the word “and” should be used to separate them. Any clause not proven beyond a reasonable doubt should be excepted from the specification at findings. *See* R.C.M. 918(a)(1). *See also* Appendix 23 of this Manual, Art. 79.

Although using the conjunctive “and” to connect the two theories of liability is recommended, a specification connecting the two theories with the disjunctive “or” is sufficient to provide the accused reasonable notice of the charge against him. *See* Appendix 23 of this Manual, Art. 134. However, use of the term “or” as a charging mechanism for alleging the terminal element in an Article 134 specification (i.e. “such conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces”) is not recommended

due to the risk of creating a vague and duplicitous specification, which may lead to uncertainty as to which theory of liability the members convicted the accused. To avoid ambiguity, an Article 134 clause 1 or 2 violation should be alleged as follows: (1) the conduct was prejudicial to good order and discipline; (2) the conduct was of a nature to bring discredit upon the armed forces; or (3) the conduct was prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces.

See Appendix 12A for a chart of lesser included offenses.

(b) *Specifications under clause 3.* When alleging a clause 3 violation, each element of the federal statute (including, in the case of a prosecution under 18 U.S.C. § 13, each element of the assimilated State, Territory, Possession, or District law) must be alleged expressly or by necessary implication, and the specification must expressly allege that the conduct was “an offense not capital.” In addition, any applicable statutes should be identified in the specification.

Analysis

91. Art. 134—General article

This paragraph is taken from paragraph 60 (Article 134—General Article) of MCM (2016 edition), and reflects two significant changes to designated Article 134 offenses within the MCM (2016 edition), namely, (1) the “relocation” of 36 of the 53 Article 134 offenses listed in MCM (2016 edition) to the enumerated punitive articles (Articles 80-132); and (2) the statutory amendment to Article 134 to provide extraterritorial jurisdiction for noncapital federal crimes committed outside of the United States which otherwise require commission of the offense “within the special maritime and territorial jurisdiction of the United States.” *2017 Amendment:*

a. *Statutory text.* Article 134 is amended and specifically provides that under clause 3, extraterritorial jurisdiction exists over non-capital federal crimes committed outside the United States which include as an element that the crime occur “within the special maritime or territorial jurisdiction of the United States.” Clause 3 aligns the prosecutorial scope of noncapital federal offenses under Article 134 with the prosecutorial scope of 18 U.S.C. § 3261 (applicable to civilian misconduct). This extraterritorial jurisdiction does not extend to 18 U.S.C. § 13—Federal Assimilative Crimes Act—which requires the commission of the offense concerned upon an enclave of federal exclusive or concurrent jurisdiction.

c. *Explanation* Subparagraph c.(4) is amended and clarifies the categories of federal crimes and offenses which may be prosecuted under clause (3), Article 134.

(6) *Drafting specifications for Article 134 offenses.* The third paragraph in the Discussion following subparagraph c.(6)(a) is consistent with *United States v. Miles*, 71 M.J. 671 (N.M. Ct. Crim. App. 2012) and R. Peter Masterton, “A View From the Bench: Prohibition on Disjunctive Charging Using ‘Or’”, *A View From the Bench: Prohibition on Disjunctive Charging Using ‘Or,’* ARMY LAW., May 2012.

92. Art. 134—(Animal abuse)

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) *Abuse, neglect, or abandonment of an animal.*

(a) That the accused wrongfully abused, neglected, or abandoned a certain (public*) animal (and the accused caused serious injury or death of the animal*); and

(b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit

upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

[Note: Add these elements as applicable.]

(2) *Sexual act with an animal.*

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

(b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.* This offense prohibits intentional abuse, culpable neglect, and abandonment of an animal. This offense does not include legal hunting, trapping, or fishing; reasonable and recognized acts of training, handling, or disciplining of an animal; normal and accepted farm or veterinary practices; research or testing conducted in accordance with approved governmental protocols; protection of person or property from an unconfined animal; or authorized military operations or military training.

(2) *Definitions.* As used in this paragraph:

(a) Abuse means intentionally and unjustifiably overdriving, overloading, overworking, tormenting, beating, depriving of necessary sustenance, allowing to be housed in a manner that results in chronic or repeated serious physical harm, carrying or confining in or upon any vehicles in a cruel or reckless manner, or otherwise mistreating an animal. Abuse may include any sexual touching of an animal if not included in the definition of sexual act with an animal below.

(b) Neglect means knowingly allowing another to abuse an animal, or, having the charge or custody of any animal, knowingly, or through culpable negligence, failing to provide it with proper food, drink, or protection from the weather consistent with the species, breed, and type of animal involved.

(c) Abandon means, while having the charge or custody of an animal, knowingly or through culpable negligence leaving of that animal at a location without providing minimum care for the animal.

(d) Animal means pets and animals of the type that are raised by individuals for resale to others, including: cattle, horses, sheep, pigs, goats, chickens, dogs, cats, and similar animals owned or under the control of any person. Animal does not include reptiles, insects, arthropods, or any animal defined or declared to be a pest by the administrator of the United States Environmental Protection Agency.

(e) Public animal means any animal owned or used by the United States or any animal owned or used by a local or State government in the United States, its territories or possessions. This would include, for example, drug detector dogs used by the Government.

(f) Sexual act with an animal means

(i) contact between the sex organ or anus of a person and the sex organ, anus or mouth of an animal; or

(ii) contact between the sex organ or anus of an animal and a person or object manipulated by a person, if done with an intent to arouse or gratify the sexual desire of any person.

(g) Serious injury of an animal means physical harm that involves a temporary but substantial disfigurement; causes a temporary but substantial loss or impairment of the function

of any bodily part or organ; causes a fracture of any bodily part; causes permanent maiming; causes acute pain of a duration that results in suffering; or carries a substantial risk of death. Serious injury includes burning, torturing, poisoning, or maiming.

d. *Maximum punishment.*

(1) *Abuse, neglect, or abandonment of an animal.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Abuse, neglect, or abandonment of a public animal.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(3) *Sexual act with an animal or cases where the accused caused the serious injury or death of the animal.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____, (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ (date), (wrongfully [abuse] [neglect] [abandon]) (*engage in a sexual act, to wit: _____, with) a certain (*public) animal (*and caused [serious injury to] [the death of] the animal), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

Analysis

92. Art. 134—(Animal abuse)

This paragraph is taken from paragraph 61 (Article 134—Animal Abuse) of MCM (2016 edition) without substantive change. This offense is relocated to its current position in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

93. Article 134—(Bigamy)

a. *Text of statute.* See paragraph 91.

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 either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and 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.” A belief that a prior marriage has been terminated by divorce, death of the other spouse, or otherwise, constitutes a mistake of fact defense only if the belief was reasonable. See R.C.M. 916(j)(1).

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

e. *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 spouse then living, to wit: _____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a

nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

Analysis

93. Art. 134—(Bigamy)

This paragraph is based on paragraph 65 (Article 134—Bigamy) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

94. Article 134—(Check, worthless making and uttering – by dishonorably failing to maintain funds)

a. *Text of statute.* See paragraph 91.

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 either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.* This offense differs from an Article 123a offense (paragraph 70) 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 96), dishonorable conduct of the accused is necessary, and the other principles discussed in paragraph 96 also apply here.

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

e. *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, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

Analysis

94. Art. 134—(Check, worthless making and uttering—by dishonorably failing to maintain funds)

This paragraph is taken from paragraph 68 (Article 134—Check, worthless, making and uttering—by dishonorably failing to maintain funds) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

95. Article 134—(Child pornography)

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) *Possessing, receiving, or viewing child pornography.*

(a) That the accused knowingly and wrongfully possessed, received, or viewed child pornography; and

(b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(2) *Possessing child pornography with intent to distribute.*

(a) That the accused knowingly and wrongfully possessed child pornography;

(b) That the possession was with the intent to distribute; and

(c) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(3) *Distributing child pornography.*

(a) That the accused knowingly and wrongfully distributed child pornography to another; and

(b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(4) *Producing child pornography.*

(a) That the accused knowingly and wrongfully produced child pornography; and

(b) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *In general.* The Article 134 offense of child pornography is broader than the federal and state statutes referenced below and extends to visual depictions of what appear to be minors. That is, the images include sexually explicit images that may not actually involve minors, but either resemble or are staged to appear so. Article 134—Child pornography is not intended to preempt prosecution of other federal and state law child pornography and obscenity offenses which may be amenable to courts-martial via Article 134 clauses 2 and 3.

(2) *Federal “Child pornography” and “Obscenity” offenses.* Practitioners are advised that the Title 18, United States Code, criminalizes the production, distribution, possession with intent

to distribute, possession, and receipt of sexually explicit images of actual children under the age of 18. *See* 18 U.S.C. §§ 2251; 2252A. Practitioners may charge these offenses utilizing Article 134, clause 3 (crimes and offenses not capital). Practitioners are further advised that Title 18 United States Code, Chapter 71, criminalizes the production of “obscene images,” that is, visual depictions of any kind, including a drawing, cartoon, sculpture, or painting. Such images are considered obscene under federal law when they depict minors involved in sexually explicit activity, and/or engaging in bestiality, sadistic or masochistic abuse. *See* 18 U.S.C. § 1466A. These federal obscenity offenses may likewise be prosecuted at courts-martial via Article 134, clause 3.

(3) *State “child pornography” and “obscenity” offenses.* If a Servicemember violates an applicable state child pornography or obscenity statute within the jurisdiction of a given state, the substance of that state child pornography and obscenity law may be charged via Article 134, clause 2 as conduct “of a nature to bring discredit upon the armed forces.” When so charged, the Article 134 charge should recite every applicable element under the state statute. The maximum punishment for such offenses is the applicable maximum punishment prescribed for such an offense under state law.

(4) Child pornography means material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct.

(5) An accused may not be convicted of possessing, receiving, viewing, distributing, or producing child pornography if he was not aware that the images were of minors, or what appeared to be minors, engaged in sexually explicit conduct. Awareness may be inferred from circumstantial evidence such as the name of a computer file or folder, the name of the host website from which a visual depiction was viewed or received, search terms used, and the number of images possessed.

(6) Distributing means delivering to the actual or constructive possession of another.

(7) Minor means any person under the age of 18 years.

(8) Possessing means exercising 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 something in a locker or a 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 for more than one person to possess an item simultaneously, as when several people share control over an item.

(9) Producing means creating or manufacturing. As used in this paragraph, it refers to making child pornography that did not previously exist. It does not include reproducing or copying.

(10) Sexually explicit conduct means actual or simulated:

(a) sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) lascivious exhibition of the genitals or pubic area of any person.

(11) Visual depiction includes any developed or undeveloped photograph, picture, film or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image.

(12) *Wrongfulness*. Any facts or circumstances that show that a visual depiction of child pornography was unintentionally or inadvertently acquired are relevant to wrongfulness, including, but not limited to, the method by which the visual depiction was acquired, the length of time the visual depiction was maintained, and whether the visual depiction was promptly, and in good faith, destroyed or reported to law enforcement.

(13) On motion of the Government, in any prosecution under this paragraph, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography or visual depiction or copy thereof shall not be admissible and may be redacted from any otherwise admissible evidence, and the panel shall be instructed, upon request of the Government, that it can draw no inference from the absence of such evidence.

d. *Maximum punishment*.

(1) *Possessing, receiving, or viewing child pornography*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) *Possessing child pornography with intent to distribute*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(3) *Distributing child pornography*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Producing child pornography*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

e. *Sample specification*.

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ knowingly and wrongfully (possess) (receive) (view) (distribute) (produce) child pornography, to wit: a (photograph) (picture) (film) (video) (digital image) (computer image) of a minor, or what appears to be a minor, engaging in sexually explicit conduct (with intent to distribute the said child pornography), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

Analysis

95. Art. 134—(Child pornography)

This paragraph is taken from paragraph 68b (Article 134—Child pornography) of MCM (2016 edition).

c. *Explanation* (1) *In general*. The scope of child pornography under Article 134 is broader than the scope of child pornography criminalized under 18 U.S.C. § 2252A. *Cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Article 134 includes visual depictions of what appear to be minors engaged in sexually explicit conduct within the definition of child pornography. *See United States v. Blouin*, 74 M.J. 247 (C.A.A.F. 2015); *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009); *United States v. Brisbane*, 63 M.J. 106, 116 (C.A.A.F. 2006); *United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006); *United States v. Reeves*, 62 M.J. 88, 96 (C.A.A.F. 2005); *United States v. Mason*, 60 M.J. 15, 19 (C.A.A.F. 2004); *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003).

(2) *Federal “Child pornography” and “Obscenity” offenses* and (3) *State “child pornography” and “obscenity” offenses* are new and emphasize that Article 134—(Child pornography) is not intended to preempt applicable federal and state child pornography and obscenity statutes. (2)

and (3) also discuss the circumstances under which these federal and state child pornography and obscenity statutes may be charged under Article 134, clauses 2 and 3.

(10) *Sexually explicit conduct*. The amendments do not change the usefulness of the “*Dost* factors” in determining whether a particular image qualifies as a “lascivious exhibition”, for purposes of this offense. *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Ca. 1986), *aff’d sub nom United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). The *Dost* factors are also commonly employed by federal civilian and military courts in interpreting “lascivious exhibition” for purposes of 18 U.S.C. § 2252A. *See United States v. Roderick*, 62 M.J. 425, 430 (C.A.A.F. 2006).

96. Article 134—(Debt, dishonorably failing to pay)

a. *Text of statute*. *See* paragraph 91.

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 either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation*. More than negligence in nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one’s just obligations. For a debt to form the basis of this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to the accused’s belief, at the time alleged. The offense should not be charged if there was a genuine dispute between the parties as to the facts or law relating to the debt which would affect the obligation of the accused to pay. The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment. The length of the period of nonpayment and any denial of indebtedness which the accused may have made may tend to prove that the accused’s conduct was dishonorable, but the court-martial may convict only if it finds from all of the evidence that the conduct was in fact dishonorable.

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

e. *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, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

Analysis

96. Art. 134—(Debt, dishonorably failing to pay)

This paragraph is taken from paragraph 71 (Article 134—Debt: dishonorable failing to pay) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

97. Article 134—(Disloyal statements)

a. *Text of statute.* See paragraph 91.

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 either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and 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. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction), 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 _____, a statement, to wit: “_____,” or words to that effect, which statement was disloyal to the United States, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

Analysis

97. Art. 134—(Disloyal statements)

This paragraph is taken from paragraph 72 (Article 134—Disloyal statements) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

98. Art. 134—(Disorderly conduct, drunkenness)

a. *Text of statute.* See paragraph 91.

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 either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) *Drunkness.* See subparagraph 49.c.(1)(a) for a discussion of drunk.

(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.* 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. Maximum punishment.

(1) *Disorderly conduct.*

(a) *Under such circumstances as to bring discredit upon the military Service.* Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

(b) *Other cases.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(2) *Drunkness.*

(a) *Aboard ship or under such circumstances as to bring discredit upon the military Service.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(b) *Other cases.* Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(3) *Drunk and disorderly.*

(a) *Aboard ship.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) *Under such circumstances as to bring discredit upon the military Service.* Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

(c) *Other cases.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. 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), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

Analysis

98. Art. 134—(Disorderly conduct, drunkenness)

This paragraph is taken from paragraph 73 (Article 134—Disorderly conduct, drunkenness) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

99. Article 134—(Extramarital sexual conduct)

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) That the accused wrongfully engaged in extramarital conduct as described in subparagraph c.(2) with a certain person;

(2) That, at the time, the accused knew that the accused or the other person was married to someone else; and

(3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *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 extramarital conduct must either be directly prejudicial to good order and discipline or service discrediting or both. Extramarital conduct that is directly prejudicial to good order and discipline 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, or both. Extramarital conduct may 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 extramarital 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 extramarital 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 extramarital conduct is prejudicial to good order and discipline or is of a nature to bring discredit upon the armed forces, or both:

(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 the co-actor, or their relationship to the armed forces;

(d) The impact, if any, of the extramarital conduct 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 extramarital conduct was accompanied by other violations of the UCMJ;

(g) The negative impact of the conduct on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organization morale, teamwork, and efficiency;

(h) Whether the accused's or co-actor's marriage was pending legal dissolution, which is defined as an action with a view towards divorce proceedings, such as the filing of a petition for divorce; and

(i) Whether the extramarital conduct involves an ongoing or recent relationship or is remote in time.

(2) *Extramarital conduct.* The conduct covered under this paragraph means any of the following acts engaged in by persons of the same or opposite sex:

- (a) genital to genital sexual intercourse;
- (b) oral to genital sexual intercourse;
- (c) anal to genital sexual intercourse; and
- (d) oral to anal sexual intercourse.

(3) *Marriage.* A marriage exists until it is dissolved in accordance with the laws of a competent state or foreign jurisdiction.

(4) *Legal Separation.* It is an affirmative defense to the offense of Extramarital sexual conduct that the accused, co-actor, or both were legally separated by order of a court of competent jurisdiction. The affirmative defense does not apply unless all parties to the conduct are either legally separated or unmarried at the time of the conduct.

(5) *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 legally separated, 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. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

e. *Sample specification.*

In that _____ (personal jurisdiction data), (a married person), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 ____, wrongfully engage in extramarital conduct, (to wit: _____) with _____, (a person the accused knew was married to a person other than the accused) (a person the accused knew was not the accused's spouse), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

Analysis

99. Art. 134—(Extramarital sexual conduct)

This paragraph is drawn from paragraph 62 (Article 134—Adultery) of MCM (2016 edition).

2017 Amendment: This offense does not preempt any additional lawful regulations prescribed by a proper authority to proscribe additional forms of improper extramarital conduct by military personnel. Violations of such regulations, directives, or orders may be punishable under Article 92. *See* paragraph 18.

b. *Elements.* The definition of extramarital conduct is consistent with the definition of sexually explicit conduct under 18 U.S.C. § 2256(2)(A)(i) and is gender neutral.

c. *Explanation.* (1) *Nature of the offense* was deleted and replaced with *Conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces*. Subparagraph c.(1)(h) from the MCM (2016 edition) regarding legal separations is now an affirmative defense.

Subparagraph c.(1)(h) now lists pending legal dissolution as a factor in assessing whether the conduct at issue meets a terminal element.

(4) *Legal separation.* This is a new affirmative defense. In order for the affirmative defense to apply, both parties to the conduct must either be legally separated or unmarried. That is, it is not an affirmative defense if the accused is legally separated but the co-actor is still married. By the same token, it is an affirmative defense if the accused is legally separated and the co-actor is unmarried.

100. Article 134—(Firearm, discharging—through negligence)

a. *Text of statute.* See paragraph 91.

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 either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.* For a discussion of negligence, see subparagraph 103.c.(2).

d. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *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 _____, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

Analysis

100. Art. 134—(Firearm, discharging—through negligence)

This paragraph is taken from paragraph 80 (Article 134—Firearm, discharging through negligence) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

101. Article 134—(Fraternization)

a. *Text of statute.* See paragraph 91.

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 either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the

armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) *In general.* The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The facts 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 18.

d. Maximum punishment. Dismissal, forfeiture of all pay and allowances, and confinement for 2 years.

e. Sample specification.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), 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, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

Analysis

101. Art. 134—(Fraternization)

This paragraph is taken from paragraph 83 (Article 134—Fraternization) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

102. Article 134—(Gambling with subordinate)

a. Text of statute. *See* paragraph 91.

b. Elements.

- (1) That the accused gambled with a certain Servicemember;
- (2) That the accused was then a noncommissioned or petty officer;
- (3) That the Servicemember was not then a noncommissioned or petty officer and was subordinate to the accused;
- (4) That the accused knew that the Servicemember was not then a noncommissioned or petty officer and was subordinate to the accused; and

(5) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and 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 103.

d. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, gamble with _____, then knowing that the said _____ was not a noncommissioned or petty officer and was subordinate to the said _____, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

Analysis

102. Art. 134—(Gambling with subordinate)

This paragraph is taken from paragraph 84 (Article 134—Gambling with subordinate) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

103. Article 134—(Homicide, negligent)

a. *Text of statute.* *See* paragraph 91.

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 either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and 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* subparagraph 57.c.(2)(a).

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

e. *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) (_____), and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

Analysis

103. Art. 134—(Homicide, negligent)

This paragraph is taken from paragraph 85 (Article 134—Homicide, negligent) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

104. Article 134—(Indecent conduct)

a. *Text of Statute.* See paragraph 91.

b. *Elements.*

(1) That the accused engaged in certain conduct;

(2) That the conduct was indecent; and

(3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) Indecent means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.

(2) Indecent conduct includes offenses previously proscribed by “Indecent acts with another” except that the presence of another person is no longer required. For purposes of this offense, the words “conduct” and “act” are synonymous. For child offenses, some indecent conduct may be included in the definition of lewd act and preempted by Article 120b(c). See subparagraph 91.c.(5)(a).

d. *Maximum punishment.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, commit indecent conduct, to wit: _____, and that said conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces).

Analysis

104. Art. 134—(Indecent conduct)

This paragraph is taken without substantive change from paragraph 90 (Article 134—Indecent conduct) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

105. Article 134—(Indecent language)

a. *Text of statute.* See paragraph 91.

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 either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

[Note: If applicable, add the following additional element:]

(4) 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 62 if the communication was made in the physical presence of a child.

d. *Maximum punishment.*

(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.

e. *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: _____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

Analysis

105. Art. 134—(Indecent language)

This paragraph is taken from paragraph 89 (Article 134—Indecent language) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

106. Article 134—(Pandering and prostitution)

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) *Prostitution.*

(a) That the accused engaged in a sexual act 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 either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(2) *Patronizing a prostitute.*

(a) That the accused engaged in a sexual act with another person not the accused's spouse;
(b) That the accused compelled, induced, enticed, or procured such person to engage in a sexual act in exchange for money or other compensation;

(c) That this act was wrongful; and

(d) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and 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 a sexual act 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 either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

(4) *Pandering by arranging or receiving consideration for arranging for a sexual act.*

(a) That the accused arranged for, or received valuable consideration for arranging for, a certain person to engage in a sexual act;

(b) That the arranging (and receipt of consideration) was wrongful; and

(c) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. *Explanation.*

(1) *Sexual act.* Sexual act as used in this paragraph shall be as defined in paragraph 60.a.(g)(1).

(2) *Other regulations.* This offense does not preempt any other lawful regulations or orders prescribed by a proper authority that proscribe other forms of sexual conduct for compensation by military personnel. Violations of such regulations or orders may be punishable under Article 92. See paragraph 18.

d. *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.

e. *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 (a

sexual act) (sexual acts), to wit: _____, with _____, a person not (his) (her) spouse, for the purpose of receiving (money) (_____), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

(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 (a sexual act) (sexual acts), to wit: _____, with the accused in exchange for (money) (_____), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

(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 (a sexual act) (sexual acts), to wit: _____, for hire and reward with persons to be directed to (him) (her) by the said _____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

(4) *Arranging, or receiving consideration for arranging for a sexual act.*

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 (a sexual act) (sexual acts) to wit: _____, with _____, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

Analysis

106. Art. 134—(Pandering and prostitution)

This paragraph is based on paragraph 97 (Article 134—Pandering and prostitution) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016’s reorganization of the punitive articles.

(c)(1) *Sexual act.* The definition of “sexual act” conforms to Article 120(g) as amended by Section 5430 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

107. Article 134—(Self-injury without intent to avoid service)

a. *Text of statute.* See paragraph 91.

b. *Elements.*

(1) That the accused intentionally inflicted injury upon himself or herself;

(2) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the

armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and 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 7) 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 debility is a self-inflicted injury. Similarly, the injury may be inflicted by another at the accused's request.

Discussion

Bona fide suicide attempts should not be charged as criminal offenses. When making a determination whether the injury by the Servicemember was a bona fide suicide attempt, the convening authority should consider factors including, but not limited to, health conditions, personal stressors, and DoD policy related to suicide prevention.

d. *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.

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) (in a hostile fire pay zone) on or about ____ 20 __, (a time of war,) intentionally injure (himself) (herself) by _____ (nature and circumstances of injury), and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

Analysis

107. Art. 134—(Self-injury without intent to avoid service)

This paragraph is taken from paragraph 103a (Article 134—Self-injury without intent to avoid service) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

108. Article 134—(Straggling)

a. *Text of statute.* *See* paragraph 91.

b. *Elements.*

(1) That the accused, while accompanying the accused's organization on a march, maneuvers, or similar exercise, straggled;

(2) That the straggling was wrongful; and

(3) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and 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. *Maximum punishment.* Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

e. *Sample specification.*

In that _____ (personal jurisdiction data) (subject-matter jurisdiction data, if required), did, at _____, on or about ____ 20 __, while accompanying (his) (her) organization on (a march) (maneuvers) (_____), wrongfully straggle, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

Analysis

108. Art. 134—(Straggling)

This paragraph is taken from paragraph 107 (Article 134—Straggling) of MCM (2016 edition). This offense is relocated to its current position in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.

109. Article 134—(Visual depiction, nonconsensual distribution or broadcast)

a. *Text of statute.* See paragraph 91.

b. Elements.

(1) That the accused knowingly distributed or broadcasted a visual depiction;

(2) That the visual depiction was of another person who is identifiable from the depiction itself or from information conveyed in connection with the depiction;

(3) That the person depicted is engaging in sexually explicit conduct or the depiction is of the private area of the person depicted;

(4) That the visual depiction was originally produced under circumstances in which the person depicted had a reasonable expectation of privacy;

(5) That the distribution or broadcasting was committed—

(a) with the intent to realize personal gain;

(b) with the intent to humiliate, harm, harass, intimidate, threaten, or coerce the depicted person; or

(c) with reckless disregard as to whether the depicted person would be humiliated, harmed, harassed, intimidated, threatened, or coerced;

(6) That the accused knew or should have known that the depicted person did not consent to the distribution or broadcast of the visual depiction; and

(7) That, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

c. Explanation

(1) *Distribute*. Distribute means delivering to the actual or constructive possession of another, including transmission by electronic means.

(2) *Broadcast*. Broadcast means to electronically transmit a visual depiction with the intent that it be viewed by a person or persons.

(3) *Identifiable*. Whether an individual is identifiable is determined under the totality of the circumstances.

(4) *Visual depiction*. Visual depiction includes any developed or undeveloped photograph, picture, film or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image. Visual depiction does not include cartoons or drawings.

(5) *Sexually explicit conduct*. Sexually explicit conduct means actual or simulated—

(a) genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex;

(b) bestiality;

(c) masturbation; or

(d) sadistic or masochistic abuse.

(6) *Private area*. Private area means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.

(7) *Reasonable expectation of privacy*. The term, “under circumstances in which the person depicted had a reasonable expectation of privacy” means circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.

(8) Law enforcement and other legal proceedings. This paragraph—

(a) does not prohibit any lawful law enforcement, correctional, or intelligence activity;

(b) shall not apply in the case of a person reporting unlawful activity; and

(c) shall not apply to a subpoena or court order for use in a legal proceeding.

(9) Voluntary public or commercial exposure. This paragraph does not apply to a visual depiction of a person’s voluntary engagement in sexually explicit conduct or a voluntary exposure of the person’s own private area if such exposure takes place in public or in a lawful commercial setting.

(10) Certain categories of visual depictions excepted. This paragraph shall not apply in the case of a visual depiction, the disclosure of which is in the bona fide public interest.

d. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

e. *Sample specification*.

In that _____ (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __, knowingly (distribute) (broadcast) a visual depiction of _____, who is identifiable from (the depiction itself) (information conveyed in connection with the depiction), [with the intent to (realize personal gain) (humiliate) (harm) (harass) (intimidate) (threaten) (coerce) the depicted person),] [with reckless disregard as to whether the depicted person would be (humiliated) (harmed) (harassed) (intimidated) (threatened) (coerced),] where the depiction was of (_____ engaging in sexually explicit conduct to wit:_____) (the private area of _____ to wit:_____), where the visual depiction was originally produced under circumstances in which the person depicted had a reasonable expectation of privacy, where the accused (knew) (should have known) that the depicted person did not consent to the (distribution) (broadcast) of the visual depiction, and that such conduct was (to the prejudice of good order and discipline in the armed forces) (of a nature to bring discredit upon the armed forces) (to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces).

Analysis

109. Art. 134—(Visual depiction, nonconsensual distribution or broadcast)

This paragraph is taken from paragraph 114 (Article 134—(Visual depiction, nonconsensual distribution or broadcast) of MCM (2016 edition), as amended by Executive Order XXXXX without substantive amendment. This offense is relocated to its current position in conjunction with the Military Justice Act of 2016's reorganization of the punitive articles.