49 FR 17152

April 23, 1984

Presidential Documents

Reporter
49 FR 17152

Notice

Part 1 of 4. You are viewing a very large document that has been divided into parts.

Title: Title 3--
The President
Manual for Courts-Martial, United States, 1984

Agency

FEDERAL REGISTER

Identifier: Executive Order 12473 of April 13, 1984

Text

By virtue of the authority vested in me as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code (Uniform Code of Military Justice), I hereby prescribe the following Manual for Courts-Martial to be designated as "Manual for Courts-Martial, United States, 1984."

This Manual shall take effect on August 1, 1984, with respect to all court-martial processes taken on and after that date: *Provided,* That nothing contained in this Manual shall be construed to invalidate any restraint, investigation, referral of charges, designation or detail of a military judge or counsel, trial in which arraignment had been had, or other action begun prior to that date, and any such restraint, investigation, trial, or other action may be completed in accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed; *Provided further,* That Rules for Courts-Martial 908, 1103(j), 1105-1107, 1110-1114, 1201, and 1203 shall not apply to any case in which the findings and sentence were adjudged by a court-martial before August 1, 1984, and the post-trial and appellate review of such cases shall be completed in

accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed; *Provided further,* That nothing contained in this Manual shall be construed to make punishable any act done or omitted prior to August 1, 1984, which was not punishable when done or omitted; *Provided further,* That nothing in part IV of this Manual shall be construed to invalidate the prosecution of any offense committed before the effective date of this Manual; *Provided further,* That the maximum punishment for an offense committed prior to August 1, 1984, shall not exceed the applicable limit in effect at the time of the commission of such offense; *Provided further,* That for offenses committed prior to August 1, 1984, for which a sentence is adjudged on or after August 1, 1984, if the maximum punishment authorized in this Manual is less than that previously authorized, the lesser maximum authorized punishment shall apply; *And provided further,* That Part V of this Manual shall not apply to nonjudicial punishment proceedings which were initiated before August 1, 1984, and nonjudicial punishment proceedings in such cases shall be completed in accordance with applicable laws, Executive orders, and regulations in the same manner and with the same effect as if this Manual had not been prescribed.

The Manual for Courts-Martial, 1969, United States (Revised edition), prescribed by Executive Order No. 11476, as amended by Executive Order Nos. 11835, 12018, 12198, 12233, 12306, 12340, 12383, and 12460 is hereby rescinded, effective August 1, 1984.

The Secretary of Defense shall cause this Manual to be revised annually and shall recommend to the President any appropriate amendments.

The Secretary of Defense, on behalf of the President, shall transmit a copy of this Order to the Congress of the United States in accord with Section 836 of Title 10 of the United States Code.

/s/ Ronald Reagon

The White House, *April 13, 1984.*

Billing code 3195-01-M

PART I

PREAMBLE

1. Sources of military jurisdiction. The sources of military jurisdiction include the Constitution and international law. International law includes the law of war.

2. Exercise of military jurisdiction.

(a) Kinds. Military jurisdiction is exercised by:

(1) A government in the exercise of that branch of the municipal law which regulates its military establishment. (Military law).

(2) A government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require. (Martial law).

(3) A belligerent occupying enemy territory. (Military government).

(4) A government with respect to offenses against the law of war.

(b) Agencies. The agencies through which military jurisdiction is exercised include:

(1) Courts-martial for the trial of offenses against military law and, in the case of general courts-martial, of persons who by the law of war are subject to trial by military tribunals. See Parts II, III, and IV of this Manual for rules governing courts-martial.

(2) Military commissions and provost courts for the trial of cases within their respective jurisdictions. Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.

(3) Courts of inquiry for the investigation of any matter referred to such court by competent authority. See Article 135. The Secretary concerned may prescribe regulations governing courts of inquiry.

(4) Nonjudicial punishment proceedings of a commander under Article 15. See Part V of this Manual.

3. Nature and purpose of military law. Military law consists of the statutes governing the military establishment and regulations issued thereunder, the constitutional powers of the President and regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

4. Structure and application of the Manual for Courts-Martial. The Manual for Courts-Martial shall consist of this Preamble, the Rules for Courts-Martial, the Military Rules of Evidence, the Punitive Articles, and Nonjudicial Punishment Procedures (Parts I-V). This Manual shall be applied consistent with the purpose of military law.

PART II

RULES FOR COURTS-MARTIAL

CHAPTER I. GENERAL PROVISIONS

Rule 101. Scope, title

(a) In general. These rules govern the procedures and punishments in all courts-martial and, whenever expressly provided, preliminary, supplementary, and appellate procedures and activities.

(b) Title. These rules may be known and cited as the Rules for Courts-Martial (R.C.M.).

Rule 102. Purpose and construction

(a) Purpose. These rules are intended to provide for the just determination of every proceeding relating to trial by court-martial.

(b) Construction. These rules shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Rule 103. Definitions and rules of construction

The following definitions and rules of construction apply throughout this Manual, unless otherwise expressly provided.

(1) "Article" refers to articles of the Uniform Code of Military Justice unless the context indicates otherwise.

(2) "Capital case" means a general court-martial to which a capital offense has been referred without an instruction that the case be treated as noncapital, and, in the case of a rehearing or new or other trial, for which offense death remains an authorized punishment under R.C.M. 810(d).

(3) "Capital offense" means an offense for which death is an authorized punishment under the code and Part IV of this Manual or under the law of war.

(4) "Code" refers to the Uniform Code of Military Justice, unless the context indicates otherwise.

(5) "Commander" means a commissioned officer in command or an officer in charge except in Part V or unless the context indicates otherwise.

(6) "Convening authority" includes a commissioned officer in command for the time being and successors in command.

(7) "Copy" means an accurate reproduction, however made. Whenever necessary and feasible, a copy may be made by handwriting.

(8) "Court-martial" includes, depending on the context:

(A) The military judge and members of a general or special court-martial;

(B) The military judge when a session of a general or special court-martial is conducted without members under Article 39(a);

(C) The military judge when a request for trial by military judge alone has been approved under R.C.M. 903;

(D) The members of a special court-martial when a military judge has not been detailed; or

(E) The summary court-martial officer.

(9) "Days." When a period of time is expressed in a number of days, the period shall be in calendar days, unless otherwise specified. Unless otherwise specified, the date on which the period begins shall not count, but the date on which the period ends shall count as one day.

(10) "Detail" means to order a person to perform a specific, temporary duty, unless the context indicates otherwise.

(11) "Explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (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 compound, mixture, or device which is an explosive within the meaning of 18 U.S.C. § 232(5) or 844(j).

(12) "Firearm" means any weapon which is designed to or may be readily converted to expel any projectile by the action of an explosive.

(13) "Joint" in connection with military organization connotes activities, operations, organizations, and the like in which elements of more than one military service of the same nation participate.

(14) "Members." The members of a court-martial are the voting members detailed by the convening authority.

(15) "Military judge" means the presiding officer of a general or special court-martial detailed in accordance with Article 26. Except as otherwise expressly provided, in the context of a summary court-martial "military judge" includes the summary court-martial officer or in the context of a special court-martial without a military judge, the president. Unless otherwise indicated in the context, "the military judge" means the military judge detailed to the court-martial to which charges in a case have been referred for trial.

(16) "Party." Party, in the context of parties to a court-martial, means:

(A) The accused and any defense or associate or assistant defense counsel and agents of the defense counsel when acting on behalf of the accused with respect to the court-martial in question; and

(B) Any trial or assistant trial counsel representing the United States, and agents of the trial counsel when acting on behalf of the trial counsel with respect to the court-martial in question.

(17) "Staff judge advocate" means a judge advocate so designated in the Army, Air Force, or Marine Corps, and means the principal legal advisor of a command in the Navy and Coast Guard who is a judge advocate.

(18) "Sua sponte" means that the person involved acts on that person's initiative, without the need for a request, motion, or application.

(19) "War, time of." For purposes of R.C.M. 1004(c)(6) and of implementing the applicable paragraphs of Parts IV and V of this Manual only, "time of war" means a period of war declared by Congress or the factual determination

by the President that the existence of hostilities warrants a finding that a "time of war" exists for purposes of R.C.M. 1004(c)(6) and Parts IV and V of this Manual.

(20) The definitions and rules of construction in 1 U.S.C. §§ 1 through 5 and in 10 U.S.C. §§ 101 and 801.

Rule 104. Unlawful command influence

(a) General prohibitions.

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

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

(3) Exceptions.

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

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

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

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

(b) Prohibitions concerning evaluations.

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

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

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

(2) Evaluation of military judge.

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

(B) Special courts-martial. The convening authority may not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a special court-martial which relates to the performance of duty as a military judge. When the military judge is normally rated or the military judge's report is reviewed by the convening authority, the manner in which such military judge will be rated or evaluated upon the performance of duty as a military judge may be as prescribed in regulations of the Secretary concerned which shall ensure the absence of any command, influence in the rating or evaluation of the military judge's judicial performance.

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

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

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

Rule 106. Delivery of military offenders to civilian authorities

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

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

If a commissioned officer of any armed force is dismissed by order of the President under 10 U.S.C. § 1161(a)(3), that officer may apply for trial by general court-martial within a reasonable time.

Rule 108. Rules of court

The Judge Advocate General concerned and persons designated by the Judge Advocate General may make rules of court not inconsistent with these rules for the conduct of court-martial proceedings. Such rules shall be disseminated in accordance with procedures prescribed by the Judge Advocate General concerned or a person to whom this authority has been delegated. Noncompliance with such procedures shall not affect the validity of any rule of court with respect to a party who has received actual and timely notice of the rule or who has not been prejudiced under Article 59 by the absence of such notice. Copies of all rules of court issued under this rule shall be forwarded to the Judge Advocate General concerned.

Rule 109. Professional supervision of military judges and counsel

(a) In general. Each Judge Advocate General may prescribe rules not inconsistent with this Manual to govern the professional supervision and discipline of military trial and appellate judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual. After notice and the opportunity to be heard, counsel and military judges may be suspended, for violations of such rules, from practice in courts-martial and in the Courts of Military Review only by the Judge Advocate General of the armed force of such court. The Judge Advocate General concerned may upon good cause shown modify or revoke suspensions.

(b) Action without further hearing. When a Judge Advocate General suspends a person from practice or the Court of Military Appeals disbars a person, any Judge Advocate General may suspend that person from practice upon notice and opportunity to respond in writing, but without further hearing.

CHAPTER II. JURISDICTION

Rule 201. Jurisdiction in general

(a) Nature of courts-martial jurisdiction.

(1) The jurisdiction of courts-martial is entirely penal or disciplinary.

(2) The code applies in all places.

(3) The jurisdiction of a court-martial with respect to offenses under the code is not affected by the place where the court-martial sits. The jurisdiction of a court-martial with respect to military government or the law of war is not affected by the place where the court-martial sits except as otherwise expressly required by this Manual or applicable rule of international law.

(b) Requisites of court-martial jurisdiction. A court-martial always has jurisdiction to determine whether it has jurisdiction. Otherwise for a court-martial to have jurisdiction:

(1) The court-martial must be convened by an official empowered to convene it;

(2) The court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here "personnel" includes only the military judge, the members, and the summary court-martial;

(3) Each charge before the court-martial must be referred to it by competent authority;

(4) The accused must be a person subject to court-martial jurisdiction; and

(5) The offense must be subject to court-martial jurisdiction.

(c) Contempt. A court-martial may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both.

(d) Exclusive and nonexclusive jurisdiction.

(1) Courts-martial have exclusive jurisdiction of purely military offenses.

(2) An act or omission which violates both the code and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal, foreign or domestic, or, subject to R.C.M. 907(b)(2)(C) and regulations of the Secretary concerned, by both.

(3) Where an act or omission is subject to trial by court-martial and by one or more civil tribunals, foreign or domestic, the determination which nation, state, or agency will exercise jurisdiction is a matter for the nations, states, and agencies concerned, and is not a right of the suspect or accused.

(e) Reciprocal jurisdiction.

(1) Each armed force has court-martial jurisdiction over all persons subject to the code.

(2) So much of the authority vested in the President by Article 22(a)(7) to empower any officer of the armed forces who is the commander of a joint command or joint task force to convene a general court-martial for the trial of members of any of the armed forces in accordance with Article 17(a) and this rule is delegated to the Secretary of Defense. A commander who has been empowered to convene courts-martial under this rule by the President or the Secretary of Defense may expressly authorize a commanding officer of a subordinate joint command or subordinate joint task force who is authorized to convene special and summary courts-martial to convene such courts-martial for the trial of members of other armed forces under regulations which the superior commander may prescribe.

(3) A member of one armed force may be tried by a court-martial convened by a member of another armed force when:

(A) the court-martial is convened by a commander of a joint command or joint task force who has been specifically empowered by the President, the Secretary of Defense, or a superior commander under the provisions of subsection (e)(2) of this rule to refer such cases for trial by courts-martial; or

(B) the accused cannot be delivered to the armed force of which the accused is a member without manifest injury to the armed forces.

An accused should not ordinarily be tried by a court-martial convened by a member of a different armed force except when the circumstances described in (A) or (B) exist. However, failure to comply with this policy does not affect an otherwise valid referral.

(4) Nothing in this rule prohibits detailing to a court-martial a military judge who is a member of an armed force different from that of the accused or the convening authority, or both.

(5) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required by the code, shall be carried out by the department that includes the armed force of which the accused is a member.

(f) Types of courts-martial.

(1) General courts-martial.

(A) Cases under the code.

(i) Except as otherwise expressly provided, general courts-martial may try any person subject to the code for any offense made punishable under the code. General courts-martial also may try any person for a violation of Article 83, 104, or 106.

(ii) Upon a finding of guilty of an offense made punishable by the code, general courts-martial may, within limits prescribed by this Manual, adjudge any punishment authorized under R.C.M. 1003.

(iii) Notwithstanding any other rule, the death penalty may not be adjudged if:

(a) Not specifically authorized for the offense by the code and Part IV of this Manual; or

(b) The case has been referred as noncapital.

(B) Cases under the law of war.

(i) General courts-martial may try and person who by the law of war is subject to trial by military tribunal for any crime or offense against:

(a) The law of war; or

(b) The law of the territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or part by the military authority of the occupying power. The law of the occupied territory includes the local criminal law as adopted or modified by competent authority, and the proclamations, ordinances, regulations, or orders promulgated by competent authority of the occupying power.

(ii) When a general court-martial exercises jurisdiction under the law of war, it may adjudge any punishment permitted by the law of war.

(C) Limitation in judge alone cases. A general court-martial composed only of a military judge does not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been referred to trial as noncapital.

(2) Special courts-martial.

(A) In general. Except as otherwise expressly provided, special courts-martial may try any person subject to the code for any noncapital offense made punishable by the code and, as provided in this rule, for capital offenses.

(B) Punishments.

(i) Upon a finding of guilty, special courts-martial may adjudge, under limitations prescribed by this Manual, any punishment authorized under R.C.M. 1003 except death, dishonorable discharge, dismissal, confinement for more than 6 months, hard labor without confinement for more than 3 months, forfeiture of pay exceeding two-thirds pay per month, or any forfeiture of pay for more than 6 months.

(ii) A bad-conduct discharge may not be adjudged by a special court-martial unless:

(a) Counsel qualified under Article 27(b) is detailed to represent the accused; and

(b) A military judge is detailed to the trial, except in a case in which a military judge could not be detailed because of physical conditions or military exigencies. Physical conditions or military exigencies, as the terms are here used, may exist under rare circumstances, such as on an isolated ship on the high seas or in a unit in an inaccessible area, provided compelling reasons exist why trial must be held at that time and at that place. Mere inconvenience does not constitute a physical condition or military exigency and does not excuse a failure to detail a military judge. If a military judge cannot be detailed because of physical conditions or military exigencies, a bad-conduct discharge may be adjudged provided the other conditions have been met. In that event, however, the convening authority shall, prior to trial, make a written statement explaining why a military judge could not be obtained. This statement shall be appended to the record of trial and shall set forth in detail the reasons why a military judge could not be detailed, and why the trial had to be held at that time and place.

(C) Capital offenses.

(i) A capital offense for which there is prescribed a mandatory pounishment beyond the punitive power of a special court-martial shall not be referred to such a court-martial.

(ii) An officer exercising general court-martial jurisdiction over the command which includes the accused may permit any capital offense other than one described in subsection (f)(2)(C)(i) of this rule to be referred to a special court-martial for trial.

(iii) The Secretary concerned may authorize, by regulation, officers exercising special court-martial jurisdiction to refer capital offenses, other than those described in subsection (f)(2)(C)(i) of this rule, to trial by special court-

martial without first obtaining the consent of the officer exercising general court-martial jurisdiction over the command.

(3) Summary courts-martial. See R.C.M. 1301(c) and (d)(1).

(g) Concurrent jurisdiction of other military tribunals. The provisions of the code and this Manual conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

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

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

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

(c) Attachment of jurisdiction over the person.

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

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

Rule 203. Jurisdiction over the offense

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

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

Rule 301. Report of offense

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

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

Rule 302. Apprehension

(a) Definition and scope.

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

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

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

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

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

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

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

(d) How an apprehension may be made.

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

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

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

(e) Where an apprehension may be made.

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

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

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

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

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

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

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

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

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

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

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

Rule 303. Preliminary inquiry into reported offenses

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

Rule 304. Pretrial restraint

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

(1) Conditions on liberty. Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.

(2) Restriction in lieu of arrest. Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

(3) Arrest. Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(4) Confinement. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. See R.C.M. 305.

(b) Who may order pretrial restraint.

(1) Of civilians and officers. Only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer.

(2) Of enlisted persons. Any commissioned officer may order pretrial restraint of any enlisted person.

(3) Delegation of authority. The authority to order pretrial restraint of civilians and commissioned and warrant officers may not be delegated. A commanding officer may delegate to warrant, petty, and noncommissioned officers authority to order pretrial restraint of enlisted persons of the commanding officer's command or subject to the authority of that commanding officer.

(4) Authority to withhold. A superior competent authority may withhold from a subordinate the authority to order pretrial restraint.

(c) When a person may be restrained. No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person to be restrained committed it; and

(3) The restraint ordered is required by the circumstances.

(d) Procedures for ordering pretrial restraint. Pretrial restraint other than confinement is imposed by notifying the person orally or in writing of the restraint, including its terms or limits. The order to an enlisted person shall be delivered personally by the authority who issues it or through other persons subject to the code. The order to an officer or a civilian shall be delivered personally by the authority who issues it or by another commissioned officer. Pretrial confinement is imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement.

(e) Notice of basis for restraint. When a person is placed under restraint, the person shall be informed of the nature of the offense which is the basis for such restraint.

(f) Punishment prohibited. Pretrial restraint is not punishment and shall not be used as such. No person who is restrained pending trial may be subjected to punishment or panalty for the offense which is the basis for that restraint. Prisoners being held for trial shall not be required to undergo punitive duty hours or training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners. This rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement. Prisoners shall be afforded facilities and treatment under regulations of the Secretary concerned.

(g) Release. Except as otherwise provided in R.C.M. 305, a person may be released from pretrial restraint by a person authorized to impose it. Pretrial restraint shall terminate when a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed.

(h) Administrative restraint. Nothing in this rule prohibits limitations on a servicemember imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons.

Rule 305. Pretrial confinement

(a) In general. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

(b) Who may be confined. Any person who is subject to trial by court-martial may be confined if the requirements of this rule are met.

(c) Who may order confinement. See R.C.M. 304(b).

(d) When a person may be confined. No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person confined committed it; and

(3) Confinement is required by the circumstances.

(e) Advice to the accused upon confinement. Each person confined shall be promptly informed of:

(1) The nature of the offenses for which held;

(2) The right to remain silent and that any statement made by the person may be used against the person;

(3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and

(4) The procedures by which pretrial confinement will be reviewed.

(f) Military counsel. If requested by the prisoner, military counsel shall be provided to the prisoner before the initial review under subsection (i) of this rule. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner's own selection.

(g) Who may direct release from confinement. Any commander of a prisoner, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i) of this rule, or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred may direct release from pretrial confinement. For purposes of this subsection, "any commander" includes the immediate or higher commander of the prisoner and the commander of the installation on which the confinement facility is located.

(h) Notification and action by commander.

(1) Report. Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer to whose charge the prisoner was committed shall, within 24 hours after that commitment, cause to be made a report to the commander which shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

(2) Action by commander.

(A) Decision: Not later than 72 hours after ordering a prisoner into pretrial confinement, or after receipt of a report that a member of the commander's unit or organization has been confined, the commander shall decide whether pretrial confinement will continue.

(B) Requirements for confinement. The commander shall direct the prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;

(ii) The prisoner committed it; and

(iii) Confinement is necessary because it is foreseeable that:

(a) The prisoner will not appear at a trial, pretrial hearing, or investigation, or

(b) the prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

(C) Memorandum. If continued pretrial confinement is approved, the commander shall prepare a written memorandum which states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the reviewing officer under subsection (i) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared. However, additional information may be added to the memorandum at any time.

(i) Procedures for review of pretrial confinement.

(1) In general. A review of the adequacy of probable cause to believe the prisoner has committed an offense and of the necessity for continued pretrial confinement shall be made within 7 days of the imposition of confinement.

(2) By whom made. The review under this subsection shall be made by a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned.

(3) Nature of review.

(A) Matters considered. The review under this subsection shall include a review of the memorandum submitted by the prisoner's commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the accused. The prisoner, and the prisoner's counsel, if any, shall be allowed to appear before the reviewing officer and make a statement, if practicable. A representative of command may appear before the reviewing officer to make a statement.

(B) Rules of evidence. Except for Mil. R. Evid., Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.

(C) Standard of proof. The requirements for confinement under subsection (h)(2)(B) of this rule must be proved by a preponderance of the evidence.

(4) Extension of time limit. The reviewing officer may, for good cause, extend the time limit for completion of the initial review to 10 days after the imposition of pretrial confinement.

(5) Action by reviewing officer. Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release.

(6) Memorandum. The reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(7) Reconsideration of approval of continued confinement. The reviewing officer shall, after notice to the parties, reconsider the decision to confine the prisoner upon request based upon any significant information not previously considered.

(j) Review by military judge. Once the charges for which they accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) Release. The military judge shall order release from pretrial confinement only if:

(A) the reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of this rule;

(B) information not presented to the reviewing officer establishes that the prisoner should be released under subsection (h)(2)(B) of this rule; or

(C) the provisions of subsection (i)(2) or (3) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection (h)(2)(B) of this rule.

(2) Credit. The military judge shall order administrative credit under subsection (k) of this rule for any pretrial confinement served as a result of an abuse of discretion or of failure to comply with the provisions of subsection (f), (h), or (i) of this rule.

(k) Remedy. The remedy for noncompliance with subsection (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of one day credit for each day of confinement served as a result of such noncompliance. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit, using the conversion formula under R.C.M. 1003(b)(6) and (7), shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, if adjudged. For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

(1) Confinement after release. No person whose release from pretrial confinement has been directed by a person authorized in subsection (g) of this rule may be confined again before completion of trial except upon the discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

(m) Exceptions.

(1) Operational necessity. The Secretary of Defense may suspend application of subsections (e)(2) and (3), (f), (h)(2)(A) and (C), and (i) of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) At sea. Subsections (e)(2) and (3), (f), (h)(2)(C), and (i) of this rule shall not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subsection (h)(2)(C) of this rule shall be transmitted to the reviewing officer under subsection (i) of this rule and shall include an explanation of any delay in the transfer.

Rule 306. Initial disposition

(a) Who may dispose of offenses. Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

(b) Policy. Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.

(c) How offenses may be disposed of. Within the limits of the commander's authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense.

(1) No action. A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed.

(2) Administrative action. A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned. Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.

(3) Nonjudicial punishment. A commander may consider the matter pursuant to Article 15, nonjudicial punishment. See Part V.

(4) Disposition of charges. Charges may be disposed of in accordance with R.C.M. 401.

(5) Forwarding for disposition. A commander may forward a matter concerning an offense, or charges, to a superior or subordinate authority for disposition.

(d) National security matters. If a commander not authorized to convene general courts-martial finds that an offense warrants trial by court-martial, but believes that trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the general court-martial convening authority for action under R.C.M. 407(b).

Rule 307. Preferral of charges

(a) Who may prefer charges. Any person subject to the code may prefer charges.

(b) How charges are preferred; oath. A person who prefers charges must:

(1) Sign the charges and specifications under oath before a commissioned officer of the armed forces authorized to administer oaths; and

(2) State that the signer has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person's knowledge and belief.

(c) How to allege offenses.

(1) In general. The format of charge and specification is used to allege violations of the code.

(2) Charge. A charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated.

(3) Specification. A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. No particular format is required.

(4) Multiple offenses. Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense.

(5) Multiple offenders. A specification may name more than one person as an accused if each person so named is believed by the accuser to be a principal in the offense which is the subject of the specification.

(d) Harmless error in citation. Error in or omission of the designation of the article of the code or other statute, law of war, or regulation violated shall not be ground for dismissal of a charge or reversal of a conviction if the error or omission did not prejudicially mislead the accused.

Rule 308. Notification to accused of charges

(a) Immediate commander. The immediate commander of the accused shall cause the accused to be informed of the charges preferred against the accused, and the name of the person who preferred the charges and of any person who ordered the charges to be preferred, if known, as soon as practicable.

(b) Commanders at higher echelons. When the accused has not been informed of the charges, commanders at higher echelons to whom the preferred charges are forwarded shall cause the accused to be informed of the matters required under subsection (a) of this rule as soon as practicable.

(c) Remedy. The sole remedy for violation of this rule is a continuance or recess of sufficient length to permit the accused to adequately prepare a defense, and no relief shall be granted upon a failure to comply with this rule unless the accused demonstrates that the accused has been hindered in the preparation of a defense.

CHAPTER IV. FORWARDING AND DISPOSITION OF CHARGES

Rule 401. Forwarding and disposition of charges in general

(a) Who may dispose of charges. Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Article 15 may dispose of charges. A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.

(b) Prompt determination. When a commander with authority to dispose of charges receives charges, that commander shall promptly determine what disposition will be made in the interest of justice and discipline.

(c) How charges may be disposed of. Unless the authority to do so has been limited or withheld by superior competent authority, a commander may dispose of charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial which the commander is empowered to convene. Charges should be disposed of in accordance with the policy in R.C.M. 306(b).

(1) Dismissal. When a commander dismisses charges further disposition under R.C.M. 306(c) of the offenses is not barred.

(2) Forwarding charges.

(A) Forwarding to a superior commander. When charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.

(B) Other cases. When charges are forwarded to a commander who is not a superior of the forwarding commander, no recommendation as to disposition may be made.

(3) Referral of charges. See R.C.M. 403, 404, 407, 601.

(d) National security matters. If a commander who is not a general court-martial convening authority finds that the charges warrant trial by court-martial but believes that trial would probably be detrimental to the prosecution of a

war or harmful to national security, the charges shall be forwarded to the officer exercising general court-martial convening authority.

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

When in receipt of charges, a commander authorized to administer nonjudicial punishment but not authorized to convene courts-martial may:

(1) Dismiss any charges; or

(2) forward them to a superior commander for disposition.

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

(a) Recording receipt. Immediately upon receipt of sworn charges, an officer exercising summary court-martial jurisdiction over the command shall cause the hour and date of receipt to be entered on the charge sheet.

(b) Disposition. When in receipt of charges a commander exercising summary court-martial jurisdiction may:

(1) Dismiss any charges;

(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

(3) Forward any charges to a superior commander for disposition;

(4) Subject to R.C.M. 601(d), refer charges to a summary court-martial for trial; or

(5) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, and, if appropriate, forward the report of investigation with the charges to a superior commander for disposition.

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

When in receipt of charges, a commander exercising special court-martial jurisdiction may:

(a) Dismiss any charges;

(b) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

(c) Forward any charges to a superior commander for disposition;

(d) Subject to R.C.M. 601(d), refer charges to a summary court-martial or to a special court-martial for trial; or

(e) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, and, if appropriate, forward the report of investigation with the charges to a superior commander for disposition.

Rule 405. Pretrial investigation

(a) In general. Except as provided in subsection (k) of this rule, no charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule. Failure to comply with this rule shall have no effect if the charges are not referred to a general court-martial.

(b) Earlier investigation. If an investigation of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused after being informed of the charge. A demand by the accused for further investigation entitles the accused to recall witnesses for further cross-examination and to offer new evidence.

(c) Who may direct investigation. Unless prohibited by regulations of the Secretary concerned, an investigation may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(d) Personnel.

(1) Investigating officer. The commander directing an investigation under this rule shall detail a commissioned officer, not the accuser, as investigating officer, who shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity.

(2) Defense counsel.

(A) Detailed counsel. Except as provided in subsection (d)(2)(B) of this rule, military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) Individual military counsel. The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b). When the accused is represented by individual military counsel, counsel detailed to represent the accused shall ordinarily be excused, unless the authority who detailed the defense counsel, as a matter of discretion, approves a request by the accused for retention of detailed counsel. The investigating officer shall forward any request by the accused for individual military counsel to the commander who directed the investigation. That commander shall follow the procedures in R.C.M. 506(b).

(C) Civilian counsel. The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the investigation. However, the investigation shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subsections (d)(2)(A) and (B) of this rule.

(3) Others. The commander who directed the investigation may also, as a matter of discretion, detail or request an appropriate authority to detail:

(A) counsel to represent the United States;

(B) a reporter; and

(C) an interpreter.

(e) Scope of investigation. The investigating officer shall inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges.

(f) Rights of the accused. At any pretrial investigation under this rule the accused shall have the right to:

(1) Be informed of the charges under investigation;

(2) Be informed of the identity of the accuser;

(3) Except in circumstances described in R.C.M. 804(b)(2), be present throughout the taking of evidence;

(4) Be represented by counsel;

(5) Be informed of the witnesses and other evidence then known to the investigating officer;

(6) Be informed of the purpose of the investigation;

(7) Be informed of the right against self-incrimination under Article 31;

(8) Cross-examine witnesses who are produced under subsection (g) of this rule;

(9) Have witnesses produced as provided for in subsection (g) of this rule;

(10) Have evidence, including documents or physical evidence, within the control of military authorities produced as provided under subsection (g) of this rule;

(11) Present anything in defense, extenuation, or mitigation for consideration by the investigating officer; and

(12) Make a statement in any form.

(g) Production of witnesses and evidence; alternatives.

(1) In general.

(A) Witnesses. Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is "reasonably available" when the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance. A witness who is unavailable under Mil. R. Evid. 804(a)(1) through (6), is not "reasonably available."

(B) Evidence. Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

(2) Determination of reasonable availability.

(A) Military witnesses. The investigating officer shall make an initial determination whether a military witness is reasonably available. If the investigating officer decides that the witness is not reasonably available, the investigating officer shall inform the parties. Otherwise, the immediate commander of the witness shall be requested to make the witness available. A determination by the immediate commander that the witness is not reasonably available is not subject to appeal by the accused but may be reviewed by the military judge under R.C.M. 906(b)(3).

(B) Civilian witnesses. The investigating officer shall decide whether a civilian witness is reasonably available to appear as a witness.

(C) Evidence. The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer shall inform the parties. Otherwise, the custodian of the evidence shall be requested to provide the evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).

(D) Action when witness or evidence is not reasonably available. If the defense objects to a determination that a witness or evidence is not reasonably available, the investigating officer shall include a statement of the reasons for the determination in the report of investigation.

(3) Witness expenses. Transportation expenses and a per diem allowance may be paid to civilians requested to testify in connection with an investigation under this rule according to regulations prescribed by the Secretary of a Department.

(4) Alternatives to testimony.

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the witness:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath;

(iv) Depositions;

v) Stipulations of fact or expected testimony;

(vi) Unsworn statements; and

(vii) Offers of proof of expected testimony of that witness.

(B) The investigating officer may consider, over objection of the defense, when the witness is not reasonably available:

(1) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath; and

(iv) Depositions

of that witness.

(5) Alternatives to evidence.

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the evidence:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence;

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described;

(iv) A stipulation of fact, document's contents, or expected testimony;

(v) An unsworn statement describing the evidence; or

(vi) An offer of proof concerning pertinent characteristics of the evidence.

(B) The investigating officer may consider, over objection of the defense, when the evidence is not reasonably available:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described.

(h) Procedure.

(1) Presentation of evidence.

(A) Testimony. All testimony shall be taken under oath, except that the accused may make an unsworn statement. The defense shall be given wide latitude in cross-examining witnesses.

(B) Other evidence. The investigating officer shall inform the parties what other evidence will be considered. The parties shall be permitted to examine all other evidence considered by the investigating officer.

(C) Defense evidence. The defense shall have full opportunity to present any matters in defense, extenuation, or mitigation.

(2) Objections. Any objection alleging failure to comply with this rule, except subsection (j), shall be made to the investigating officer promptly upon discovery of the alleged error. The investigating officer shall not be required to rule on any objection. An objection shall be noted in the report of investigation if a party so requests. The investigating officer may require a party to file any objection in writing.

(3) Access by spectators. Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer.

(4) Presence of accused. The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present, whenever the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent (whether or not informed by the investigating officer of the obligation to be present); or

(B) After being warned by the investigating officer that disruptive conduct will cause removal from the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

(i) Military Rules of Evidence. The Military Rules of Evidence -- other than Mil. R. Evid. 301, 302, 303, 305, and Section V -- shall not apply in pretrial investigations under this rule.

(j) Report of investigation.

(1) In general. The investigating officer shall make a timely written report of the investigation to the commander who directed the investigation.

(2) Contents. The report of investigation shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or it not present the reason why;

(B) The substance of the testimony taken on both sides, including any stipulated testimony;

(C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;

(D) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation;

(E) A statement whether the essential witnesses will be available at the time anticipated for trial and the reasons why any essential witness may not then be available;

(F) An explanation of any delays in the investigation;

(G) The investigating officer's conclusion whether the charges and specifications are in proper form;

(H) The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

(I) The recommendations of the investigating officer, including disposition.

(3) Distribution of the report. The investigating officer shall cause the report to be delivered to the commander who directed the investigation. That commander shall promptly cause a copy of the report to be delivered to each accused.

(4) Objections. Any objection to the report shall be made to the commander who directed the investigation within 5 days of its receipt by the accused. This subsection does not prohibit a convening authority from referring the charges or taking other action within the 5-day period.

(k) Waiver. The accused may waive an investigation under this rule. In addition, failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

Rule 406. Pretrial advice

(a) In general. Before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice.

(b) Contents. The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

(1) Conclusion with respect to whether each specification alleges an offense under the code;

(2) Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report);

(3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

(4) Recommendation of the action to be taken by the convening authority.

(c) Distribution. A copy of the advice of the staff judge advocate shall be provided to the defense if charges are referred to trial by general court-martial.

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

(a) Disposition. When in receipt of charges, a commander exercising general court-martial jurisdiction may:

(1) Dismiss any charges;

(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

(3) Forward any charges to a superior commander for disposition;

(4) Refer charges to a summary court-martial or a special court-martial for trial;

(5) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, after which additional action under this rule may be taken;

(6) Subject to R.C.M. 601(d), refer charges to a general court-martial.

(b) National security matters. When in receipt of charges the trial of which the commander exercising general court-martial jurisdiction finds would probably be inimical to the prosecution of a war or harmful to national security, that commander, unless otherwise prescribed by regulations of the Secretary concerned, shall determine whether trial is warranted and, if so, whether the security considerations involved are paramount to trial. As the commander finds appropriate, the commander may dismiss the charges, authorize trial of them, or forward them to a superior authority.

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

Rule 501. Composition and personnel of courts-martial

(a) Composition of courts-martial.

(1) General courts-martial. General courts-martial shall consist of:

(A) A military judge and not less than five members; or

(B) Except in capital cases, of the military judge alone if requested and approved under R.C.M. 903.

(2) Special courts-martial. Special courts-martial shall consist of:

(A) Not less than three members;

(B) A military judge and not less than three members; or

(C) A military judge alone if a military judge is detailed and if requested and approved under R.C.M. 903.

(b) Counsel in general and special courts-martial. Military trial and defense counsel shall be detailed to general and special courts-martial. Assistant trial and associate or assistant defense counsel may be detailed.

(c) Other personnel. Other personnel, such as reporters, interpreters, bailiffs, clerks, escorts, and orderlies, may be detailed or employed as appropriate but need not be detailed by the convening authority personally.

Rule 502. Qualifications and duties of personnel of courts-martial

(a) Members.

(1) Qualifications. The members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. Each member shall be on active duty with the armed forces and shall be:

(A) a commissioned officers;

(B) a warrant officer, except when the accused is a commissioned officer; or

(C) an enlisted person if the accused is an enlisted person and has made a timely request under R.C.M. 503(a)(2).

(2) Duties. The members of a court-martial shall determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge. Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them, except as otherwise specifically provided in these rules. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material, except the president of a special court-martial without a military judge may use such materials in open session.

(b) President.

(1) Qualifications. The president of a court-martial shall be the detailed member senior in rank then serving.

(2) Duties. The president shall have the same duties as the other members and shall also:

(A) Preside over closed sessions of the members of the court-martial during their deliberations;

(B) Speak for the members of the court-martial when announcing the decision of the members or requesting instructions from the military judge; and,

(C) In a special court-martial without a military judge, perform the duties assigned by this Manual to the military judge except as otherwise expressly provided.

(c) Qualifications of military judge. A military judge shall be a commissioned officer on active duty in the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which the military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial. As used in this subsection "military judge" does not include the president of a special court-martial without a military judge.

(d) Counsel.

(1) Certified counsel required. Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel or associate defense counsel in general or special courts-martial or as trial counsel in general courts-martial.

(2) Other military counsel. Any commissioned officer may be detailed as trial counsel in special courts-martial, or as assistant trial counsel or assistant defense counsel in general or special courts-martial. The Secretary concerned may establish additional qualifications for such counsel.

(3) Qualifications of individual military and civilian defense counsel. Individual military or civilian defense counsel who represents an accused in a court-martial shall be:

(A) a member of the bar of a Federal court or of the bar of the highest court of a State; or

(B) if not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity with the general principles of criminal law which apply in a court-martial.

(4) Disqualifications. No person shall act as trial counsel or assistant trial counsel or, except when expressly requested by the accused, as defense counsel or associate or assistant defense counsel in any case in which that person is or has been:

(A) the accuser;

(B) an investigating officer;

(C) a military judge; or

(D) a member.

No person who has acted as counsel for a party may serve as counsel for an opposing party in the same case.

(5) Duties of trial and assistant trial counsel. The trial counsel shall prosecute cases on behalf of the United States and shall cause the record of trial of such cases to be prepared. Under the supervision of trial counsel an assistant trial counsel may perform any act or duty which trial counsel may perform under law, requlation, or custom of the service.

(6) Duties of defense and associate or assistant defense counsel. Defense counsel shall represent the accused in matters under the code and these rules arising from the offenses of which the accused is then suspected or charged. Under the supervision of the defense counsel an associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the service.

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

(1) Qualifications. The qualifications of interpreters and reporters may be prescribed by the Secretary concerned. Any person who is not disqualified under subsection (e)(2) of this rule may serve as escort, bailiff, clerk, or orderly, subject to removal by the military judge.

(2) Disqualifications. In addition to any disqualifications which may be prescribed by the Secretary concerned, no person shall act as interpreter, reporter, escort, bailiff, clerk, or orderly in any case in which that person is or has been in the same case:

(A) the accuser;

(B) a witness;

(C) an investigating officer;

(D) counsel for any party; or

(E) a member of the court-martial or of any earlier court-martial of which the trial is a rehearing or new or other trial.

(3) Duties. In addition to such other duties as the Secretary concerned may prescribe, the following persons may perform the following duties.

(A) Interpreters. Interpreters shall interpret for the court-martial or for an accused who does not speak or understand English.

(B) Reporters. Reporters shall record the proceedings and testimony and shall transcribe them so as to comply with the requirements for the record of trial as prescribed in these rules.

(C) Others. Other personnel detailed for the assistance of the court-martial shall have such duties as may be imposed by the military judge.

(4) Payment of reporters, interpreters. The Secretary concerned may prescribe regulations for the payment of allowances, expenses, per diem, and compensation of reporters and interpreters.

(f) Action upon discovery of disqualification or lack of qualifications. Any person who discovers that a person detailed to a court-martial is disqualified or lacks the qualifications specified by this rule shall cause a report of the matter to be made before the court-martial is first in session to the convening authority or, if discovered later, to the military judge.

Rule 503. Detailing members, military judge, and counsel

(a) Members.

(1) In general. The convening authority shall detail qualified persons as members for courts-martial.

(2) Enlisted members. An enlisted accused may, before assembly, request in writing that enlisted persons serve as members of the general or special court-martial to which that accused's case has been or will be referred. If such a request is made, an enlisted accused may not be tried by a court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total number of members unless eligible enlisted members cannot be obtained because of physical conditions or military exigencies. If the appropriate number of enlisted members cannot be obtained, the court-martial may be assembled, and the trial may proceed without them, but the convening authority shall make a detailed written explanation why enlisted members could not be obtained which must be appended to the record of trial.

(3) Members from another command or armed force. A convening authority may detail as members of general and special courts-martial persons under that convening authority's command or made available by their commander, even if those persons are members of an armed force different from that of the convening authority or accused.

(b) Military judge.

(1) By whom detailed. The military judge shall be detailed, in accordance with regulations of the Secretary concerned, by a person assigned as a military judge and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The authority to detail military judges may be delegated to persons assigned as military judges. If authority to detail military judges has been delegated to a military judge, that military judge may detail himself or herself as military judge for a court-martial.

(2) Record of detail. The order detailing a military judge shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the military judge was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) Military judge from a different armed force. A military judge from one armed force may be detailed to a court-martial convened in a different armed force when permitted by the Judge Advocate General of the armed force of which the military judge is a member. The Judge Advocate Ceneral may delegate authority to make military judges available for this purpose.

(c) Counsel.

(1) By whom detailed. Trial and defense counsel, assistant trial and defense counsel, and associate defense counsel shall be detailed in accordance with regulations of the Secretary concerned. If authority to detail counsel has been delegated to a person, that person may detail himself or herself as counsel for a court-martial.

(2) Record of detail. The order detailing a counsel shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the counsel was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) Counsel from a different armed force. A person from one armed force may be detailed to serve as counsel in a court-martial in a different armed force when permitted by the Judge Advocate General of the armed force of which the counsel is a member. The Judge Advocate General may delegate authority to make persons available for this purpose.

Rule 504. Convening courts-martial

(a) In general. A court-martial is created by a convening order of the convening authority.

(b) Who may convene courts-martial.

(1) General courts-martial. Unless otherwise limited by superior competent authority, general courts-martial may be convened by persons occupying positions designated in Article 22(a) and by any commander designated by the Secretary concerned or empowered by the President.

(2) Special courts-martial. Unless otherwise limited by superior competent authority, special courts-martial may be convened by persons occupying positions designated in Article 23(a) and by commanders designated by the Secretary concerned.

(A) Definition. For purposes of Articles 23 and 24, a command or unit is "separate or detached" when isolated or removed from the immediate disciplinary control of a superior in such manner as to make its commander the person held by superior commanders primarily responsible for discipline. "Separate or detached" is used in a disciplinary sense and not necessarily in a tactical or physical sense.

(B) Determination. If a commander is in doubt whether the command is separate or detached, the matter shall be determined:

(i) in the Army or the Air Force, by the officer exercising general court-martial jurisdiction over the command; or

(ii) in the Naval Service or Coast Guard, by the flag or general officer in command or the senior officer present who designated the detachment.

(3) Summary courts-martial. See R.C.M. 1302(a).

(4) Delegation prohibited. The power to convene courts-martial may not be delegated.

(c) Disqualification.

(1) Accuser. An accuser may not convene a general or special court-martial for the trial of the person accused.

(2) Other. A convening authority junior in rank to an accuser may not convene a general or special court-martial for the trial of the accused unless that convening authority is superior in command to the accuser. A convening authority junior in command to an accuser may not convene a general or special court-martial for the trial of the accused.

(3) Action when disqualified. When a commander who would otherwise convene a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another convening authority who is superior in rank to the accuser, or, if in the same chain of command, who is superior in command to the accuser.

(d) Convening orders.

(1) General and special courts-martial. A convening order for a general or special court-martial shall designate the type of court-martial and detail the members and may designate where the court-martial will meet. If the convening authority has been designated by the Secretary concerned, the convening order shall so state.

(2) Summary courts-martial. A convening order for a summary court-martial shall designate that it is a summary court-martial and detail the summary court-martial, and may designate where the court-martial will meet. If the convening authority has been designated by the Secretary concerned, the convening order shall so state.

(3) Additional matters. Additional matters to be included in convening orders may be prescribed by the Secretary concerned.

(e) Place. The convening authority shall ensure that an appropriate location and facilities for courts-martial are provided.

Rule 505. Changes of members, military judge, and counsel

(a) In general. Subject to this rule, the members, military judge, and counsel may be changed by an authority competent to detail such persons. Members also may be excused as provided in subsections (c)(1)(B)(ii) and (c)(2)(A) of this rule.

(b) Procedure. When new persons are added as members or counsel or when substitutions are made as to any members or counsel or the military judge, such persons shall be detailed in accordance with R.C.M. 503. An order changing the members of the court-martial, except one which excuses members without replacement, shall be reduced to writing before authentication of the record of trial.

(c) Changes of members.

(1) Before assembly.

(A) By convening authority. Before the court-martial is assembled, the convening authority may change the members of the court-martial without showing cause.

(B) By convening authority's delegate.

(i) Delegation. The convening authority may delegate, under regulations of the Secretary concerned, authority to excuse individual members to the staff judge advocate or legal officer or other principal assistant to the convening authority.

(ii) Limitations. Before the court-martial is assembled, the convening authority's delegate may excuse members without cause shown; however, no more than one-third of the total number of members detailed by the convening authority may be excused by the convening authority's delegate in any one court-martial. After assembly the convening authority's delegate may not excuse members.

(2) After assembly.

(A) Excusal. After assembly no member may be excused, except:

(i) By the convening authority for good cause shown on the record;

(ii) By the military judge for good cause shown on the record; or

(iii) As a result of challenge under R.C.M. 912.

(B) New members. New members may be detailed after assembly only when, as a result of excusals under subsection (c)(2)(A) of this rule, the number of members of the court-martial is reduced below a quorum, or the number of enlisted members, when the accused has made a timely written request for enlisted members, is reduced below one-third the total membership.

(d) Changes of detailed counsel.

(1) Trial counsel. An authority competent to detail trial counsel may change the trial counsel and any assistant trial counsel at any time without showing cause.

(2) Defense counsel.

(A) Before formation of attorney-client relationship. Before an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail defense counsel may excluse or change such counsel without showing cause.

(B) After formation of attorney-client relationship. After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:

(i) under R.C.M. 506(b)(3);

(ii) upon request of the accused or application for withdrawal by such counsel under R.C.M. 506(c); or

(iii) for other good cause shown on the record.

(e) Change of military judge.

(1) Before assembly. Before the court-martial is assembled, the military judge may be changed by an authority competent to detail the military judge, without cause shown on the record.

(2) After assembly. After the court-martial is assembled, the military judge may be changed by an authority competent to detail the military judge only when, as a result of disqualification under R.C.M. 902 or for good cause shown, the previously detailed military judge is unable to proceed.

(f) Good cause. For purposes of this rule, "good cause" includes physical disability, military exigency, and other extraordinary circumstances which render the member, counsel, or military judge unable to proceed with the court-martial within a reasonable time. "Good cause" does not include temporary inconveniences which are incident to normal conditions of military life.

Rule 506. Accused's rights to counsel

(a) In general. The accused has the right to be represented before a general or special court-martial by civilian counsel if provided at no expense to the Government, and either by the military counsel detailed under Article 27 or military counsel of the accused's own selection if reasonably available. The accused is not entitled to be represented by more than one military counsel.

(b) Individual military counsel.

(1) Reasonably available. Subject to this subsection, the Secretary concerned shall define "reasonably available." While so assigned, the following persons are not reasonably available to serve as individual military counsel because of the nature of their duties or positions:

(A) a general or flag officer;

(B) a trial or appellate military judge;

(C) a trial counsel;

(D) an appellate defense or government counsel;

(E) a principal legal advisor to a command, organization, or agency and, when such command, organization, or agency has general court-martial jurisdiction, the principal assistant of such an advisor;

(F) an instructor or student at a service school or academy;

(G) a student at a college or university;

(H) a member of the staff of the Judge Advocate General of the Army, Navy, or Air Force, the Chief Counsel of the Coast Guard, or the Director, Judge Advocate Division, Headquarters, Marine Corps.

The Secretary concerned may determine other persons to be not reasonably available because of the nature or responsibilities of their assignments, geographic considerations, exigent circumstances, or military necessity. A person who is a member of an armed force different from that of which the accused is a mamber shall be reasonably available to serve as individual military counsel for such accused to the same extent as that person is available to serve as individual military counsel for an accused in the same armed force as the person requested. The Secretary concerned may prescribe circumstances under which exceptions may be made to the prohibitions in this subsection when merited by the existence of an attorney-client relationship regarding matters relating to a charge in question. However, if the attorney-client relationship arose solely because the counsel represented the accused on review under Article 70, this exception shall not apply.

(2) Procedure. Subject to this subsection, the Secretary concerned shall prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for an individual military counsel shall be made by the accused or the detailed defense counsel through the trial counsel to the convening authority. If the requested person is among those not reasonably available under subsection (b)(1) of this rule or under regulations of the Secretary concerned, the convening authority shall deny the request and notify the accused, unless the accused asserts that there is an existing attorney-client relationship regarding a charge in question or that the person requested will not, at the time of the trial or investigation for which requested, be among those so listed as not reasonably available. If the accused's request makes such a claim, or if the person is not among those so listed as not reasonably available, the convening authority shall forward the request to the commander or head of the organization, activity, or agency to which the requested person is assigned. That authority shall make an administrative determination whether the requested person is reasonably available in accordance with the procedure prescribed by the Secretary concerned. This determination is a matter within the sole discretion of that authority. An adverse determination may be reviewed upon request of the accused through that authority to the next higher commander or level of supervision, but no administrative review may be made which requires action at the departmental or higher level.

(3) Excusal of detailed counsel. If the accused is represented by individual military counsel, detailed defense counsel shall normally be excused. The authority who detailed the defense counsel, as a matter of discretion, may approve a request from the accused that detailed defense counsel shall act as associate counsel. The action of the authority who detailed the counsel is subject to review only for abuse of discretion.

(c) Excusal or withdrawal. Except as otherwise provided in R.C.M. 505(d)(2) and subsection (b)(3) of this rule, defense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown.

(d) Waiver. The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and

understanding. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

(e) Nonlawyer present. Subject to the discretion of the military judge, the accused may have present and seated at the counsel table for purpose of consultation persons not qualified to serve as counsel under R.C.M. 502.

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

Rule 601. Referral

(a) In general. Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial.

(b) Who may refer. Any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor, unless the power to do so has been withheld by superior competent authority.

(c) Disqualification. An accuser may not refer charges to a general or special court-martial.

(d) When charges may be referred.

(1) Basis for referral. If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with subsection (d)(2) of this rule. The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

(2) General court-martial. The convening authority may not refer a specification under a charge to a general court-martial unless --

(A) There has been substantial compliance with the pretrial investigation requirements of C.R.M. 405; and

(B) The convening authority has received the advice of the staff judge advocate required under R.C.M. 406.

These requirements may be waived by the accused.

(e) How charges shall be referred.

(1) Order, instructions. Eferral shall be by the personal order of the convening authority. The convening authority may include proper instructions in the order.

(2) Joinder of offenses. In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

(3) Joinder of accused. Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such accused may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

(f) Superior convening authorities. Except as otherwise provided in those rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to that authority for further consideration, including, if appropriate, referral.

Rule 602. Service of charges

The trial counsel detailed to the court-martial to which charges have been referred for trial shall cause to be served upon each accused a copy of the charge sheet. In time of peace, no person may, over objection, be brought to trial -- including an Article 39(a) session -- before a general court-martial within a period of five days after service of charges, or before a special court-martial within a period of three days after service of charges. In computing these periods, the date of service of charges and the date of trial are excluded; holidays and Sundays are included.

Rule 603. Changes to charges and specifications

(a) Minor changes defined. Minor changes in charges and specifications are any except those which add a party, offense, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged.

(b) Minor changes before arraignment. Any person forwarding, acting upon, or prosecuting charges on behalf of the United States except an investigating officer appointed under R.C.M. 405 may make minor changes to charges or specifications before arraignment.

(c) Minor changes after arraignment. After arraignment the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced.

(d) Major changes. Changes or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification affected is preferred anew.

Rule 604. Withdrawal of charges

(a) Withdrawal. The convening authority or a superior competent authority may for any reason cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced.

(b) Referral of withdrawn charges. Charges which have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason. Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforessen military necessity.

CHAPTER VII. PRETRIAL MATTERS

Rule 701. Discovery

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Reduce the punishment.

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

(1) Notice of alibi. The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer a defense of alibi. Such notice by the defense shall disclose the specific place or places at which the defense claims the accused to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the accused intends to rely to establish such alibi.

(2) Mental responsibility. If the defense intends to rely upon the defense of lack of mental responsibility or to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the guilt of the accused, the defense shall, before the beginning of trial on the merits, notify the trial counsel of such intention.

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

(4) Reports of examinations and tests. If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall (except as provided in R.C.M. 706 and Mil. R. Evid. 302) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, which are within the possession, custody, or control of the defense which the defense intends to introduce as evidence in the defense case-in-chief at trial or which were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

(5) Inadmissibility of withdrawn defense. If an intention to rely upon a defense under subsection (b)(1) or (2) of this rule is withdrawn, evidence of such intention and of disclosures by the accused or defense counsel made in connection with such intention is not admissible in any court-martial against the accused who gave notice of the intention.

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

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

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

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

(g) Regulation of discovery.

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

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

may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

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

(A) Order the party to permit discovery;

(B) Grant a continuance;

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

(D) Enter such other order as is just under the circumstances.

This rule shall not limit the right of the accused to testify in the accused's behalf.

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

Rule 702. Depositions

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

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

(c) Request to take deposition.

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

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

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

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

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

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

(3) Action on request.

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

(B) Written deposition. A request for a written deposition may not be approved without the consent of the opposing party except when the deposition is ordered solely in lieu of producing a witness for sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be adequately served by a written deposition.

(C) Notification of decision. The authority who acts on the request shall promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for denial.

(D) Waiver. Failure to renew before the military judge a request for a deposition denied by a convening authority waives further consideration of the request.

(d) Action when request is approved.

(1) Detail of deposition officer. When a request for a deposition is approved, the convening authority shall detail an officer to serve as deposition officer or request an appropriate civil officer to serve as deposition officer.

(2) Assignment of counsel. If charges have not yet been referred to a court-martial when a request to take a deposition is approved, the convening authority who directed the taking of the deposition shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party.

(3) Instructions. The convening authority may give instructions not inconsistent with this rule to the deposition officer.

(e) Notice. The party at whose request a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition and the name and address of each person to be examined. On motion of a party upon whom the notice is served the deposition officer may for cause shown extend or shorten the time or change the place for taking the deposition, consistent with any instructions from the convening authority.

(f) Duties of the deposition officer. In accordance with this rule, and subject to any instructions under subsection (d)(3) of this rule, the deposition officer shall:

(1) Arrange a time and place for taking the deposition and, in the case of an oral deposition, notify the party who requested the deposition accordingly;

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance with the procedures for production of witnesses and evidence under R.C.M. 703(e);

(3) Maintain order during the deposition and protect the parties and witnesses from annoyance, embarrassment, or oppression;

(4) Administer the oath to each witness, the reporter, and interpreter, if any;

(5) In the case of a written deposition, ask the questions submitted by counsel to the witness;

(6) Cause the proceedings to be recorded so that a verbatim record is made or may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Authenticate the record of the deposition and forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.

(g) Procedure.

(1) Oral depositions.

(A) Rights of accused. At an oral deposition, the accused shall have the rights to:

(i) Be present except when: (a) the accused, absent good cause shown, fails to appear after notice of the time and place of the deposition; (b) the accused is disruptive within the meaning of R.C.M. 804(b)(2); or (c) the deposition is ordered in lieu of production of a witness on sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused; and

(ii) Be represented by counsel as provided in R.C.M. 506.

(B) Examination of witnesses. Each witness giving an oral deposition shall be examined under oath. The scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The Government shall make available to each accused for examination and use at the taking of the deposition any statement of the witness which is in the possession of the United States and to which the accused would be entitled at the trial.

(2) Written depositions.

(A) Rights of accused. The accused shall have the right to be represented by counsel as provided in R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at a summary court-martial.

(B) Presence of parties. No party has a right to be present at a written deposition.

(C) Submission of interrogatories to opponent. The party requesting a written deposition shall submit to opposing counsel a list of written questions to be asked of the witness. Opposing counsel may examine the questions and shall be allowed a reasonable time to prepare cross-interrogatories and objections, if any.

(D) Examination of witnesses. The deposition officer shall swear the witness, read each question presented by the parties to the witness, and record each response. The testimony of the witness shall be recorded on videotape, audiotape, or similar material or shall be transcribed. When the testimony is transcribed, the deposition shall, except when impracticable, be submitted to the witness for examination. The deposition officer may enter additional matters then stated by the witness under oath. The deposition shall be signed by the witness if the witness is available. If the deposition is not signed by the witness, the deposition officer shall record the reason. The certificate of authentication shall then be executed.

(3) How recorded. In the discretion of the authority who ordered the deposition, a deposition may be recorded by a reporter or by other means including videotape, audiotape, or sound film. In the discretion of the military judge, depositions recorded by videotape, audiotape, or sound film may be played for the court-martial or may be transcribed and read to the court-martial.

(h) Objections.

(1) In general. A failure to object prior to the deposition to the taking of the deposition on grounds which may be corrected if the objection is made prior to the deposition waives such objection.

(2) Oral depositions. Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection shall be stated at the time of taking such deposition. If an objection relates to a matter which could have been corrected if the objection had been made during the deposition, the objection is waived if not made at the deposition.

(3) Written depositions. Objections to any question in written interrogatories shall be served on the party who proposed the question before the interrogatories are sent to the deposition officer or the objection is waived. Objections to answers in a written deposition may be made at trial.

(i) Deposition by agreement not precluded.

(1) Taking deposition. Nothing in this rule shall preclude the taking of a deposition without cost to the United States, orally or upon written questions, by agreement of the parties.

(2) Use of deposition. Subject to Article 49, nothing in this rule shall preclude the use of a deposition at the court-martial by agreement of the parties unless the military judge forbids its use for good cause.

Rule 703. Production of witnesses and evidence

(a) In general. The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.

(b) Right to witnesses.

(1) On the merits or on interlocutory questions. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.

(2) On sentencing. Each party is entitled to the production of a witness whose testimony on sentencing is required under R.C.M. 1001(e).

(3) Unavailable witness. Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to

attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been presented by the requesting party.

(c) Determining which witnesses will be produced.

(1) Witnesses for the prosecution. The trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution.

(2) Witnesses for the defense.

(A) Request. The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests.

(B) Contents of request.

(i) Witnesses on merits or interlocutory questions. A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

(ii) Witnesses on sentencing. A list of witnesses wanted for presentencing proceedings shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the reasons why the witness' personal appearance will be necessary under the standards set forth in R.C.M. 1001(e).

(C) Time of request. A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness' presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

(D) Determination. The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness' production is not required under this rule. If the trial counsel contends that the witness' production is not required by this rule, the matter may be submitted to the military judge. If the military judge grants a motion for a witness, the trial counsel shall produce the witness or the proceedings shall be abated.

(d) Employment of expert witnesses. When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for

employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

(e) Procedures for production of witnesses.

(1) Military witnesses. The attendance of a military witness may be obtained by notifying the commander of the witness of the time, place, and date the witness' presence is required and requesting the commander to issue any necessary orders to the witness.

(2) Civilian witnesses -- subpoena.

(A) In general. The presence of witnesses not on active duty may be obtained by subpoena.

(B) Contents. A subpoena shall state the command by which the proceeding is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command the person to whom it is directed to produce books, papers, documents or other objects designated therein at the proceeding or at an earlier time for inspection by the parties.

(C) Who may issue. A subpoena may be issued by the summary court-martial or trial counsel of a special or general court-martial to secure witnesses or evidence for that court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.

(D) Service. A subpoena may be served by the person authorized by this rule to issue it, a United States marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named and by tendering to the person named travel orders and fees as may be prescribed by the Secretary concerned.

(E) Place of service.

(i) In general. A subpoena requiring the attendance of a witness at a deposition, court-martial, or court of inquiry may be served at any place within the United States, its Territories, Commonwealths, or possessions.

(ii) Foreign territory. In foreign territory, the attendance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence of agreements, with principles of international law.

(iii) Occupied territory. In occupied enemy territory, the appropriate commander may compel the attendance of civilian witnesses located within the occupied territory.

(F) Relief. If a person subpoenaed requests relief on grounds that compliance is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena be modified or withdrawn if appropriate.

(G) Neglect or refusal to appear.

(i) Issuance of warrant of attachment. The military judge or, if there is no military judge, the convening authority may, in accordance with this rule, issue a warrant of attachment to compel the attendance of a witness or production of documents.

(ii) Requirements. A warrant of attachment may be issued only upon probable cause to believe that the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that appropriate fees and mileage were tendered to the witness, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the subpoena, and that no valid excuse reasonably appears for the witness' failure to appear.

(iii) Form. A warrant of attachment shall be written. All documents in support of the warrant of attachment shall be attached to the warrant, together with the charge sheet and convening orders.

(iv) Execution. A warrant of attachment may be executed by a United States marshal or such other person who is not less than 18 years of age as the authority issuing the warrant may direct. Only such nondeadly force as may be necessary to bring the witness before the court-martial or other proceeding may be used to execute the warrant. A witness attached under this rule shall be brought before the court-martial or proceeding without delay and shall testify as soon as practicable and be released.

(v) Definition. For purposes of subsection (e)(2)(G) of this rule "military judge" does not include a summary court-martial or the president of a special court-martial without a military judge.

(f) Right to evidence.

(1) In general. Each party is entitled to the production of evidence which is relevant and necessary.

(2) Unavilable evidence. Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

(3) Determining what evidence will be produced. The procedures in subsection (c) of this rule shall apply to a determination what evidence will be produced, except that any defense request for the production of evidence shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence.

(4) Procedures for production of evidence.

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

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

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

Rule 704. Immunity

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

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

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

(b) Scope. Nothing in this rule bars:

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

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

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

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

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

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

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

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

(1) the witness' testimony would be of such central importance to the defense case that it is essential to a fair trial; and

(2) the witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify.

Rule 705. Pretrial agreements

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

(b) Nature of agreement. A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

(D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Take specified action on the sentence adjudged by the court-martial.

(c) Terms and conditions.

(1) Prohibited terms or conditions.

(A) Not voluntary. A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) Deprivation of certain rights. A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of posttrial and appellate rights.

(2) Permissible terms or conditions. Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit an accused from offering the following additional conditions with an offer to plead guilty:

(A) A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(E) A promise to waive procedural requirements much as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

(d) Procedure.

(1) Offer. An offer to plead guilty or to enter a confessional stipulation must originate with the accused and defense counsel, if any.

(2) Negotiation. Upon the initiation of the defense, the convening authority, the staff judge advocate, or the trial counsel may negotiate the terms and conditions of a pretrial agreement with the defense. All negotiations shall be with defense counsel unless the accused is not represented.

(3) Ormal submission. After negotiation, if any, under subsection (d)(2) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

(4) Acceptance. The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement. The decision is within the sole discretion of the convening authority. When the convening authority has

accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

(5) Withdrawal.

(A) By accused. The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively.

(B) By convening authority. The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

(e) Nondisclosure of existence of agreement. Except in a special court-martial without a military judge, no member of a court-martial shall be informed of the existence of a pretrial agreement. In addition, except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a pretrial agreement, and any statements made by an accused in connection therewith, whether during negotiations or during a providence inquiry, shall not be otherwise disclosed to the members.

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused

(a) Initial action. If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

(b) Ordering an inquiry.

(1) Before referral. Before referral of charges an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition.

(2) After referral. After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by the convening authority.

(c) Inquiry.

(1) By whom conducted. When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board of one or more physicians for their observation and report as to the mental capacity or mental responsiblity, or both, of the accused. Ordinarily at least one member of the board shall be a psychiatrist.

(2) Matters in inquiry. When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

(A) At the time of the alleged criminal conduct did the accused have a mental disease or defect? (The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.)

(B) What is the clinical psychiatric diagnosis?

(C) Did the accused, at the time of the alleged criminal conduct and as a result of such mental disease or defect, lack substantial capacity to appreciate the criminality of the accused's conduct?

(D) Did the accused, at the time of the alleged criminal conduct and as a result of such mental disease or defect, lack substantial capacity to conform the accused's conduct to the requirements of law?

(E) Does the accused have sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate intelligently in the defense?

Other appropriate questions may also be included.

(3) Directions to board. In addition to the requirements specified in subsection (c)(2) of this rule, the order to the board shall specify:

(A) That upon completion of the board's investigation, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused's commanding officer, the investigating officer, if any, appointed pursuant to Article 32 and to all counsel in the case, the convening authority, and, after referral, to the military judge;

(B) That the full report of the board may be released by the board or other medical personnel only to other medical personnel for medical purposes, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense and, upon request, to the commanding officer of the accused; and

(C) That neither the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge.

(4) Additional examinations. Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require.

(5) Disclosure to trial counsel. No person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement.

Rule 707. Speedy trial

(a) In general. The accused shall be brought to trial within 120 days after notice to the accused of preferral of charges under R.C.M. 308 or the imposition of restraint under R.C.M. 304, whichever is earlier.

(b) Accountability.

(1) In general. The date on which the accused is notified of the preferral of charges or the date on which pretrial restraint is imposed shall not count for purpose of computing the time under subsection (a) of this rule. The date on which the accused is brought to trial shall count.

(2) Inception. If charges are dismissed, if a mistrial is granted, or -- when no charges are pending -- if the accused is released from pretrial restraint for a significant period, the time under this rule shall run only from the date on which charges or restraint are reinstituted.

(3) Termination. An accused is brought to trial within the meaning of this rule when:

(A) a plea of guilty is entered to an offense; or

(B) presentation to the factfinder of evidence on the merits begins.

(4) Multiple charges. When charges are preferred at different times, the inception for each shall be determined from the date on which the accused was notified of preferral or on which restraint was imposed on the basis of that offense.

(c) Exclusions. The following periods shall be excluded when determining whether the period in subsection (a) of this rule has run --

(1) Any periods of delay resulting from other proceedings in the case, including:

(A) Any examination into the mental capacity or responsibility of the accused;

(B) Any hearing on the capacity of the accused to stand trial and any time during which the accused lacks capacity to stand trial:

(C) Any session on pretrial motions;

(D) Any appeal filed under R.C.M. 908 unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit; and

(E) Any petition for extraordinary relief by either party.

(2) Any period of delay resulting from unavailability of a military judge when the unavailability results from extraordinary circumstances.

(3) Any period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense.

(4) Any period of delay resulting from a failure of the defense to provide notice, make a request, or submit any matter in a timely manner as otherwise required by this Manual.

(5) Any period of delay resulting from a delay in the Article 32 hearing or a continuance in the court-martial at the request of the prosecution if:

(A) the delay or continuance is granted because of unavailability of substantial evidence relevant and necessary to the rosecution's case when the Government has exercised due diligence to obtain such evidence and there exists at the time of the delay grounds to believe that such evidence would be available within a reasonable time; or

(B) the continuance is granted to allow the trial counsel additional time to prepare the prosecution's case and additional time is justified because of the exceptional circumstances of the case.

(6) Any period of delay resulting from the absence or unavailability of the accused.

(7) Any reasonable period of delay when the accused is joined for trial with a coaccused as to whom the time for trial has not yet run and there is good cause for not granting a severance.

(8) Any other period of delay for good cause, including unusual operational requirements and military exigencies.

(d) Arrest or confinement. When the accused is in pretrial arrest or confinement under R.C.M. 304 or 305, immediate steps shall be taken to bring the accused to trial. No accused shall be held in pretrial arrest or confinement ine excess of 90 days for the same or related charges. Except for any periods under subsection (c)(7) of this rule, the periods described in subsection (c) of this rule shall be excluded for the purpose of computing when 90 days has run. The military judge may, upon a showing of extraordinary circumstances, extend the period by 10 days.

(e) Remedy. Failure to comply with this rule shall result in dismissal of the affected charges upon timely motion by the accused.

CHAPTER VIII. TRIAL PROCEDURE GENERALLY

Rule 801. Military judge's responsibilities; other matters

(a) Responsibilities of military judge. The military judge is the presiding officer in a court-martial.

The military judge shall:

(1) Determine the time and uniform for each session of a court-martial;

(2) Ensure that the dignity and decorum of the proceedings are maintained.

(3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual;

(4) Subject to subsection (e) of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial; and

(5) Instruct the members on questions of law and procedure which may arise.

(b) Rules of court; contempt. The military judge may:

(1) Subject to R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to R.C.M. 809, exercise contempt power.

(c) Obtaining evidence. The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

(d) Uncharged offenses. If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial, the court-martial shall proceed with the trial of the offense charged.

(e) Interlocutory questions and questions of law. For purposes of this subsection "military judge" does not include the president of a special court-martial without a military judge.

(1) Rulings by the military judge.

(A) Finality of rulings. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final

(B) Changing a ruling. The military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) Article 39(a) sessions. When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803

(2) Rulings by the president of a special court-martial without a military judge.

(A) Questions of law. Any ruling by the president of a special court-martial without a military judge on any question of law other than a motion for a finding of not guilty is final.

(B) Questions of fact. Any ruling by the president of a special court-martial without a military judge on any interlocutory question of fact, including a factual issue of mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(C) Changing a ruling. The president of a special court-martial without a military judge may change a ruling made by that or another president in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(D) Presence of members. Except as provided in R.C.M. 505 and 912, all members will be present at all sessions of a special court-martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a special court-martial without a military judge may examine an offered items of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) Procedures for rulings by the president of a special court-martial without a military judge which are subject to objection by a member.

(A) Determination. The president of a special court-martial without a military judge shall determine whether a ruling is subject to objection.

(B) Instructions. When a ruling by the president of a special court-martial without a military judge is subject to objection, the president shall so advise the members and shall give such instructions on the issue as may be necessary to enable the members to understand the issue and the legal standards by which they will determine it if objection is made.

(C) Voting. When a member objects to a ruling by the president of a special court-martial without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused

(D) Consultation. The president of a special court-martial without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member

(4) Standard of proof. Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absece of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion

(5) Scope. Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

(f) Rulings on record. All sessions involving rulings or instructions made or given by the military judge or the president of a special court-martial without a military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection [R.C.M. 801(f)] "military judge" does not include the president of a special court-martial without a military judge.

(g) Effect of failure to raise defenses or objections. Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

Rule 802. Conferences

(a) In general. After referral, the military judge may, upon request of any party or sua sponte, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial.

(b) Matters on record. Conferences need not be made part of the record, but matters agreed upon at a conference shall be included in the record orally or in writing. Failure of a party to object at trial to failure to comply with this subsection shall waive this requirement.

(c) Rights of parties. A conference shall not proceed over the objection of any party. No party may be prevented under this rule from presenting evidence or from making any argument, objection, or motion at trial.

(d) Accused's presence. The presence of the accused is neither required nor prohibited at a conference.

(e) Admission. No admissions made by the accused or defense counsel at a conference shall be used against the accused unless the admissions are reduced to writing and signed by the accused and defense counsel.

(f) Limitations. This rule shall not be invoked in the case of an accused who is not represented by counsel, or in special courts-martial without a military judge.

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

A military judge who has been detailed to the court-martial may, under Article 39(a), after service of charges, call the court-martial into session without the presence of members. Such sessions may be held before and after assembly of the court-martial, and when authorized in these rules, after adjournment and before action by the convening authority. All such sessions are a part of the trial and shall be conducted in the presence of the accused, defense counsel, and trial counsel, in accordance with R.C.M. 804 and 805, and shall be made a part of the record. For purposes of this rule "military judge" does not include the president of a special court-martial without a military judge.

Rule 804. Presence of the accused at trial proceedings

(a) Presence required. The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings, and posttrial sessions, if any, except as otherwise provided by this rule.

(b) Continued presence not required. The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present:

(1) Is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial); or

(2) After being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

(c) Appearance and security of accused.

(1) Appearance. The accused shall be properly attired in the uniform or dress prescribed by the military judge. An accused servicemember shall wear the insignia of grade and may wear any decorations, emblems, or ribbons to which entitled. The accused and defense counsel are responsible for ensuring that the accused is properly attired; however, upon request, the accused's commander shall render such assistance as may be reasonably necessary to ensure that the accused is properly attired.

(2) Custody. Responsibility for maintaining custody or control of an accused before and during trial may be assigned, subject to R.C.M. 304 and 305, and subsection (c)(3) of this rule, under such regulations as the Secretary concerned may prescribe.

(3) Restraint. Physical restraint shall not be imposed on the accused during open sessions of the court-martial unless prescribed by the military judge.

Rule 805. Presence of military judge, members, and counsel

(a) Military judge. No court-martial proceeding, except the deliberations of the embers, may take place in the absence of the military judge, if detailed.

(b) Members. Unless trial is by military judge alone pursuant to a request by the accused, no court-martial proceeding may take place in the absence of any detailed member except: Article 39(a) sessions under R.C.M. 83; examination of members under R.C.M. 911(d); when the member has been excused under R.C.M. 505 or 911(f); or as otherwise provided in R.C.M. 1102. No general court-martial proceeding requiring the presence of members may be conducted unless at least 5 members are present and, except as provided in R.C.M. 911(h), no special court-martial proceeding requiring the presence of members may be conducted unless at least 30 members are present. Except as provided in R.C.M. 503(b), when an enlisted accused has requested enlisted members, no proceeding requiring the presence of members may be conducted unless at least one-third of the members actually sitting on the court-martial are enlisted persons.

(c) Counsel. As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a court-martial session. An assistant counsel who lacks the qualifications necessary to serve as counsel for a party may not act at a session in the absence of such qualified counsel.

(d) Effect of replacement of member or military judge.

(1) Members. When, after the presentation of evidence on the merits has begun, a new member is detailed under R.C.M. 505(c)(2)(B), trial may not proceed unless the testimony and evidence previously admitted on the merits, if recorded verbatim, is read to the new member, or, if not recorded verbatim, and in the absence of a stipulation as to such testimony and evidence, the trial proceeds as if no evidence has been presented.

(2) Military judge. When, after the presentation of evidence on the merits has begun in trial before military judge alone, a new military judge is detailed under R.C.M. 505(e)(2) trial may not proceed unless the accused requests, and the military judge approves, trial by military judge alone, and a verbatim record of the testimony and evidence or a stipulation thereof is read to the military judge, or the trial proceeds as if no evidence had been presented.

Rule 806. Public trial

(a) In general. Except as otherwise provided in this rule, courts-martial shall be open to the public. For purposes of this rule, "public" includes members of both the military and civilian communities.

(b) Control of spectators. In order to maintain the dignity and decorum of the proceedings or for other good cause, the military judge may reasonably limit the number of spectators in, and the means of access to, the courtroom, exclude specific persons from the courtroom, and close a session; however, a session may be closed over the objection of the accused only when expressly authorized by another provision of this Manual.

(c) Photography and broadcasting prohibited. Video and audio recording and the taking of photographs -- except for the purpose of preparing the record of trial -- in the courtroom during the proceedings and radio or television broadcating of proceedings from the courtroom shall not be permitted. However, the military judge may, as a matter of discretion permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under R.C.M. 804 or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.

Rule 807. Oaths

(a) Definition. "Oath" includes "affirmation."

(b) Oaths in courts-martial.

(1) Who must be sworn.

(A) Court-martial personnel. The military judge, members of a general or special court-martial, trial counsel, assistant trial counsel, defense counsel, associate defense counsel, assistant defense counsel, reporter, interpreter, and escort shall take an oath to perform their duties faithfully. For purposes of this rule, "defense

counsel," "associate defense counsel," and "assistant defense counsel" include detailed and individual military and civilian counsel.

(B) Witnesses. Each witness before a court-martial shall be examined on oath.

(2) Procedure for administering oaths. Any procedure which appeals to the conscience of the person to whom the oath is administered and which binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

Rule 808. Record of trial

The trial counsel of a general or special court-martial shall take such action as may be necessary to ensure that a record which will meet the requirements of R.C.M. 1103 can be prepared.

Rule 809. Contempt proceedings

(a) In general. Courts-martial may exercise contempt power under Article 48.

(b) Method of disposition.

(1) Summary disposition. When conduct constituting contempt is directly witnessed by the court-martial, the conduct may be punished summarily. In such cases, the regular proceedings shall be suspended while the contempt is disposed of.

(2) Disposition upon notice and hearing. When the conduct apparently constituting contempt is not directly witnessed by the court-martial, the alleged offender shall be brought before the court-martial and informed orally or in writing of the alleged contempt. The alleged offender shall be given a reasonable opportunity to present evidence, including calling witnesses. The alleged offender shall have the right to be represented by counsel and shall be so advised. The contempt must be proved beyond a reasonable doubt before it may be punished.

(c) Procedure; who may punish for contempt.

(1) Members not present. When the conduct allegedly constituting contempt occurs during a session when the members are not present, the military judge shall determine whether to punish for contempt, and, if so, what the punishment shall be. The military judge may punish summarily under subsection (b)(1) only if the military judge recites the facts for the record and states that they were directly witnessed by the military judge in the actual presence of the court-martial.

(2) Members present. When the conduct allegedly constituting contempt occurs during a session when the members are present, contempt proceedings may be initiated by the military judge or upon motion of any member, unless the military judge rules that as a matter of law, contempt has not been committed. If contempt proceedings are initiated the following procedures apply.

(A) Instructions. The military judge shall instruct the members so that they can properly decide the questions presented.

(B) Findings. The members shall decide in a closed session, upon vote by secret written ballot whether to hold an alleged offender in contempt. At least two-thirds of the members must concur in a finding of contempt to convict. If the proceedings are summary, no member may vote to convict unless that member directly witnessed the conduct in question in the presence of the court-martial and finds it to be contemptuous.

(C) Sentence. If the members find the offender in contempt, they shall, without reopening the court-martial determine the punishment in accordance with the procedures in R.C.M. 1006.

(D) Announcement. After reaching findings, and, if necessary, a sentence, the court-martial shall be reopened and the results announced by the president.

(d) Record; review. A record of the contempt proceedings shall be part of the record of the court-martial during which it occurred. If the person was held in contempt, then a separate record of the contempt proceedings shall be prepared and forwarded to the convening authority for review. The convening authority may approve or disapprove all or part of the sentence. The action of the convening authority is not subject to further review or appeal.

(e) Sentence. A sentence of confinement pursuant to a finding of contempt shall begin to run when it is adjudged unless deferred, suspended, or disapproved by the convening authority. The place of confinement for a civilian or military person who is held in contempt and is to be punished by confinement shall be designated by the convening authority. A fine does not become effective until ordered executed by the convening authority. The military judge may delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings.

(f) Informing person held in contempt. The person held in contempt shall be informed by the convening authority in writing of the holding and sentence, if any, of the court-martial and of the action of the convening authority upon the sentence.

Rule 810. Procedures for rehearings, new trials, and other trials

(a) In general.

(1) Rehearings in full and new or other trials. In rehearings which require findings on all charges and specifications referred to a court-martial and in new or other trials, the procedure shall be the same as in an original trial except as otherwise provided in this rule.

(2) Rehearings on sentence only. In a rehearing on sentence only, the procedure shall be the same as in an original trial, except that the portion of the procedure which ordinarily occurs after challenges and through and including the findings is omitted, and except as otherwise provided in this rule.

(A) Contents of the record. The contents of the record of the original trial consisting of evidence properly admitted on the merits relating to each offense of which the accused stands convicted but not sentenced may be established by any party whether or not testimony so read is otherwise admissible under Mil.R.Evid. 804(b)(1) and whether or not it was given through an interpreter.

(B) Plea. The accused at a rehearing only on sentence may not withdraw any plea of guilty upon which findings of guilty are based. However, if such a plea is found to be improvident, the rehearing shall be suspended and the matter reported to the authority ordering the rehearing.

(3) Combined rehearings. When a rehearing on sentence is combined with a trial on the merits of one or more specifications referred to the court-martial, whether or not such specifications are being tried for the first time or reheard, the trial will proceed first on the merits, without reference to the offenses being reheard on sentence only. After findings on the merits are announced, the members, if any, shall be advised of the offenses on which the rehearing on sentence has been directed. Additional challenges for cause may be permitted, and the sentencing procedure shall be the same as at an original trial, except as otherwise provided in this rule. A single sentence shall be adjudged for all offenses.

(b) Composition.

(1) Members. No member of the court-martial which previously heard the case may sit as a member of the court-martial at any rehearing, new trial, or other trial of the same case.

(2) Military judge. The military judge at a rehearing may be the same military judge who presided over a previous trial of the same case. The existence or absence of a request for trial by military judge alone at a previous hearing shall have no effect on the composition of a court-martial on rehearing.

(3) Accused's election. The accused at a rehearing or new or other trial shall have the same right to request enlisted members or trial by military judge alone as the accused would have at an original trial.

(c) Examination of record of former proceedings. No member may, upon a rehearing or upon a new or other trial, examine the record of any former proceedings in the same case except:

(1) When permitted to do so by the military judge after such matters have been received in evidence; or

(2) that the president of a special court-martial without a military judge may examine that part of the record of former proceedings which relates to errors committed at the former proceedings when necessary to decide the admissibility of offered evidence or other questions of law, and such a part of the record may be read to the members when necessary for them to consider a matter subject to objection by any member.

(d) Sentence limitations.

(1) In general. Except as otherwise provided in subsection (d)(2) of this rule, offense on which a rehearing, new trial, or other trial has been ordered shall not be the basis for punishment in excess of or more severe than the legal

sentence adjudged at the previous trial or hearing, as ultimately reduced by the convening or higher authority, unless the sentence prescribed for the offense is mandatory. When a rehearing on sentencing is combined with trial on new charges, the maximum punishment shall be the maximum punishment for the offenses being reheard as limited above plus the total maximum punishment under R.C.M. 1003 for any new charges of which the accused has been found guilty. In the case of an "other trial" no sentence limitations apply if the original trial was invalid because a summary or special court-martial improperly tried an offense involving a mandatory punishment or one otherwise considered capital.

(2) Pretrial agreement. If, after the earlier court-martial, the sentence was approved in accordance with a pretrial agreement and at the rehearing the accused fails to comply with the pretrial agreement, by failing to enter a plea of guilty or otherwise, the sentence as to the affected charges and specifications may include any otherwise lawful punishment not in excess of or more severe than that lawfully adjudged at the earlier court-martial.

(e) Definition. "Other trial" means another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense.

Rule 811. Stipulations

(a) In general. The parties may make an oral or written stipulation to any fact, the contents of a document, or the expected testimony of a witness.

(b) Authority to reject. The military judge may, in the interest of justice, decline to accept a stipulation.

(c) Requirements. Before accepting a stipulation in evidence, the military judge must be satisfied that the parties consent to its admission.

(d) Withdrawal. A party may withdraw from an agreement to stipulate or from a stipulation at any time before a stipulation is accepted; the stipulation may not then be accepted. After a stipulation has been accepted a party may withdraw from it only if permitted to do so in the discretion of the military judge.

(e) Effect of stipulations. Unless properly withdrawn or ordered stricken from the record, a stipulation of fact that has been accepted is binding on the court-martial and may not be contradicted by the parties thereto. The contents of a stipulation of expected testimony or of a document's contents may be attacked, contradicted, or explained in the same way as if the witness had actually so testified or the document had been actually admitted. The fact that the parties so stipulated does not admit the truth of the indicated testimony or document's contents, nor does it add anything to the evidentiary nature of the testimony or document. The Military Rules of Evidence apply to the contents of stipulations.

(f) Procedure. When offered, a written stipulation shall be presented to the military judge and shall be included in the record whether accepted or not. Once accepted, a written stipulation of expected testimony shall be read to the members, if any, but shall not be presented to them; a written stipulation of fact or of a document's contents may be

read to the members, if any, presented to them, or both. Once accepted, an oral stipulation shall be announced to the members, if any.

Rule 812. Joint and common trials

In joint trials and in common trials, each accused shall be accorded the rights and privileges as if tried separately.

Rule 813. Announcing personnel of the court-martial and accused

(a) Opening sessions. When the court-martial is called to order for the first time in a case, the military judge shall ensure that the following is announced:

(1) the order, including any amendment, by which the court-martial is convened;

(2) the name, rank, and unit or address of the accused;

(3) the name and rank of the military judge, if one has been detailed;

(4) the names and ranks of the members, if any, who are present;

(5) the names and ranks of members who are absent, if presence of members is required;

(6) the names and ranks (if any) of counsel who are present; and

(7) the names and ranks (if any) of counsel who are absent;

(8) the name and rank (if any) of any detailed court reporter.

(b) Later proceedings. When the court-martial is called to order after a recess or adjournment or after if has been closed for any reason, the military judge shall ensure that the record reflects whether all parties and members who were present at the time of the adjournment or recess, or at the time the court-martial closed, are present.

(c) Additions, replacement, and absences of personnel. Whenever there is a replacement of the military judge, any member, or counsel, either through the appearance of new personnel or personnel previously absent or through the absence of personnel previously present, the military judge shall ensure the record reflects the change and the reason for it.

CHAPTER IX. TRIAL PROCEDURE THROUGH FINDINGS

Rule 901. Opening session

(a) Call to order. A court-martial is in session when the military judge so declares.

(b) Announcement of parties. After the court-martial is called to order, the presence or absence of the parties, military judge, and members shall be announced.

(c) Swearing reporter and interpreter. After the personnel have been accounted for as required in subsection (b) of this rule, the trial counsel shall announce whether the reporter and interpreter, if any is present, have been properly sworn. If not so sworn, the reporter and interpreter, if any, shall be sworn.

(d) Counsel.

(1) Trial counsel. The trial counsel shall announce the legal qualifications and status as to oaths of the members of the prosecution and whether any member of the prosecution has acted in any manner which might tend to disqualify that counsel.

(2) Defense counsel. The detailed defense counsel shall announce the legal qualifications and status as to oaths of the detailed members of the defense and whether any member of the defense has acted in any manner which might tend to disqualify that counsel. Any defense counsel not detailed shall state that counsel's legal qualifications, and whether that counsel has acted in any manner which might tend to disqualify that counsel.

(3) Disqualification. If it appears that any counsel may be disqualified, the military judge shall decide the matter and take appropriate action.

(4) Inquiry. The military judge shall, in open session:

(A) Inform the accused of the rights to be represented by military counsel detailed to the defense; or by individual military counsel requested by the accused, if such military counsel is reasonably available; and by civilian counsel, either alone or in association with military counsel, if such civilian counsel is provided at no expense to the United States;

(B) Inform the accused that, if afforded individual military counsel, the accused may request retention of detailed counsel as associate counsel, which request may be granted or denied in the sole discretion of the convening authority;

(C) Ascertain from the accused whether the accused understands these rights;

(D) Promptly inquire, whenever two or more accused in a joint or common trial are represented by the same detailed or individual military or civilian counsel, or by civilian counsel who are associated in the practice of law, with respect to such joint representation and shall personally advise each accused of the right to effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the military judge shall take appropriate measures to protect each accused's right to counsel; and

(E) Ascertain from the accused by whom the accused chooses to be represented.

(5) Unsworn counsel. The military judge shall administer the oath to any counsel not sworn.

(e) Presence of members. In cases in which a military judge has been detailed, the procedures described in R.C.M. 901 through 903, 904 when authorized by the Secretary concerned, and 905 through 910 shall be conducted without members present in accordance with R.C.M. 803.

Rule 902. Disqualification of military judge

(a) In general. Except as provided in subsection (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

(b) Specific grounds. A military judge shall also disqualify himself or herself in the following circumstances:

(1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

(2) Where the military judge has acted as counsel, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.

(3) Where the military judge has been or will be a witness in the same case, it the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.

(4) Where the military judge is not eligible to act because the military judge is not qualified under R.C.M. 502(c) or not detailed under R.C.M. 503(b).

(5) Where the military judge, the military judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person:

(A) Is a party to the proceeding;

(B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or

(C) Is to the military judge's knowledge likely to be a material witness in the proceeding.

(c) Definitions. For the purposes of this rule the following words or phrases shall have the meaning indicated --

(1) "proceeding" includes pretrial, trial, posttrial, appellate review, or other stages of litigation.

(2) the "degree of relationship" is calculated according to the civil law system.

(3) "military judge" does not include the president of a special court-martial without a military judge.

(d) Procedure.

(1) The military judge shall, upon motion of any party or sua sponte, decide whether the military judge is disqualified.

(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

(3) Except as provided under subsection (e) of this rule, if the military judge rules that the military judge is disqualified, the military judge shall recuse himself or herself.

(e) Waiver. No military judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) of this rule. Where the ground for disqualification arises only under subsection (a) of this rule, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Rule 903. Accused's elections on composition of court-martial

(a) Time of elections.

(1) Request for enlisted members. Before the end of the initial Article 39(a) session or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether an enlisted accused elects to be tried by a court-martial including enlisted members. The military judge may, as a matter of discretion, permit the accused to defer requesting enlisted members until any time before assembly, which time may be determined by the military judge.

(2) Request for trial by military judge alone. Before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether in a noncapital case, the accused requests trial by the military judge alone. The accused may defer requesting trial by military judge alone until any time before assembly.

(b) Form of election.

(1) Request for enlisted members. A request for the membership of the court-martial to include enlisted persons shall be in writing and signed by the accused.

(2) Request for trial by military judge alone. A request for trial by military judge alone shall be in writing and signed by the accused or shall be made orally on the record.

(c) Action on election.

(1) Request for enlisted members. Upon receipt of a timely written request for enlisted members by an enlisted accused the convening authority shall detail enlisted members to the court-martial in accordance with R.C.M. 503 or prepare a detailed written statement explaining why physical conditions or military exigencies prevented this. The trial of the general issue shall not proceed until this is done.

(2) Request for military judge alone. Upon receipt of a timely request for trial by military judge alone the military judge shall:

(A) Ascertain whether the accused has consulted with defense counsel and has been informed of the identity of the military judge and of the right to trial by members; and

(B) Approve or disapprove the request, in the military judge's discretion.

(3) Other. In the absence of a written request for enlisted members or for trial by military judge alone, trial shall be by a court-martial composed of officers.

(d) Right to withdraw request.

(1) Enlisted members. A request for enlisted members may be withdrawn by the accused as a matter of right any time before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly.

(2) Military judge. A request for trial by military judge alone may be withdrawn by the accused as a matter of right any time before it is approved, or, even after approval, if there is a change of the military judge.

(e) Untimely requests. Failure to request, or failure to withdraw a request for enlisted members or trial by military judge alone in a timely manner shall waive the right to submit or to withdraw such a request. However, the military judge may until the beginning of the introduction of evidence on the merits, as a matter of discretion, approve an untimely request or withdrawal of a request.

(f) Scope. For purposes of this rule, "military judge" does not include the president of a special court-martial without a military judge.

Rule 904. Arraignment

Arraignment shall be conducted in a court-martial session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading.

Rule 905. Motions generally

(a) Definitions and form. A motion is an application to the military judge for particular relief. Motions may be oral or, at the discretion of the military judge, written. A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of a motion, not its form or designation, shall control.

(b) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue of guilt may be raised before trial. The following must be raised before a plea is entered:

(1) Defenses or objections based on defects (other than jurisdictional defects) in the preferral, forwarding, investigation, or referral of charges;

(2) Defenses or objections based on defects in the charges and specifications (other than any failure to show jurisdiction or to charge an offense, which objections shall be resolved by the military judge at any time during the pendency of the proceedings);

(3) Motions to suppress evidence;

(4) Motions for discovery under R.C.M. 701 or for production of witnesses or evidence;

(5) Motions for severance of charges or accused; or

(6) Objections based on denial of request for individual military counsel or for retenion of detailed defense counsel when individual military counsel has been granted.

(c) Burden of proof.

(1) Standard. Unless otherwise provided in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence.

(2) Assignment.

(A) Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party.

(B) In the case of a motion to dismiss for lack of jurisdiction, denial of the right to speedy trial under R.C.M. 707, or the running of the statute of limitations, the burden of persuasion shall be upon the prosecution.

(d) Ruling on motions. A motion made before pleas are entered shall be determined before pleas are entered unless, if otherwise not prohibited by this Manual, the military judge for good cause orders that determination be deferred until trial of the general issue or after findings, but no such determination shall be deferred if a party's right to review or appeal is adversely affected. Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.

(e) Effect of failure to raise defenses or objections. Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

(f) Reconsideration. On request of any party or sua sponte, the military judge may reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge.

(g) Effect of final determinations. Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused, except that, when the offenses charged at one court-martial did not

arise out of the same transaction as those charged at the court-martial at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties.

(h) Written motions. Written motions may be submitted to the military judge after referral and when appropriate they may be supported by affidavits, with service and opportunity to reply to the opposing party. Such motions may be disposed of before arraignment and without a session. Upon request, either party is entitled to an Article 39(a) session to present oral argument or have an evidentiary hearing concerning the disposition of written motions.

(i) Service. Written motions shall be served on all other parties. Unless otherwise directed by the military judge, the service shall be made upon counsel for each party.

(j) Application to convening authority. Except as otherwise provided in this Manual, any matters which may be resolved upon motion without trial of the general issue of guilt may be submitted by a party to the convening authority before trial for decision. Submission of such matter to the convening authority is not, except as otherwise provided in this Manual, required, and is, in any event, without prejudice to the renewal of the issue by timely motion before the military judge.

(k) Production of statements on motion to suppress. Except as provided in this subsection, R.C.M. 914 shall apply at a hearing on a motion to suppress evidence under subsection (b)(3) of this rule. For purposes of this subsection, a law enforcement officer shall be deemed a witness called by the Government, and upon a claim of privilege the military judge shall excise portions of the statement containing privileged matter.

Rule 906. Motions for appropriate relief

(a) In general. A motion for appropriate relief is a request for a ruling to cure a defect which deprives a party of a right or hinders a party from preparing for trial or presenting its case.

(b) Grounds for appropriate relief. The following may be requested by motion for appropriate relief. This list is not exclusive.

(1) %continuances. A continuance may be granted only by the military judge.

(2) Record of denial of individual military counsel or of denial of request to retain detailed counsel when a request for individual military counsel was granted. If a request for military counsel was denied, which denial was upheld on appeal (if available) or if a request to retain detailed counsel was denied when the accused is represented by individual military counsel, and if the accused so requests, the military judge shall ensure that a record of the matter is included in the record of trial, and may make findings. The trial counsel may request a continuance to inform the convening authority of those findings. The military judge may not dismiss the charges or otherwise effectively prevent further proceedings based on this issue. However, the military judge may grant reasonable continuances

until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of unavailability is in the process of review in administrative channels.

(3) Correction of defects in the Article 32 investigation or pretrial advice.

(4) Amendment of charges or specifications. A charge or specification may not be amended over the accused's objection unless the amendment is minor within the meaning of R.C.M. 603(a).

(5) Severance of a duplicious specification into two or more specifications.

(6) Bill of particulars. A bill of particulars may be amended at any time, subject to such conditions as justice permits.

(7) Discovery and production of evidence and witnesses.

(8) Relief from pretrial confinement in violation of R.C.M. 305.

(9) Severance of multiple accused, if it appears that an accused or the Government is prejudiced by a joint or common trial. In a common trial, a severance shall be granted whenever any accused, other than the moving accused, faces charges unrelated to those charged against the moving accused.

(10) Severance of offenses, but only to prevent manifest injustice.

(11) Change of place of trial. The place of trial may be changed when necessary to prevent prejudice to the rights of the accused or for the convenience of the Government if the rights of the accused are not prejudiced thereby.

(12) Determination of multiplicity of offenses for sentencing purposes.

(13) Preliminary ruling on admissibility of evidence.

(14) Motions relating to mental capacity or responsibility of the accused.

Rule 907. Motions to dismiss

(a) In general. A motion to dismiss is a request to terminate further proceedings as to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt.

(b) Grounds for dismissal. Grounds for dismissal include the following --

(1) Nonwaivable grounds. A charge or specification shall be dismissed at any stage of the proceedings if:

(A) The court-martial lacks jurisdiction to try the accused for the offense; or

(B) The specification fails to state an offense.

(2) Waivable grounds. A charge or specification shall be dismissed upon motion made by the accused before the final adjournment of the court-martial in that case if:

(A) Dismissal is required under R.C.M. 707;

(B) The statute of limitations (Article 43) has run, provided that, if it appears that the accused is unaware of the right to assert the statute of limitations in bar of trial, the military judge shall inform the accused of this right;

(C) The accused has previously been tried by court-martial or federal civilian court for the same offense, provided that:

(i) no court-martial proceeding is a trial in the sense of this rule unless presentation of evidence on the general issue of guilt has begun;

(ii) no court-martial proceeding which has been terminated under R.C.M. 604(b) or R.C.M. 915 shall bar later prosecution for the same offense or offenses, if so provided in those rules;

(iii) no court-martial proceeding in which an accused has been found guilty of any charge or specification is a trial in the sense of this rule until the finding of guilty has become final after review of the case has been fully completed; and

(iv) no court-martial proceeding which lacked jurisdiction to try the accused for the offense is a trial in the sense of this rule.

(D) Prosecution is barred by:

(i) A pardon issued by the President;

(ii) Immunity from prosecution granted by a person authorized to do so;

(iii) Constructive condonation of desertion established by unconditional restoration to duty without trial of a deserter by a general court-martial convening authority who knew of the desertion; or

(iv) Prior punishment under Articles 13 or 15 for the same offense, if that offense was minor.

(3) Permissible grounds. A specification may be dismissed upon timely motion by the accused if:

(A) the specification is so defective that it substantially misled the accused, and the military judge finds that, in the interest of justice, trial should proceed on remaining charges and specifications without undue delay; or

(B) the specification is multiplicious with another specification, is unnecessary to enable the prosecution to meet the exigencies of proof through trial, review, and appellate action, and should be dismissed in the interest of justice.

Rule 908. Appeal by the United States

(a) In general. In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceedings.

However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty, with respect to the charge or specification.

(b) Procedure.

(1) Delay. After an order or ruling which may be subject to an appeal by the United States, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the trial counsel requests a delay to determine whether to file notice of appeal under this rule. Trial counsel is entitled to no more than 72 hours under this subsection.

(2) Decision to appeal. The decision whether to file notice of appeal under this rule shall be made within 72 hours of the ruling or order to be appealed. If the Secretary concerned so prescribes, the trial counsel shall not file notice of appeal unless authorized to do so by a person designated by the Secretary concerned.

(3) Notice of appeal. If the United States elects to appeal, the trial counsel shall provide the military judge with written notice to this effect not later than 72 hours after the ruling or order. Such notice shall identify the ruling or order to be appealed and the charges and specifications affected. Trial counsel shall certify that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(4) Effect on the court-martial. Upon written notice to the military judge under subsection (b)(3) of this rule, no session of the court-martial may proceed pending disposition by the Court of Military Review of the appeal, except that solely as to charges and specifications not affected by the ruling or order:

(A) Motions may be litigated, in the discretion of the military judge, at any point in the proceedings;

(B) When trial on the merits has not begun,

(i) A severance may be granted upon request of all the parties;

(ii) A severance may be granted upon request of the accused and when appropriate under R.C.M. 906(b)(10); or

(C) When trial on the merits has begun but has not been completed, a party may, on that party's request and in the discretion of the military judge, present further evidence on the merits.

(5) Record. Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall cause a record of the proceedings to be prepared. Such record shall be verbatim and complete to the extent necessary to resolve the issues appealed. R.C.M. 1103(g), (h), and (i) shall apply and the record shall be authenticated in accordance with R.C.M. 1104(a). The military judge or the Court of Military Review may direct that additional parts of the proceeding be included in the record; R.C.M. 1104(d) shall not apply to such additions.

(6) Forwarding. Upon written notice to the military judge under subsection (b)(3) of this rule, trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by the Judge Advocate General. The matter forwarded shall include: a statement of the issues appealed; the record of the

proceedings or, if preparation of the record has not been completed, a summary of the evidence; and such other matters as the Secretary concerned may prescribe. The person designated by the Judge Advocate General shall promptly decide whether to file the appeal with the Court of Military Review and notify the trial counsel of that decision.

(7) Appeal filed. If the United States elects to file an appeal, it shall be filed directly with the Court of Military Review, in accordance with the rules of that court.

(8) Appeal not filed. If the United States elects not to file an appeal, trial counsel promptly shall notify the military judge and the other parties.

(c) Appellate proceedings.

(1) Appellate counsel. The parties shall be represented before appellate courts in proceedings under this rule as provided in R.C.M. 1202. Appellate Government counsel shall diligently prosecute an appeal under this rule.

(2) Court of Military Review. An appeal under Article 62 shall, whenever practicable, have priority over all other proceedings before the Court of Military Review. In determining an appeal under Article 62, the Court of Minitary Review may take action only with respect to matters of law.

(3) Action following decision of Court of Military Review. After the Court of Military Review has decided any appeal under Article 62, the accused may petition for review by the Court of Military Appeals, or the Judge Advocate General may certify a question to the Court of Military Appeals. The parties shall be notified of the decision of the Court of Military Review promptly. If the decision is adverse to the accused, the accused shall be notified of the decision and of the right to petition the Court of Military Appeals for review within 60 days orally on the record at the court-martial or in accordance with R.C.M. 1203(d). If the accused is notified orally on the record, trial counsel shall forward by expeditious means a certificate that the accused was so notified to the Judge Advocate General, who shall forward a copy to the clerk of the Court of Military Appeals when required by the Court. If the decision by the Court of Military Review permits it, the court-martial may proceed as to the affected charges and specifications pending further review by the Court of Military Appeals or the Supreme Court, unless either court orders the proceedings stayed. Unless the case is reviewed by the Court of Military Appeals, it shall be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court of Military Review. If the case is reviewed by the Court of Military Appeals, R.C.M. 1204 and 1205 shall apply.

(d) Military judge. For purposes of this rule, "military judge" does not include the resident of a special court-martial without a military judge.

Rule 909. Capacity of the accused to stand trial by court-martial

(a) In general. No person may be brought to trial by court-martial unless that person possesses sufficient mental capacity to understand the nature of the proceedings against that person and to conduct or cooperate intelligently in the defense of the case.

(b) Presumption of capacity. A person is presumed to have the capacity to stand trial unless the contrary appears.

(c) Determination at trial.

(1) Nature of issue. The mental capacity of the accused is an interlocutory question of fact.

(2) Standard. When the issue of the accused's capacity to stand trial is raised, trial may not proceed unless it is established by a preponderance of the evidence that the accused possesses sufficient mental capacity to understand the nature of the proceedings against the accused and to conduct or cooperate intelligently in the defense of the case.

Rule 910. Pleas

(a) Alternatives.

(1) In general. An accused may plead not guilty or guilty. An accused may plead, by exceptions or by exceptions and substitutions, not guilty to an offense as charged, but guilty to an offense included in that offense. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.

(2) Conditional pleas. With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for the Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

(b) Refusal to plead; irregular plea. If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

(c) Advice to accused. Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) the nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law;

(2) in a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

(3) that the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) that if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this rule; and

(5) that if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's answers may later be used against the accused in a prosecution for perjury or false statement.

(d) Ensuring that the plea is voluntary. The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) Determining accuracy of plea. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

(f) Plea agreement inquiry.

(1) In general. A plea agreement may not be accepted if it does not comply with R.C.M. 705.

(2) Notice. The parties shall inform the military judge if a plea agreement exists.

(3) Disclosure. If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.

(4) Inquiry. The military judge shall inquire to ensure:

(A) that the accused understands the agreement; and

(B) that the parties agree to the terms of the agreement.

(g) Findings. Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless:

(1) such action is not permitted by regulations of the Secretary concerned;

(2) the plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged; or

(3) trial is by a special court-martial without a military judge, in which case the president of the court-martial may enter findings based on the pleas without a formal vote except when subsection (g)(2) of this rule applies.

(h) Later action.

(1) Withdrawal by the accused. If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) Statements by accused inconsistent with plea. If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appeals that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

(3) Pretrial agreement inquiry. After sentence is announced the military judge shall inquire into any parts of a pretrial agreement which were not previously examined by the military judge. If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea.

(i) Record of proceedings. A verbatim record of the guilty plea proceedings shall be made in cases in which a verbatim record is required under R.C.M. 1103. In other special courts-martial, a summary of the explanation and replies shall be included in the record of trial. As to summary courts-martial, see R.C.M. 1305.

(j) Waiver. Except as provided in subsection (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

Rule 911. Assembly of the court-martial

The military judge shall announce the assembly of the court-martial.

Rule 912. Challenge of selection of members; examination and challenges of members

(a) Pretrial matters.

(1) Questionnaires. Before trial the trial counsel may, and shall upon request of the defense counsel, submit to each member written questions requesting the following information:

(A) date of birth;

(B) sex;

(C) race;

(D) marital status and sex, age, and number of dependents;

(E) home of record;

(F) civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received;

(G) current unit to which assigned;

(H) past duty assignments;

(I) awards and decorations received;

(J) date of rank; and

(K) whether the member has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

Additional information may be requested with the approval of the military judge. Each member's responses to the questions shall be written and signed by the member.

(2) Other materials. A copy of any written materials considered by the convening authority in selecting the members detailed to the court-martial shall be provided to any party upon request, except that such materials pertaining solely to persons who were not selected for detail as members need not be provided unless the military judge, for good cause, so directs.

(b) Challenge of selection of members.

(1) Motion. Before the examination of members under subsection (d) of this rule begins, or at the next session after a party discovered or could have discovered by the exercise of diligence, the grounds therefor, whichever is earlier, that party may move to stay the proceedings on the ground that members were selected improperly.

(2) Procedure. Upon a motion under subsection (b)(1) of this rule containing an offer of proof of matters which, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence, including any written materials considered by the convening authority in selecting the members. Any other party may also present evidence on the matter. If the military judge determines that the members have been selected improperly, the military judge shall stay any proceedings requiring the presence of members until members are properly selected.

(3) Waiver. Failure to make a timely motion under this subsection shall waive the improper selection unless it constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2).

(c) Stating grounds for challenge. The trial counsel shall state any ground for challenge for cause against any member of which the trial counsel is aware.

(d) Examination of members. The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.

(e) Evidence. Any party may present evidence relating to whether grounds for challenge exist against a member.

(f) Challenges and removal for cause.

(1) Grounds. A member shall be excused for cause whenever it appears that the member:

(A) Is not competent to serve as a member under Article 25(a), (b), or (c);

(B) Has not been properly detailed as a member of the court-martial;

(C) Is an accuser as to any offense charged;

(D) Will be a witness in the court-martial;

(E) Has acted as counsel for any party as to any offense charged;

(F) Has been an investigating officer as to any offense charged;

(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;

(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;

(I) Has forwarded charges in the case with a personal recommendation as to disposition;

(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;

(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;

(L) Is in arrest or confinement;

(M) Has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

(2) When made.

(A) Upon completion of examination. Upon completion of any examination under subsection (d) of this rule and the presentation of evidence, if any, on the matter, each party shall state any challenges for cause it elects to make.

(B) Other times. A challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.

(3) Procedure. Each party shall be permitted to make challenges outside the presence of the members. The party making a challenge shall state the grounds for it. Ordinarily the trial counsel shall enter any challenges for cause before the defense counsel. The military judge shall rule finally on each challenge. When a challenge for cause is granted, the member concerned shall be excused. The burden of establishing that grounds for a challenge exist is upon the party making the challenge. A member successfully challenged shall be excused.

(4) Waiver. The grounds for challenge in subsection (f)(1)(A) of this rule may not be waived except that membership of enlisted members in the same unit as the accused may be waived. Membership of enlisted members in the same unit as the accused and any other ground for challenge is waived if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner.

Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie. When a challenge for cause has been denied, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.

(g) Peremptory challenges.

(1) Procedure. Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenge before the defense.

(2) Waiver. Failure to exercise a peremptory challenge when properly called upon to do so shall waive the right to make such a challenge. The military judge may, for good cause shown, grant relief from the waiver, but a peremptory challenge may not be made after the presentation of evidence before the members has begun.

However, nothing in this subsection shall bar the exercise of a previously unexercised peremptory challenge against a member newly detailed under R.C.M. 505(c)(2)(B), even if presentation of evidence on the merits has begun.

(h) Special courts-martial without a military judge. In a special court-martial without a military judge, the procedures in this rule shall apply, except that challenges shall be made in the presence of the members and a ruling on any challenge for cause shall be decided by a majority vote of the members upon secret written ballot in closed session. The challenged member shall not be present at the closed session at which the challenge is decided. A tie vote on a challenge disqualifies the member challenged. Before closing, the president shall give such instructions as may be necessary to resolve the challenge. Each challenge shall be necessary to resolve the challenge. Each challenge shall be decided separately, and all unexcused members except the challenged member shall participate. When only three members are present and one is challenged, the remaining two may decide the challenge. When the president is challenged, the next senior member shall act as president for purposes of deciding the challenge.

(i) Definitions.

(1) Military judge. For purpose of this rule, "military judge" does not include the president of a special court-martial without a military judge.

(2) Witness. For purposes of this rule, "witness" includes one who testifies at a court-martial and anyone whose declaration is received in evidence for any purpose, including written declarations made by affidavit or otherwise.

(3) Investigating officer. For purposes of this rule, "investigating officer" includes any person who has investigated charges under R.C.M. 405 and any person who as counsel for or a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.

Rule 913. Presentation of the case on the merits

(a) Preliminary instructions. The military judge may give such preliminary instructions as may be appropriate.

(b) Opening statements. Each party may make one opening statement to the court-martial before presentation of evidence has begun. The defense may elect to make its statement after the prosecution has rested, before the presentation of evidence for the defense. The military judge may, as a matter of discretion, permit the parties to address the court-martial at other times.

(c) Presentation of evidence. Each party shall have full opportunity to present evidence.

(1) Order of presentation. Ordinarily the following sequence shall be followed:

(A) Presentation of evidence for the prosecution;

(B) Presentation of evidence for the defense;

(C) Presentation of prosecution evidence in rebuttal;

(D) Presentation of defense evidence in surrebuttal;

(E) Additional rebuttal evidence in the discretion of the military judge; and

(F) Presentation of evidence requested by the military judge or members.

(2) Taking testimony. The testimony of witnesses shall be taken orally in open session, unless otherwise provided in this Manual.

(3) Views and inspections. The military judge may, as a matter of discretion, permit the court-martial to view or inspect premises or a place or an article or object. Such a view or inspection shall take place only in the presence of all parties, the members (if any), and the military judge. A person familiar with the scene may be designated by the military judge to escort the court-martial. Such person shall perform the duties of escort under oath. The escort shall not testify, but may point out particular features prescribed by the military judge. Any statement made at the view or inspection by the escort, a party, the military judge, or any member shall be made part of the record.

(4) Evidence subject to exclusion. When offered evidence would be subject to exclusion upon objection, the military judge may, as a matter of discretion, bring the matter to the attention of the parties and may, in the interest of justice, exclude the evidence without an objection by a party.

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

Rule 914. Production of statements of witnesses

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

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

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

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

(c) Production of excised statement. If the party who called the witness claims that the statement contains matter than does not relate to the subject matter concerning which the witness has testified, the military judge shall order that it be delivered to the military judge. Upon inspection, the military judge shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of a statement that is withheld from an accused over objection shall be preserved by the trial counsel, and, in the event of a conviction, shall be

made available to the reviewing authorities for the purpose of determining the correctness of the decision to excise the portion of the statement.

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

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

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

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

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

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

Rule 915. Mistrial

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

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

(c) Effect of declaration of mistrial.

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

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

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

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

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Rule 916. Defenses

(a) In general. As used in this rule, "defenses" includes any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts.

(b) Burden of proof. Once a defense under this rule is placed in issue by some evidence, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist.

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

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

(e) Self-defense.

(1) Homicide or aggravated assault cases. It is a defense to a homicide or assault in which the accused intended to kill or inflict grievous bodily harm that the accused:

(A) apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and

(B) believed that the force the accused used was necessary for protection against death or grievous bodily harm.

(2) Certain aggravated assault cases. It is a defense to assault with a dangerous weapon or means likely to produce death or grievous bodily harm that the accused:

(A) apprehended, on reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) in order to deter the assailant, offered but did not actually apply or attempt to apply such means or force as would be likely to cause death or grievous bodily harm.

(3) Other assaults. It is a defense to any assault punishable under Article 90, 91, or 128 and not listed in subsections (c)(1) or (2) of this rule that the accused:

(A) apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and

(B) believed that the force the accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.

(4) Loss of right to self-defense. The right to self-defense is lost and the defenses described in subsections (e)(1), (2), and (3) of this rule shall not apply if the accused was an aggressor, engaged in mutual combat, or provoked the

attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.

(5) Defense of another. The principles of self-defense under subsections (e)(1) through (4) of this rule apply to defense of another. It is a defense to homicide, attempted homicide, assault with intent to kill, or any assault under Article 90, 91, or 128 that the accused acted in defense of another, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances.

(f) Accident. A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable.

(g) Entrapment. It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense.

(h) Coercion or duress. It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.

(i) Inability. It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty.

(j) Ignorance or mistake of fact. Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

(k) Lack of mental responsibility.

(1) General lack of mental responsibility. It is a defense to any offense that the accused was not mentally responsible for it. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacks substantial capacity to appreciate the criminality of that person's conduct or to conform that person's conduct to the requirements of law. As used in this rule, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial behavior.

(2) Partial mental responsibility. A mental condition not amounting to a general lack of mental responsibility under subsection (k)(1) of this rule but which produces a lack of mental ability at the time of the offense to possess actual knowledge or to entertain a specific intent or a premeditated design to kill is a defense to an offense having one of these states of mind as an element.

(3) Procedure.

(A) Presumption. The accused is presumed to have been mentally responsible at the time of the alleged offense. This presumption continues until some evidence to the contrary is admitted.

(B) Inquiry. If a question is raised concerning the mental responsibility of the accused, the military judge shall rule finally whether to direct an inquiry under R.C.M. 706. In a special court-martial without a military judge, the president shall rule finally except to the extent that the question is one of fact, in which case the president rules subject to objection by any member.

(C) Determination. The issue of mental responsibility shall not be considered as an interlocutory question.

(1) Not defenses generally.

(1) Ignorance or mistake of law. Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense.

(2) Voluntary intoxication. Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

Rule 917. Motion for a finding of not guilty

(a) In general. The military judge, on motion by the accused or sua sponte, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected. If a motion for a finding of not guilty at the close of the prosecution's case is denied, the defense may offer evidence on that offense without having reserved the right to do so.

(b) Form of motion. The motion shall specifically indicate wherein the evidence is insufficient.

(c) Procedure. Before ruling on a motion for a finding of not guilty, whether made by counsel or sua sponte, the military judge shall give each party an opportunity to be heard on the matter.

(d) Standard. A motion for a finding of not guilty shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

(e) Motion as to greater offense. A motion for a finding of not guilty may be granted as to part of a specification and, if appropriate, the corresponding charge, as long as a lesser offense charged is alleged in the portion of the specification as to which the motion is not granted. In such cases, the military judge shall announce that a finding of not guilty has been granted as to specified language in the specification and, if appropriate, corresponding charge. In cases before members, the military judge shall instruct the members accordingly, so that any findings later announced will not be inconsistent with the granting of the motion.

(f) Effect of ruling. A ruling granting a motion for a finding of not guilty is final when announced and may not be reconsidered. Such a ruling is a finding of not guilty of the affected specification, or affected portion thereof, and, when appropriate, of the corresponding charge. A ruling denying a motion for a finding of not guilty may be reconsidered at any time before findings on the general issue of guilt are announced.

(g) Effect of denial on review. If all the evidence admitted before findings, regardless by whom offered, is sufficient to sustain findings of guilty, the findings need not be set aside upon review solely because the motion for finding of not guilty should have been granted upon the state of the evidence when it was made.

Rule 918. Findings

(a) General findings. The general findings of a court-martial state whether the accused is guilty of each offense charged. If two or more accused are tried together, separate findings as to each shall be made.

(1) As to a specification. General findings as to a specification may be: guilty; guilty with exceptions, with or without substitutions, not guilty of the exceptions but guilty of any substitutions; or not guilty. Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it.

(2) As to a charge. General findings as to a charge may be: guilty; not guilty, but guilty of a violation of Article ; or not guilty.

(b) Special findings. In a trial by court-martial composed of military judge alone, the military judge shall make special findings upon request by any party. Special findings may be requested only as to matters of fact reasonably in issue as to an offense and need be made only as to offenses of which the accused was found guilty. Special findings may be requested at any time before general findings are announced. Only one set of special findings may be requested by a party in a case. If the request is for findings on specific matters, the military judge may require that the request be written. Special findings may be entered orally on the record at the court-martial or in writing during or after the court-martial, but in any event shall be made before authentication and included in the record of trial.

(c) Basis of findings. Findings may be based on direct or circumstantial evidence. Only matters properly before the court-martial on the merits of the case may be considered. A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt.

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Rule 919. Argument by counsel on findings

(a) In general. After the closing of evidence, trial counsel shall be permitted to open the argument. The defense counsel shall be permitted to reply. Trial counsel shall then be permitted to reply in rebuttal.

(b) Contents. Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case.

(c) Waiver of objection to improper argument. Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection.

Rule 920. Instructions on findings

(a) In general. The military judge shall give the members appropriate instructions on findings.

(b) When given. Instructions on findings shall be given after arguments by counsel and before the members close to deliberate on findings, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.

(c) Requests for instruction. At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.

(d) How given. Instructions on findings shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or, unless a party objects, portions of them, may also be given to the members for their use during deliberations.

(e) Required instructions. Instructions on findings shall include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

(2) A description of the elements of each lesser included offense in issue;

(3) A description of any special defense under R.C.M. 916 in issue;

(4) A direction that only matters properly before the court-martial may be considered;

(5) A charge that --

(A) the accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt;

(B) in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

(C) if, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is no reasonable doubt; and

(D) the burden of proof to establish the guilt of the accused is upon the Government;

(6) Directions on the procedures under R.C.M. 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given.

(f) Waiver. Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions given were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 921. Deliberations and voting on findings

(a) In general. After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgment.

(b) Deliberations. Deliberations properly include full and free discussion of the merits of the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(c) Voting.

(1) Secret ballot. Voting on the findings for each charge and specification shall be by secret written ballot. All members present shall vote.

(2) Number of votes required to convict.

(A) Death penalty mandatory. A finding of guilty of an offense for which the death penalty is mandatory results only if all members present vote for a finding of guilty.

(B) Other offenses. As to any offense for which the death penalty is not mandatory, a finding of guilty results only if at least two-thirds of the members present vote for a finding of guilty.

(3) Acquittal. If fewer than two-thirds of the members present vote for a finding of guilty--or, when the death penalty is mandatory, if fewer than all the members present vote for a finding of guilty--a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

(4) Included offenses. Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has been reached the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue to vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each such offense.

(5) Procedure for voting.

(A) Order. Each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object.

(B) Counting votes. The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

(d) Action after findings are reached. After the members have reached findings on each charge and specification before them, the court-martial shall be opened and the president shall inform the military judge that findings have been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the sentence and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings.

Rule 922. Announcement of findings

(a) In general. Findings shall be announced in the presence of all parties promptly after they have been determined.

(b) Findings by members. The president shall announce the findings by the members. If a finding is based on a plea of guilty, the president shall so state.

(c) Findings by military judge. The military judge shall announce the findings when trial is by military judge alone or when findings may be entered under R.C.M. 910(g).

(d) Erroneous announcement. If an error was made in the announcement of the findings of the court-martial, the error may be corrected by a new announcement in accordance with this rule. The error must be discovered and the new announcement made before the final adjournment of the court-martial in the case.

(e) Polling prohibited. Except as provided in Mil. R. Evid. 606, members may not be questioned about their deliberations and voting.

Rule 923. Impeachment of findings

Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Rule 924. Reconsideration of findings

(a) Time for reconsideration. Members may reconsider any finding reached by them before such finding is announced in open session. Members may reconsider any finding of guilty reached by them at any time before announcement of the sentence.

(b) Procedure. Any member may propose that a finding be reconsidered. If such a proposal is made in a timely manner the question whether to reconsider shall be determined the closed session by secret written ballot. Any finding of not guilty shall be reconsidered if a majority vote for reconsideration. Any finding of guilty shall be reconsidered if more than one-third of the members vote for reconsideration. When the death penalty is mandatory, a request by any member for reconsideration of a guilty finding requires reconsideration. If a vote to reconsider a finding succeeds, the procedures in R.C.M. 921 shall apply.

(c) Military judge sitting alone. In trial by military judge alone, the military judge may reconsider any finding of guilty at any time before announcement of sentence.

CHAPTER X. SENTENCING

Rule 1001. Presentencing procedure

(a) In general.

(1) Procedure. After findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence. Such matter shall ordinarily be presented in the following sequence --

(A) Presentation by trial counsel of:

(i) service data relating to the accused taken from the charge sheet;

(ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;

(iii) evidence of prior convictions, military or civilian;

(iv) evidence of aggravation; and

(v) evidence of rehabilitative potential.

(B) Presentation by the defense of evidence in extenuation or mitigation or both.

(C) Rebuttal.

(D) Argument by the trial counsel on sentence.

(E) Argument by the defense counsel on sentence.

(F) Rebuttal arguments in the discretion of the military judge.

(2) Adjudging sentence. A sentence shall be adjudged in all cases without unreasonable delay.

(3) Advice and inquiry. The military judge shall personally inform the accused of the right to present matters in extenuation and mitigation, including the right to make a sworn or unsworn statement or to remain silent, and shall ask whether the accused chooses to exercise those rights.

(b) Matter to be presented by the prosecution.

(1) Service data from the charge sheet. Trial counsel shall inform the court-martial of the data on the charge sheet relating to the age, pay, and service of the accused and the duration and nature of any pretrial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue. Objections not asserted are waived.

(2) Personal data and character of prior service of the accused. Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's marital status; number of dependents, if any; and character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15. "Personnel records of the accused" includes all those records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document as inaccurate or incomplete in a specified respect, or as containing matter that is not admissible under the military Rules of Evidence, the matter shall be determined by the military judge. Objections not asserted are waived.

(3) Evidence of prior convictions of the accused.

(A) In general. The trial counsel may introduce evidence of military or civilian convictions of the accused. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

(B) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of this rule until review has been completed pursuant to Article 65(c) or Article 66, if applicable. Evidence of the pendency of an appeal is admissible.

(C) Method of proof. Previous convictions may be proved by any evidence admissible under the Military Rules of Evidence.

(4) Evidence in aggravation. The trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Except in capital cases a written or oral deposition taken in accordance with R.C.M. 702 is admissible in aggravation.

(5) Evidence of rehabilitative potential. The trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of opinion, concerning the accused's previous performance as a servicemember and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instance of conduct.

(c) Matter to be presented by the defense.

(1) In general. The defense may present matters in rebuttal of any material presented by the prosecution and may present matters in extenuation and mitigation regardless whether the defense offered evidence before findings.

(A) Matter in extenuation. Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.

(B) Matter in mitigation. Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency. It includes the fact that nonjudicial punishment under Article 15 has been imposed for an offense growing out of the same act or omission that constitutes the offense of which the accused has been found guilty, particular acts of good conduct or bravery, and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember.

(2) Statement by the accused.

(A) In general. The accused may testify, make an unsworn statement, or both in extenuation, in mitigation, or to rebut matters presented by the prosecution, or for all three purposes whether or not the accused testified prior to findings. The accused may limit such testimony or statement to any one or more of the specifications of which the accused has been found guilty. This subsection does not permit the filing of an affidavit of the accused.

(B) Testimony of the accused. The accused may give sworn oral testimony under this paragraph and shall be subject to cross-examination concerning it by the trial counsel or examination on it by the court-martial, or both.

(C) Unsworn statement. The accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial. The prosecution may, however, rebut any statements of facts therein. The unsworn statement may be oral, written, or both, and may be made by the accused, by counsel, or both.

(3) Rules of evidence relaxed. The military judge may, with respect to matters in extenuation or mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

(d) Rebuttal and surrebuttal. The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue, in the discretion of the military judge. If the Military Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

(e) Production of witnesses.

(1) In general. During the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. Whether a witness shall be produced to testify during presentence proceedings is a matter within the discretion of the military judge, subject to the limitations in subsection (e)(2) of this rule.

(2) Limitations. A witness may be produced to testify during presentence proceedings through a subpoena or travel orders at Government expense only if --

(A) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;

(B) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;

(D) Other forms of evidence, such as oral depositions, written interrogatories, or former testimony would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

(E) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(f) Additional matters to be considered. In addition to matters introduced under this rule, the court-martial may consider --

(1) That a plea of guilty is a mitigating factor; and

(2) Any evidence properly introduced on the merits before findings, including:

(A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and

(B) Evidence relating to any mental impairment or deficiency of the accused.

(g) Argument. After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection.

Rule 1002. Sentence determination

Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment or any lesser punishment, or may adjudge a sentence of no punishment.

Rule 1003. Punishments

(a) In general. Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial.

(b) Authorized punishments. Subject to the limitaitons in this Manual, a court-martial may adjudge only the following punishments:

(1) Reprimand. A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority;

(2) Forfeiture of pay and allowances. Unless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last. Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or foreign duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced;

(3) Fine. Any court-martial may adjudge a fine instead of forfeitures. General courts-martial may also adjudge a fine in addition to forfeitures. Special and summary courts-martial may not adjudge any fine in excess of the total

amount of forfeitures which may be adjudged in that case. In order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial;

(4) Loss of numbers, lineal position, or seniority. These punishments are authorized only in cases of Navy, Marine Corps, and Coast Guard officers;

(5) Reduction in pay grade. Except as provided in R.C.M. 1301(d), a court-martial may sentence an enlisted member to be reduced to the lowest or any intermediate pay grade;

(6) Restriction to specified limits. Restriction may be adjudged for no more than 2 months for each month of authorized confinement and in no case for more than 2 months. Confinement and restriction may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection;

(7) Hard labor without confinement. Hard labor without confinement may be adjudged for no more than 1-1/2 months for each month of authorized confinement and in no case for more than three months. Hard labor without confinement may be adjudged only in the cases of enlisted members. The court-martial shall not specify the hard labor to be performed. Confinement and hard labor without confinement may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection.

(8) Confinement. The place of confinement shall not be designated by the court-martial. A court-marital shall not adjudge a sentence to solitary confinement or to confinement without hard labor;

(9) Confinement on bread and water or diminished rations. Confinement on bread and water or diminished rations may be adjudged only in cases of enlisted members attached to or embarked in a vessel and for no more than 3 days. The categories of enlisted personnel upon whom this type of punishment may be imposed may be further limited by regulations of the Secretary concerned. If adjudged in the same sentence wih confinement, hard labor without confinement, or restriction, confinement on bread and water or diminished rations for 1 day shall be treated as the equivalent of confinement for 2 days;

(10) Punitive separation. A court-martial may not adjudge an administrative separation from the service. There are three types of punitive separation.

(A) Dismissal. Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dismissal may be adjudged for any offense of which a commissioned officer, commissioned warrant officer, cadet, or midshipman has been found guilty;

(B) Dishonorable discharge. A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment; and

(C) Bad-conduct discharge. A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M. 201(f)(2)(B). A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary;

(11) Death. Death may be adjudged only in accordance with R.C.M. 1004; and

(12) Punishments under the law of war. In cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war.

(c) Limits on punishments.

(1) Based on offenses.

(A) Offenses listed in Part IV.

(i) Maximum punishment. The maximum limits for the authorized punishments of cnfinement, forfeitures, and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge. When a dishonorable discharge is authorized, a bad-conduct discharge is also authorized.

(ii) Other punishments. Except as otherwise specifically provided in this Manual, the types of punishments listed in subsections (b)(1), (3), (4), (5), (6), and (7) of this rule may be adjudged in addition to or instead of confinement, forfeitures, a punitive discharge (if authorized), and death (if authorized).

(B) Offenses not listed in Part IV.

(i) Included or related offenses. For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however, if an offense not listed is included in a listed offense and is closely related to another, or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.

(ii) Not included or related offenses. An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service. When the United States Code provides for confinement for a specified period or not more than a specified

period, the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay and allowances; if less than 6 months, forfeiture of two-thirds pay per month for the authorized period of confinement.

(C) Multiplicity. When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense. Except as provided in paragraph 5 or Part IV, offenses are not separate if each does not require proof of an element not required to prove the other. If the offenses are not separate, the maximum punishment for those offenses shall be the maximum authorized punishment for the offense carrying the greatest maximum punishment.

(2) Based on rank of accused.

(A) Commissioned or warrant officers, cadets, and midshipmen.

(i) A commissioned or warrant officer or a cadet, or midshipman may not be reduced in grade by any court-martial. However, in time of war or national emergency the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned, may commute a sentence of dismissal to reduction to any enlisted grade.

(ii) Only a general court-martial may sentence a commissioned or warrant officer or a cadet, or midshipman to confinement.

(iii) A commissioned or warrant officer or a cadet or midshipman may not be sentenced to hard labor without confinement.

(iv) Only a general court-martial, upon conviction of any offense in violation of the Code, may sentence a commissioned or warrant officer or a cadet or midshipman to be separated from the service with a punitive separation. In the case of commissioned officers, cadets, midshipmen, and commissioned warrant officers, the separation shall be by dismissal. In the case of all other warrant officers, the separation shall be by dishonorable discharge.

(B) Enlisted persons. See subsection (b)(9) of this rule and R.C.M. 1301(d).

(3) Based on other rules. The maximum limits on punishments in this rule may be further limited by other Rules of Courts-Martial.

(d) Circumstances permitting increased punishments.

(1) Three or more convictions. If an accused is found guilty of an offense or offenses for none of which a dishonorable discharge is otherwise authorized, proof of three or more previous convictions adjudged by a court-martial during the year next preceding the commission of any offense of which the accused stands convicted shall authorize a dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise

authorized is less than 1 year, confinement for 1 year. In computing the 1-year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection, the court-martial convictions must be final.

(2) Two or more convictions. If an accused is found guilty of an offense or offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, proof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a bad-conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 3 months, confinement for 3 months. In computing the 3 year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection the court-martial convictions must be final.

(3) Two or more offenses. If an accused is found guilty of two or more offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances.

Rule 1004. Capital cases

(a) In general. Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The requirements of subsections (b) and (c) of this rule have been met.

(b) Procedure. In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases --

(1) Notice. Before arraignment, trial counsel shall give the defense written notice of which aggravating circumstances under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating circumstances under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating circumstances unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) Evidence of aggravating circumstnces. Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating circumstances in subsection (c) of this rule.

(3) Evidence in extenuation and mitigation. The accused shall be given broad latitude to present evidence in extenuation and mitigation.

(4) Necessary findings. Death may not be adjudged unless the members find:

(A) Beyond a reasonable doubt that one or more of the aggravating circumstances under subsection (c) of this rule existed; and

(B) That any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances including such circumstances under subsection (c) of this rule as the members have found existed.

(5) Basis for findings. The findings in subsection (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) Instructions. In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members on such aggravating circumstances under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) Voting. In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating circumstance under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating circumstance. After voting on all the aggravating circumstances on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) Announcement. If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating circumstances under subsection (c) of this rule were found by the members.

(c) Aggravating circumstances. Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating circumstances:

(1) That the offense was committed before or in the presence of the enemy, except that this circumstance shall not apply in the case of a violation of Article 118 or 120;

(2) That in committing the offense the accused intended to:

(A) Cause substantial damage to the national security of the United States; or

(B) Cause substantial damage to a mission, system, or function of the United States, provided that this subsection shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this circumstance shall not apply in the case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the lives of persons other than the victim, if any, were unlawfully and substantially endangered, except that this circumstance shall not apply to a violation of Article 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed while the accused was engaged in the commission or attempted commission of any robbery, rape, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel, or was engaged in flight or attempted flight after the commission or attempted commission of any such offense;

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a proise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress or Member-of-Congress elect, or any judge of the United States;

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim;

(J) The accused has been found guilty in the same case of another violation of Article 118;

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing;

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim; or

(10) That, only in the case of a violation of the law of war, death is authorized under the law of war for the offense.

For purposes of this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

(d) Spying. If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) Other penalties. Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal, as appropriate. Confinement is a necessary incident of a sentence of death but not a part of it.

Rule 1005. Instructions on sentence

(a) In general. The military judge shall give the members apropriate instructions on sentence.

(b) When given. Instructions on sentence shall be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may, upon request of the members, any party, or sua sponte, give additional instructions at a later time.

(c) Requests for instructions. After presentation of matters relating to sentence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments on sentence.

(d) How given. Instructions on sentence shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or unless a party objects, portions of them, may also be given to the members for their use during deliberations.

(e) Required instructions. Instructions on sentence shall include:

(1) a statement of the maximum authorized punishment which may be adjudged and of the mandatory minimum punishment, if any;

(2) a statement of the procedures for deliberation and voting on the sentence set out in R.C.M. 1006;

(3) a statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and

(4) a statement that the members should consider all matters in extenuation, mitigation, and aggraviation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3) and (5).

(f) Waiver. Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 1006. Deliberations and voting on sentence

(a) In general. The members shall deliberate and vote after the military judge instructs the members on sentence. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment.

(b) Deliberations. Deliberations may properly include full and free discussion of the sentence to be imposed in the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(c) Proposal of sentences. Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed. The junior member shall collect the proposed sentences and submit them to the president.

(d) Voting.

(1) Duty of members. Each member has the duty to vote for a proper sentence for the offenses of which the court-martial found the accused guilty, regardless of the member's vote or opinion as to the guilt of the accused.

(2) Secret ballot. Proposed sentences shall be voted on by secret written ballot.

(3) Procedure.

(A) Order. All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule. The process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted.

(B) Counting votes. The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

(4) Number of votes requried.

(A) Death. A sentence which includes death may be adjudged only if all members present vote for that sentence.

(B) Confinement for life or more than 10 years. A sentence which includes confinement for life or more than 10 years may be adjudged only it at least three-fourths of the members present vote for that sentence.

(C) Other. A sentence other than those described in subsection (d)(4)(A) or (B) of this rule may be adjudged only if at least two-thirds of the members present vote for that sentence.

(5) Mandatory sentence. When a mandatory minimum is prescribed under Article 118 the members shall vote on a sentence in accordance with this rule.

(6) Effect of failure to agree. If the required number of members do not agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence and the case shall be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.

(e) Action after a sentence is reached. After the members have agreed upon a sentence, the court-martial shall be opened and the president shall inform the military judge that a sentence has been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the sentence and may assist the members in putting the sentence in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the sentence.

Rule 1007. Announcement of sentence

(a) In general. The sentence shall be announced by the president or, in a court-martial composed of a military judge alone, by the military judge, in the presence of all parties promptly after it has been determined.

(b) Erroneous announcement. If the announced sentence is not the one a actually determined by the court-martial, the error may be corrected by a new announcement made before the record of trial is authenticated and forwarded to the convening authority. This action shall not constitute reconsideration of the sentence. If the court-martial has been adjourned before the error is discovered, the military judge may call the court-martial into session to correct the announcement.

(c) Polling prohibited. Except as provided in Mil. R. Evid. 606, members may not otherwise be questioned about their deliberations and voting.

Rule 1008. Impeachment of sentence

A sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Rule 1009. Reconsideration of sentence

(a) Time for reconsideration. Subject to this rule, a sentence may be reconsidered by the members or the military judge who reached it at any time before the record of trial is authenticated.

(b) Limitations. After a sentence has been announced, it may not be increased upon reconsideration unless the sentence announced was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty.

(c) Initiation of reconsideration.

(1) By members. Any member may propose that a sentence reached by the members be reconsidered.

(2) By military judge.

(A) Adjudged by military judge. The military judge may initiate reconsideration of a sentence adjudged by that military judge.

(B) Reached by members. When a sentence reached by members is ambiguous or apparently illegal, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned. If the matter is discovered after adjournment, the military judge may call a session for reconsideration and proceed in accordance with subsection (d) of this rule, or may bring the matter to the attention of the convening authority.

(3) By convening authority. When a sentence adjudged by the court-martial is ambiguous or apparently illegal, the convening authority may return the matter to the court-martial for clarification or may approve a sentence no more severe than the legal, unambiguous portions of the adjudged sentence.

(d) Procedure with members.

(1) Instructions. When a sentence has been reached by members and reconsideration has been initiated under subsection (c) of this rule, the military judge shall instruct the members on the procedure for reconsideration.

(2) Voting. The members shall vote by secret written ballot in closed session whether to reconsider a sentence already reached by them.

(3) Number of votes required.

(A) With a view to increasing. Subject to subsection (b) of this rule, members may reconsider a sentence with a view to increasing it only if at least a majority vote for reconsideration.

(B) With a view to decreasing. Members may reconsider a sentence with a view to decreasing it only if:

(i) in the case of a sentence which includes death, at least one member votes to reconsider;

(ii) in the case of a sentence which includes confinement for life or more than 10 years, more than one-fourth of the members vote to reconsider; or

(iii) in the case of any other sentence, more than one-third of the members vote to reconsider.

(4) Successful vote. If a vote to reconsider a sentence succeeds, the procedures in R.C.M. 1006 shall apply.

Rule 1010. Advice concerning post-trial and appellate rights

(a) Advice. In each general and special court-martial, after the sentence is announced and before the court-martial is adjourned, the military judge shall inform the accused of:

(1) The right to submit matters to the convening authority to consider before taking action;

(2) The right to appellate review, as applicable, and the effect of waiver or withdrawal of such rights;

(3) The right to apply for relief from the Judge Advocate General if the case is not reviewed by a Court of Military Review; and

(4) The right to the advice and assistance of counsel in the exercise of the foregoing rights or any decision to waive them.

(b) Inquiry. After compliance with subsection (a) of this rule, the military judge shall inquire of the accused to ensure that the accused understands the advice.

Rule 1011. Adjournment

The military judge may adjourn the court-martial at the end of the trial of an accused or proceed to trial of other cases referred to that court-martial. Such an adjournment may be for a definite or indefinite period.

CHAPTER XI. POST-TRIAL PROCEDURE

Rule 1101. Report of result of trial; post-trial restraint; deferment of confinement

(a) Report of the result of trial. After final adjournment of the court-martial in a case, the trial counsel shall promptly notify the accused's immediate commander, the convening authority or the convening authority's designee, and, if appropriate, the officer in charge of the confinement facility of the findings and sentence.

(b) Post-trial confinement.

(1) In general. An accused may be placed in post-trial confinement if the sentence adjudged by the court-martial includes death or confinement.

(2) Who may order confinement. Unless limited by superior authority, a commander of the accused may order the accused into post-trial confinement when post-trial confinement is authorized under subsection (b)(1) of this rule. A commander authorized to order post-trial confinement under this subsection may delegate this authority to the trial counsel.

(3) Confinement on other grounds. Nothing in this rule shall prohibit confinement of a person after a court-martial on proper grounds other than the offenses for which the accused was tried at that court-martial.

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(c) Deferment of confinement.

(1) In general. Deferment of a sentence to confinement is a postponement of the service and of the running of the sentence.

(2) Who may defer. The convening authority or, if the accused is no longer in the convening authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may, upon written application of the accused, at any time after the adjournment of the court-martial, defer the accused's service of a sentence to confinement which has not been ordered executed.

(3) Action on deferment request. The authority acting on the deferment request may, in that authority's discretion, defer service of a sentence to confinement. The accused shall have the burden to show that the interests of the accused and the community in release outweigh the community's interests in confinement. Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation or witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; and the accused's character, mental condition, family situation, and service record. The decision of the authority acting on the deferment shall be subject to judicial review only for abuse of discretion. The action of the convening authority shall be written and a copy shall be provided to the accused.

(4) Orders. The action granting deferment shall be reported in the convening authority's action under R.C.M. 1107(f)(4)(E) and shall include the date of the action on the request when it occurs prior to or concurrently with the action. Action granting deferment after the convening authority's action under R.C.M. 1107 shall be reported in orders under R.C.M. 1114 and included in the record of trial.

(5) Restraint when deferment is granted. When deferment of confinement is granted, no form of restraint or other limitation on the accused's liberty may be ordered as a substitute form of punishment. An accused may, however, be restricted to specified limits or conditions may be placed on the accused's liberty during the period of deferment for any other proper reason, including a ground for restraint under R.C.M. 304.

(6) End of deferment. Deferment of a sentence to confinement ends when:

(A) The convening authority takes action under R.C.M. 1107, unless the convening authority specifies in the action that service of confinement after the action is deferred;

(B) The confinement is suspended;

(C) The deferment expires by its own terms; or

(D) The deferment is otherwise rescinded in accordance with subsection (c)(7) of this rule.

Deferment of confinement may not continue after the conviction is final under R.C.M. 1209.

(7) Rescission of deferment.

(A) Who may rescind. The authority who granted the deferment, or, if the accused is no longer within that authority's jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is assigned, may rescind the deferment.

(B) Action. Deferment of confinement may be rescinded when additional information is presented to a proper authority which, when considered with all other information in the case, that authority finds, in that authority's discretion, is grounds for denial of deferment under subsection (c)(3) of this rule. The accused shall promptly be informed of the basis for the rescission and of the right to submit written matters in the accused's behalf and to request that the rescission be reconsidered. However, the accused may be required to serve the sentence to confinement pending this action.

(C) Execution. When deferment is rescinded after the convening authority's action under R.C.M. 1107, the confinement may be ordered executed. However, no such order may be issued within 7 days of notice of the rescission to the accused under subsection (c)(7)(B) of this rule, to afford the accused an opportunity to respond. The authority rescinding the deferment may extend this period for good cause shown. The accused shall be credited with any confinement actually served during this period.

(D) Orders. Rescission of a deferment before or concurrently with the initial action in the case shall be reported on the action under R.C.M. 1107(f)(4)(E), which action shall include the dates of the granting of the deferment and the rescission. Rescission of a deferment after the convening authority's action shall be reported in supplementary orders in accordance with R.C.M. 1114 and shall state whether the approved period of confinement is to be executed or whether all or part of it is to be suspended.

Rule 1102. Post-trial sessions

(a) In general. Post-trial sessions may be proceedings in revision or Article 39(a) sessions. Such sessions may be directed by the military judge or the convening authority in accordance with this rule.

(b) Purpose.

(1) Proceedings in revision. Proceedings in revision may be directed to correct an apparent error, omission, or improper or inconsistent action by the court-martial, which can be rectified by reopening the proceedings without material prejudice to the accused.

(2) Article 39(a) sessions. An Article 39(a) session under this rule may be called for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence.

(c) Matters not subject to post-trial sessions. Post-trial sessions may not be directed:

(1) for reconsideration of a finding of not guilty of any specification, or a ruling which amounts to a finding of not guilty;

(2) for reconsideration of a finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of the code; or

(3) for increasing the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(d) When directed. The military judge may direct a post-trial session any time before the record is authenticated. The convening authority may direct a post-trial session may time before the convening authority takes initial action on the case or at such later time as the convening authority is authorized to do so by a reviewing authority, except that no proceeding in revision may be held when any part of the sentence has been ordered executed.

(e) Procedure.

(1) Personnel. The requirements of R.C.M. 505 and 805 shall apply at post-trial sessions except that --

(A) For a proceeding in revision, if trial was before members and the matter subject to the proceeding in revision requires the presence of members:

(i) The absence of any members does not invalidate the proceedings if, in the case of a general court-martial, at least five members are present, or, in the case of a special court-martial, at least three members are present; and

(ii) A different military judge may be detailed, subject to R.C.M. 502(c) and 902, if the military judge who presided at the earlier proceedings is not reasonably available.

(B) For an Article 39(a) session, a different military judge may be detailed, subject to R.C.M. 502(c) and 902, for good cause.

(2) Action. The military judge shall take such action as may be appropriate, including appropriate instructions when members are present. The members may deliberate in closed session, if necessary, to determine what corrective action, if any, to take.

(3) Record. All post-trial sessions, except any deliberations by the members, shall be held in open session. The record of the post-trial sessions shall be prepared, authenticated, and served in accordance with R.C.M. 1103 and 1104 and shall be included in the record of the prior proceedings.

Rule 1103. Preparation of record of trial

(a) In general. Each general, special, and summary court-martial shall keep a separate record of the proceedings in each case brought before it.

(b) General courts-martial.

(1) Responsibility for preparation. The trial counsel shall:

(A) under the direction of the military judge, cause the record of trial to be prepared; and

(B) under regulations prescribed by the Secretary concerned, cause to be retained stenographic or other notes or mechanical or electronic recordings from which the record of trial was prepared.

(2) Contents

(A) In general. The record of trial in each general court-martial shall be separate, complete, and independent of any other document.

(B) Verbatim transcript required. Except as otherwise provided in subsection (j) of this rule, the record of trial shall include a verbatim written transcript of all sessions except sessions closed for deliberations and voting when:

(i) any part of the sentence adjudged exceeds that which may be adjudged by a special court-martial; or

(ii) a bad-conduct discharge has been adjudged.

(C) Verbatim transcript not required. If a verbatim transcript is not required under subsection (b)(2)(B) of this rule, a summarized report of the proceedings may be prepared instead of a verbatim transcript.

(D) Other matters. In addition to the matter required under subsection (b)(2)(B) or (b)(2)(C) of this rule, a complete record shall include:

(i) The original charge sheet or a duplicate;

(ii) A copy of the convening order and any amending order(s);

(iii) The request, if any, for trial by military judge alone, or that the membership of the court-martial include enlisted persons, and, when applicable, any statement by the convening authority required under R.C.M. 201(f)(2)(B)(ii) or 503(a)(2); and

(iv) Exhibits, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits.

(3) Matters attached to the record. The following matters shall be attached to the record:

(A) If not used as exhibits --

(i) the report of investigation under Article 32, if any;

(ii) the staff judge advocate's pretrial advice under Article 34, if any; and

(iii) if the trial was a rehearing or new or other trial of the case, the record of the former hearing(s);

(iv) written special findings, if any, by the military judge;

(B) Exhibits or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were marked for and referred to on the record but not received in evidence;

(C) Any matter filed by the accused under R.C.M. 1105, or any written waiver of the right to submit such matter;

(D) Any determent request and the action on it;

(E) Explanation for any substitute authentication under R.C.M. 1104(a)(2)(B);

(F) Explanation for any failure to serve the record of trial on the accused under R.C.M. 1104(b);

(G) The post-trial recommendation of the staff judge advocate or legal officer and proof of service on defense counsel in accordance with R.C.M. 1106(f)(1);

(H) Any response by defense counsel to the post-trial review;

(I) Recommendations and other papers relative to clemency;

(J) Any statement why it is impracticable for the convening authority to act;

(K) Conditions of suspension, if any, and proof of service on probationer under R.C.M. 1108;

(L) The certificate of a medical officer concerning the physical condition of an accused sentenced to confinement on bread and water or diminished rations;

(M) Any waiver or withdrawal of appellate review under R.C.M. 1110; and

(N) Records of any proceedings in connection with vacation of suspension under R.C.M. 1109.

(c) Special courts-martial.

(1) Involving a bad-conduct discharge. The requirements of subsections (b)(1), (b)(2)(A), (b)(2)(B), (b)(2)(D), and (b)(3) of this rule shall apply in a special court-martial in which a bad-conduct discharge has been adjudged.

(2) Not involving a bad-conduct discharge. If the special court-martial resulted in findings of guilty but a bad-conduct discharge was not adjudged, the requirements of subsections (b)(1), (b)(2)(C), (b)(2)(D), and (b)(3)(A)-(F) and (I)-(N) of this rule shall apply.

(d) Summary courts-martial. The summary court-martial record of trial shall be prepared as prescribed in R.C.M. 1305.

(e) Acquittal; termination prior to findings. Notwithstanding subsections (b), (c), and (d) of this rule, if the proceedings resulted in an acquittal of all charges and specification or the proceedings were terminated by withdrawal, mistrial, or dismissal before findings, the record may consist of the original charge sheet, a copy of the convening order and amending orders (if any), and sufficient information to establish jurisdiction over the accused and the offenses (if not shown on the charge sheet).

(f) Loss of notes or recordings of the proceedings. If, because of loss of recordings or notes, or other reasons, a verbatim transcript cannot be prepared when required by subsection (b)(2)(B) or (c)(1) of this rule, a record which meets the requirements of subsection (b)(2)(C) of this rule shall be prepared, and the convening authority may:

(1) Approve only so much of the sentence which could be adjudged by a special court-martial, except that no bad-conduct discharge may be approved; or

(2) Direct a rehearing as to any offense of which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record, provided that the court-martial in a rehearing may not adjudge any sentence in excess of that adjudged by the earlier court-martial.

(g) Copies of the record of trial.

(1) General and special courts-martial.

(A) In general. In general and special courts-martial which require a verbatim transcript under subsections (b) or (c) of this rule, the trial counsel shall cause to be prepared an original and four copies of the record of trial. In all other general and special courts-martial the trial counsel shall cause to be prepared an original and one copy of the record of trial.

(B) Additional copies. The convening or higher authority may direct that additional copies of the record of trial of any general or special court-martial be prepared.

(2) Summary courts-martial. Copies of the summary court-martial record of trial shall be prepared as prescribed in R.C.M. 1305(b).

(h) Security classification. If the record of trial contains matter which must be classified under applicable security regulations, the trial counsel shall cause a proper security classification to be assigned to the record of trial and on each page thereof on which classified material appears.

(i) Examination and correction before authentication.

(1) General and special courts-martial.

(A) Examination and correction by trial counsel. In general and special courts-martial, the trial counsel shall examine the record of trial before authentication and cause those changes to be made which are necessary to report the proceedings accurately. The trial counsel shall not change the record after authentication.

(B) Examination by defense counsel. Except when unreasonable delay will result, the trial counsel shall permit the defense counsel to examine the record before authentication.

(2) Summary courts-martial. The summary court-martial shall examine and correct the summary court-martial record of trial as prescribed in R.C.M. 1305(a).

(j) Videotape and similar records.

(1) Recording proceedings. If authorized by regulations of the Secretary concerned, general and special courts-martial may be recorded by videotape, audiotape, or similar material from which sound or sound and visual images may be reproduced to accurately depict the entire court-martial. Such means of recording may be used in lieu of recording by a qualified court reporter, when one is required, subject to this rule.

(2) Preparation of written record. When the court-martial, or any part of it, is recorded by videotape, audiotape, or similar material under subsection (j)(1) of this rule, a written transcript or summary as required in subsection (b)(2)(A), (b)(2)(B), (b)(2)(C), or (c) of this rule, as appropriate, shall be prepared in accordance with this rule and R.C.M. 1104 before the record is forwarded under R.C.M. 1104(e), unless military exigencies prevent transcription.

(3) Military exigency. If military exigency prevents preparation of a written transcript or summary, as required, and when the court-martial has been recorded by videotape, audiotape, or similar material under subsection (j)(1) of this rule, the videotape, audiotape, or similar material, together with the matters in subsections (b)(2)(D) and (b)(3) of this rule shall be authenticated and forwarded in accordance with R.C.M. 1104, provided that in such case the convening authority shall cause to be attached not be prepared, and provided futher that in such case the defense counsel shall be given reasonable opportunity to listen to or to view and listen to the recording whenever defense counsel is otherwise entitled to examine the record under these rules. Subsection (g) of this rule shall not apply in case of military exigency under this subsection.

(4) Further review.

(A) Cases reviewed by the Court. of Military Review. Before review, if any, by a Court of Military Review of a case in which the record includes an authenticated recording prepared under subsection (j)(3) of this rule, a complete written transcript shall be prepared and certified as accurate in accordance with regulations of the Secretary concerned. The authenticated recording shall be retained for examination by appellate authorities.

(B) Cases not reviewed by the Court of Military Review. In cases in which the record includes an authenticated recording prepared under subsection (j)(3) of this rule, a written record shall be prepared under such circumstances as the Secretary concerned may prescribe.

(5) Accused's copy. When a record includes an authenticated recording under subsection (j)(3) of this rule, the Government shall, in order to comply with R.C.M. 1104(b):

(A) Provide the accused with a duplicate copy of the videotape, audiotape, or similar matter and copies of any written contents of and attachments to the record, and give the accused reasonable opportunity to use such viewing equipment as is necessary to listen to or view and listen to the recording; or

(B) With the written consent of the accused, defer service of the record until a written record is prepared under subsection (4) of this rule.

Rule 1104. Records of trial: authentication; service; loss; correction; forwarding

(a) Authentication.

(1) In general. A record is authenticated by the signature of a person specified in this rule who thereby declares that the record accurately reports the proceedings. No person may be required to authenticate a record of trial if that person is not satisfied that it accurately reports the proceedings.

(2) General and special courts-martial.

(A) Authentication by the military judge. In special courts-martial in which a bad-conduct discharge has been adjudged and in general courts-martial, except as provided in subsection (a)(2)(B) of this rule, the military judge present at the end of the proceedings shall authenticate the record of trial, or that portion over which the military judge presided. If more than one military judge presided over the proceedings, each military judge shall authenticate the record of the proceedings over which that military judge presided, except as provided in subsection (a)(2)(B) of this rule. The record of trial of special courts-martial in which no bad-conduct discharge was adjudged shall be authenticated in accordance with regulations of the Secretary concerned.

(B) Substitute authentication. If the military judge cannot authenticate the record of trial because of the military judge's death, disability, or absence, the trial counsel present at the end of the proceedings shall authenticate the record of trial. If the trial counsel cannot authenticate the record of trial because of the trial counsel's death, disability, or absence, a member shall authenticate the record of trial. In a court-martial composed of a military judge alone, or as to sessions without members, the court reporter shall authenticate the record of trial when this duty would fall upon a member under this subsection. A person authorized to authenticate a record under this subsection may authenticate the record only as to those proceedings at which that person was present.

(3) Summary courts-martial. The summary court-martial shall authenticate the summary court-martial record of trial as prescribed in R.C.M. 1305(a).

(b) Service.

(1) General and special courts-martial.

(A) Service of record of trial on accused. In each general and special court-martial, except as provided in subsection (b)(1)(C) or (D) of this rule, the trial counsel shall cause a copy of the record of trial to be served on the accused as soon as the record of trial is authenticated.

(B) Proof of service of record of trial on accused. The trial counsel shall cause the accused's receipt for the copy of the record of trial to be attached to the original record of trial. If it is impracticable to secure a receipt from the accused before the original record of trial is forwarded to the convening authority, the trial counsel shall prepare a certificate indicating that a copy of the record of trial has been transmitted to the accused, including the means of transmission and the address, and cause the certificate to be attached to the original record of trial. In such a case the accused's receipt shall be forwarded to the convening authority as soon as it is obtained.

(C) Substitute service. If it is impracticable to serve the record of trial on the accused because of the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so

requests on the record at the court-martial or in writing, the accused's copy of the record shall be forwarded to the accused's defense counsel, if any. Trial counsel shall attach a statement to the record explaining why the accused was not served personally. If the accused has more than one counsel, R.C.M. 1106(f)(2) shall apply. If the accused has no counsel and if the accused is absent without authority, the trial counsel shall prepare an explanation for the failure to serve the record. The explanation and the accused's copy of the record shall be forwarded with the original record. The accused shall be provided with a copy of the record as soon as practicable.

(D) Classified information.

(i) Forwarding to convening authority. If the copy of the record of trial prepared for the accused contains classified information, the trial counsel, unless directed otherwise by the convening authority, shall forward the accused's copy to the convening authority, before it is served on the accused.

(ii) Responsibility of the convening authority. The convening authority shall:

(a) cause any classified information to be deleted or withdrawn from the accused's copy of the record of trial;

(b) cause a certificate indicating that classified information has been deleted or withdrawn to be attached to the record of trial; and

(c) cause the expurgated copy of the record of trial and the attached certificate regarding classified information to be served on the accused as provided in subsections (b)(1)(A) and (B) of this rule except that the accused's receipt shall show that the accused has received an expurgated copy of the record of trial.

(iii) Contents of certificate. The certificate regarding deleted or withdrawn classified information shall indicate:

(a) that the original record of trial may be inspected in the Office of the Judge Advocate General concerned under such regulations as the Secretary concerned may prescribe;

(b) the pages of the record of trial from which matter has been deleted;

(c) the pages of the record of trial which have been entirely deleted; and

(d) the exhibits which have been withdrawn.

(2) Summary courts-martial. The summary court-martial record of trial shall be disposed of as provided in R.C.M. 1305(e). Subsection (b)(1)(D) of this rule shall apply if classified information is included in the record of trial of a summary court-martial.

(c) Loss of record. If the authenticated record of trial is lost or destroyed, the trial counsel shall, if practicable, cause another record of trial to be prepared for authentication. The new record of trial shall become the record of trial in the case if the requirements of R.C.M. 1103 and this rule are met.

(d) Correction of record after authentication; certificate of correction.

(1) In general. A record of trial found to be incomplete or defective after authentication may be corrected to make it accurate. A record of trial may be returned to the convening authority by superior competent authority for correction under this rule.

(2) Procedure. An authenticated record of trial believed to be incomplete or defective may be returned to the military judge or summary court-martial for a certificate of correction. The military judge or summary court-martial shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction before authenticating the certificate of correction. All parties shall be given reasonable access to any original reporter's notes or tapes of the proceedings.

(3) Authentication of certificate of correction; service on the accused. The certificate of correction shall be authenticated as provided in subsection (a) of this rule and a copy served on the accused as provided in subsection (b) of this rule. The certificate of correction and the accused's receipt for the certificate of correction shall be attached to each copy of the record of trial required to be prepared under R.C.M. 1103(g).

(e) Forwarding. After every court-martial, including a rehearing and new and other trials, the authenticated record shall be forwarded to the convening authority for initial review and action, provided that in case of a special court-martial in which a bad-conduct discharge was adjudged or a general court-martial, the convening authority shall refer the record to the staff judge advocate or legal officer for a recommendation under R.C.M. 1106 before the convening authority takes action.

Rule 1105. Matters submitted by the accused

(a) In general. After a sentence is adjudged in any court-martial, the accused may submit matters to the convening authority in accordance with this rule.

(b) Matters which may be submitted. The accused may submit to the convening authority any written matters which may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. Such matters are not subject to the Military Rules of Evidence and may include:

(1) Allegations of errors affecting the legality of the findings or sentence;

(2) Portions or summaries of the record and copies of documentary evidence offered or introduced at trial;

(3) Matters in mitigation which were not available for consideration at the court-martial; and

(4) Clemency recommendations by any member, the military judge, or any other person. The defense may ask any person for such a recommendation.

(c) Time periods.

(1) General courts-martial and special courts-martial in which a bad-conduct discharge was adjudged. After a general court-martial or after a special court-martial in which a bad-conduct discharge was adjudged, the accused may submit matters under this rule within 30 days after the sentence was announced or within 7 days after a copy

of the record of trial is served on the accused under R.C.M. 1104(b)(1), whichever is later. The convening authority may, for good cause, extend the 30-day period for not more than 20 additional days or the 7-day period for not more than 10 additional days.

(2) Other special courts-martial. After a special court-martial in which a bad-conduct discharge was not adjudged, the accused may submit matters under this rule within 20 days after the sentence is announced or within 7 days after a copy of the record of trial is served on the accused under R.C.M. 1104(b)(1), whichever is later. The convening authority may, for good cause, extend either period for not more than 10 additional days.

(3) Summary courts-martial. After a summary court-martial the accused may submit matters under this rule within 7 days after the sentence is announced. The convening authority, for good cause, may extend this period for not more than 10 additional days.

(4) Post-trial sessions. A post-trial session under R.C.M. 1102 shall have no effect on the running of any time period in this rule, except when such session results in the announcement of a new sentence, in which case the period shall run from that announcement.

(5) Good cause. For purposes of this rule, good cause for an extension ordinarily does not include the need for securing matters which could reasonably have been presented at the court-martial.

(d) Waiver.

(1) Failure to submit matters. Failure to submit matters within the time prescribed by this rule shall be deemed a waiver of the right to submit such matters.

(2) Submission of matters. Submission of any matters under this rule shall be deemed a waiver of the right to submit additional matters unless the right to submit additional matters within the prescribed time limits is expressly reserved in writing.

(3) Written waiver. The accused may expressly waive, in writing, the right to submit matters under this rule. Once filed, such waiver may not be revoked.

(4) Absence of accused. If, as a result of the unauthorized absence of the accused, the record cannot be served on the accused in accordance with R.C.M. 1104(b)(1) and if the accused has no counsel to receive the record, the accused shall be deemed to have waived the right to submit matters under this rule within the time limit which begins upon service on the accused of the record of trial.

Rule 1106. Recommendation of the staff judge advocate or legal officer

(a) In general. Before the convening authority takes action under R.C.M. 1107 on a record of trial by general court-martial or a record of trial by special court-martial which includes a sentence to a bad-conduct discharge, that convening authority's staff judge advocate or legal officer shall, except as provided in subsection (c) of this rule, forward to the convening authority a recommendation under this rule.

(b) Disqualification. No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer or any reviewing or convening authority in the same case.

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

(1) When the convening authority does not have a staff judge advocate or legal officer or that person is disqualified. If the convening authority does not have a staff judge advocate or legal officer, or if the person serving in that capacity is disqualified under subsection (b) of this rule or otherwise, the convening authority shall:

(A) request the assignment of another staff judge advocate or legal officer to prepare a recommendation under this rule; or

(B) forward the record for action to any officer exercising general court-martial jurisdiction as provided in R.C.M. 1107(a).

(2) When the convening authority has a legal officer but wants the recommendation of a staff judge advocate. If the convening authority has a legal officer but no staff judge advocate, the convening authority may, as a matter of discretion, request designation of a staff judge advocate to prepare the recommendation.

(d) Form and content of recommendation.

(1) In general. The purpose of the recommendation of the staff judge advocate or legal officer is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative. The staff judge advocate or legal officer shall use the record of trial in the preparation of the recommendation.

(2) Form. The recommendation of the staff judge advocate or legal officer shall be a concise written communication.

(3) Required contents. Except as provided in subsection (e) of this rule, the recommendation of the staff judge advocate or legal officer shall include concise information as to:

(A) The findings and sentence adjudged by the court-martial;

(B) A summary of the accused's service record, to include length and character of service, awards and decorations received, and any records of nonjudicial punishment and previous convictions;

(C) A statement of the nature and duration of any pretrial restraint;

(D) If there is a pretrial agreement, a statement of any action the convening authority is obligated to take under the agreement or a statement of the reasons why the convening authority is not obligated to take specific action under the agreement; and

(E) A specific recommendation as to the action to be taken by the convening authority on the sentence.

(4) Legal errors. The staff judge advocate or legal officer is not required to examine the record for legal errors. However, when the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required.

(5) Optional matters. The recommendation of the staff judge advocate or legal officer may include, in addition to matters included under subsections (d)(3) and (4) of this rule, any additional matters deemed appropriate by the staff judge advocate or legal officer. Such matters may include matters outside the record.

(6) Effect of error. In case of error in the recommendation not otherwise waived under subsection (f)(6) of this rule, appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority.

(e) No findings of guilty. If the proceedings resulted in an acquittal of all charges and specifications or if, after the trial began, the proceedings were terminated without findings and no further action is contemplated, a recommendation under this rule is not required.

(f) Service of recommendation on defense counsel; defense response.

(1) Service of recommendation on defense counsel. Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused.

(2) Counsel for the accused. The accused may, at trial or in writing to the staff judge advocate or legal officer before the recommendation has been served under this rule, designate which counsel (detailed, individual military, or civilian) will be served with the recommendation. In the absence of such designation, the staff judge advocate or legal officer shall cause the recommendation to be served in the following order of precedence, as applicable, on: (1) civilian counsel; (2) individual military counsel; or (3) detailed defense counsel. If the accused has not retained civilian counsel and the detailed defense counsel and individual military counsel, if any, have been relieved or are not reasonably available to represent the accused, substitute military counsel to represent the accused shall be detailed by an appropriate authority. Substitute counsel shall enter into an attorney-client relationship with the accused before examining the recommendation and preparing any response.

(3) Record of trial. The staff judge advocate or legal officer shall, upon request of counsel for the accused served with the recommendation, provide that counsel with a copy of the record of trial for use while preparing the response to the recommendation.

(4) Response. Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter.

(5) Time period. Counsel for the accused shall be given 5 days from receipt in which to submit comments on the recommendation. The convening authority may, for good cause, extend the period in which comments may be submitted for up to 20 additional days.

(6) Waiver. Failure of counsel for the accused to comment on any matter in the recommendation or matters attached to the recommendation in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error.

(7) New matter in addendum to recommendation. The staff judge advocate or legal officer may supplement the recommendation after counsel for the accused has been served with the recommendation and given an opportunity to comment. When new matter is introduced after counsel for the accused has examined the recommendation, however, counsel for the accused must be served with the new matter and given a further opportunity to comment.

Rule 1107. Action by convening authority

(a) Who may take action. The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impracticable. If it is impracticable for the convening authority to act, the convening authority shall, in accordance with such regulations as the Secretary concerned may prescribe, forward the case to an officer exercising general court-martial jurisdiction who may take action under this rule.

(b) General considerations.

(1) Discretion of convening authority. The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a court-martial is a matter of commend prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency.

(2) When action may be taken. The convening authority may take action only after the applicable time periods under R.C.M. 1105(c) have expired or the accused has waived the right to present matters under R.C.M. 1105(d), whichever is earlier, subject to regulations of the Secretary concerned.

(3) Matters considered.

(A) Required matters. Before taking action, the convening authority shall consider:

(i) The result of trial;

(ii) The recommendation of the staff judge advocate or legal officer under R.C.M. 1106, if applicable; and

(iii) Any matters submitted by the accused under R.C.M. 1105 or, if applicable, R.C.M. 1106(f).

(B) Additional matters. Before taking action the convening authority may consider:

(i) The record of trial;

(ii) The personnel records of the accused; and

(iii) Such other matters as the convening authority deems appropriate. However, if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut.

(4) When proceedings resulted in finding of not guilty or there was a ruling amounting to a finding of not guilty. The convening authority shall not take any action approving or disapproving a finding of not guilty or a ruling amounting to a finding of not guilty.

(5) Action when accused lacks mental capacity. The convening authority may not approve a sentence while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. If a question is raised as to the requisite mental capacity of the accused, the convening authority must be satisfied by a preponderance of evidence -- including matters outside the record of trial -- that the accused has the requisite mental capacity before approving the sentence. The convening authority may direct an examination of the accused in accordance with R.C.M. 706 before deciding whether the accused lacks mental capacity. Nothing in this subsection shall prohibit the convening authority from disapproving the findings of guilty and sentence.

(c) Action on findings. Action on the findings is not required. However, the convening authority may, in the convening authority's sole discretion:

(1) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or

(2) Set aside any finding of guilty and --

(A) Dismiss the specification and, if appropriate, the charge, or

(B) Direct a rehearing in accordance with subsection (e) of this rule.

(d) Action on the sentence.

(1) In general. The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening or higher authority may not increase the punishment imposed by a court-martial. The approval or disapproval shall be explicitly stated.

(2) Determining what sentence should be approved. The convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused. When the court-martial has adjudged a mandatory punishment, the convening authority may nevertheless approve a lesser sentence.

(3) Limitations on sentence based on record of trial. If the record of trial does not meet the requirements of R.C.M. 1103(b)(2)(B) or (c)(1), the convening authority may not approve a sentence in excess of that which may be adjudged by a special court-martial, or one which includes a bad-conduct discharge.

(e) Ordering rehearing or other trial.

(1) Rehearing.

(A) In general. Subject to subsections (e)(1)(B) through (e)(1)(E) of this rule, the convening authority may in the convening authority's discretion order a rehearing. A rehearing may be ordered as to some or all offenses of which findings of guilty were entered and the sentence, or as to sentence only.

(B) When the convening authority may order a rehearing. The convening authority may order a rehearing:

(i) When taking action on the court-martial under this rule;

(ii) In cases subject to review by the Court of Military Review, before the case is forwarded under R.C.M. 1111(a)(1) or (b)(1), but only as to any sentence which was approved or findings of guilty which were not disapproved in any earlier action. In such a case, a supplemental action disapproving the sentence and some or all of the findings, as appropriate, shall be taken; or

(iii) When authorized to do so by superior competent authority. If the convening authority finds a rehearing as to any offenses impracticable, the convening authority may dismiss those specifications and, when appropriate, charges.

(C) Limitations.

(i) Sentence approved. A rehearing shall not be ordered if, in the same action, a sentence is approved.

(ii) Lack of sufficient evidence. A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense in an offense of which the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

(iii) Rehearing on sentence only. A rehearing on sentence only shall not be referred to a different kind of court-martial from that which made the original findings.

(D) Additional charges. Additional charges may be referred for trial together with charges as to which a rehearing has been directed.

(E) Lesser included offenses. If at a previous trial the accused was convicted of a lesser included offense, a rehearing may be ordered only as to that included offense or as to an offense included in that found. If, however, a rehearing is ordered improperly on the original offense charged and the accused is convicted of that offense at the rehearing, the finding as to the lesser included offense of which the accused was convicted at the original trial may nevertheless be approved.

(2) "Other" trial. The convening or higher authority may order an "other" trial if the original proceedings were invalid because of lack of jurisdiction or failure of a specification to state an offense. The authority ordering an "other" trial shall state in the action the basis for declaring the proceedings invalid.

(f) Contents of action and related matters.

(1) In general. The convening authority shall state in writing the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, and orders as to further disposition. The action shall be signed personally by the convening authority. The convening authority's authority to sign shall appear below the signature.

(2) Modification of initial action. The convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified. In addition, in any special court-martial not involving a bad-conduct discharge or any summary court-martial, the convening authority may recall and correct an illegal, erroneous, incomplete, or ambiguous action at any time before completion of review under R.C.M. 1112, as long as the correction does not result in action less favorable to the accused than the earlier action. When so directed by a higher reviewing authority or the Judge Advocate General, the convening authority shall modify any incomplete, ambiguous, void, or inaccurate action noted in review of the record of trial under Article 64, 66, or 67, or examination of the record of trial under Article 69. The convening authority shall personally sign any supplementary or corrective action.

(3) Findings of guilty. If any findings of guilty are disapproved, the action shall so state. If a rehearing is not ordered, the affected charges and specifications shall be dismissed by the convening authority in the action. If a rehearing or other trial is directed, the reasons for the disapproval shall be set forth in the action.

(4) Action on sentence.

(A) In general. The action shall state whether the sentence adjudged by the court-martial is approved. If only part of the sentence is approved, the action shall state which parts are approved. A rehearing may not be directed if any sentence is approved.

(B) Execution; suspension. The action shall indicate, when appropriate, whether an approved sentence is to be executed or whether the execution of all or any part of the sentence is to be suspended. No reasons need be stated.

(C) Place of confinement. If the convening authority orders a sentence of confinement into execution, the convening authority shall designate the place of confinement in the action, unless otherwise prescribed by the Secretary concerned. If a sentence of confinement is ordered into execution after the initial action of the convening authority, the authority ordering the execution shall designate the place of confinement unless otherwise prescribed by the Secretary concerned.

(D) Custody or confinement pending appellate review; capital cases. When a record of trial involves an approved sentence to death, the convening authority shall, unless any approved sentence of confinement has been ordered

into execution and a place of confinement designated, provide in the action for the temporary custody or confinement of the accused pending final disposition of the case on appellate review.

(E) Deferment of service of sentence to confinement. Whenever the service of the sentence to confinement is deferred by the convening authority under R.C.M. 1101(c) before or concurrently with the initial action in the case, the action shall include the date on which the deferment became effective. The reason for the deferment need not be stated in the action.

(f) Credit for illegal pretrial confinement. When the military judge has directed that the accused receive credit under R.C.M. 305(k), the convening authority shall so direct in the action.

(G) Reprimand. The convening authority shall include in the action any reprimand which the convening authority has ordered executed.

(5) Action on rehearing or new or other trial.

(A) Rehearing or other trial. In acting on a rehearing or other trial the convening authority shall be subject to the sentence limitations prescribed in R.C.M. 810(d). Except when a rehearing or other trial is combined with a trial on additional offenses and except as otherwise provided in R.C.M. 810(d), if any part of the original sentence was suspended and the suspension was not properly vacated before the order directing the rehearing, the convening authority shall take the necessary suspension action to prevent an increase in the same type of punishment as was previously suspended. The convening authority may approve a sentence adjudged upon a rehearing or other trial regardless whether any kind or amount of the punishment adjudged at the former trial has been served or executed. However, in computing the term or amount of punishment to be actually served or executed under the new sentence, the accused shall be credited with any kind or amount of the former sentence include within the new sentence that was served or executed before the time it was disapproved or set aside. The convening authority shall, if any part of a sentence adjudged upon a rehearing or other trial is approved, direct in the action that any part or amount of the former sentence served or executed between the date it was adjudged and the date it was disapproved or set aside shall be credited to the accused. If, in the action on the record of a rehearing, the convening authority disapproves the findings of guilty of all charges and specifications which were tried at the former hearing and that part of the sentence which was based on these findings, the convening authority shall, unless a further rehearing is ordered, provide in the action that all rights, privileges, and property affected by any executed portion of the sentence adjudged at the former hearing shall be restored. The convening authority shall take the same restorative action if a court-martial at a rehearing acquits the accused of all charges and specifications which were tried at the former hearing.

(B) New trial. The action of the convening authority on a new trial shall, insofar as practicable, conform to the rules prescribed for rehearings and other trials in subsection (f)(5)(A) of this rule.

(g) Incomplete, ambiguous, or erroneous action. When the action of the convening or of a higher authority is incomplete, ambiguous, or contains clerical error, the authority who took the incomplete, ambiguous, or erroneous

action may be instructed by an authority acting under Article 64, 66, 67, or 69 to withdraw the original action and substitute a corrected action.

(h) Service on accused. A copy of the convening authority's action shall be served on the accused or on defense counsel. If the action is served on defense counsel, defense counsel shall, by expeditious means, provides the accused with a copy.

Rule 1108. Suspension of execution of sentence; remission

(a) In general. Suspension of a sentence grants the accused a probationary period during which the suspended part of an approved sentence is not executed, and upon the accused's successful completion of which the suspended part of the sentence shall be remitted. Remission cancels the unexecuted part of a sentence to which it applies.

(b) Who may suspend and remit. The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence of a court-martial except for a sentence of death. The general court-martial convening authority over the accused at the time of the court-martial may, when taking the action under R.C.M. 1112(f), suspend or remit any part of the sentence. The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or officer exercising general court-martial jurisdiction over the command to which the accused is assigned may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President. The commander of the accused who has the authority to convene a court-martial of the kind which adjudged the sentence may suspend or remit any part or amount of the unexecuted part of any sentence by summary court-martial or any sentence by special court-martial which does not include a bad-conduct discharge regardless whether the person acting has previously approved the sentence.

(c) Conditions of suspension. The authority who suspends the execution of the sentence of a court-martial shall:

(1) Specify in writing the conditions of the suspension;

(2) Cause a copy of the conditions of the suspension to be served on the probationer; and

(3) Cause a receipt to be secured from the probationer for service of the conditions of the suspension.

Unless otherwise stated, an action suspending a sentence includes as a condition that the probationer not violate any punitive article of the code.

(d) Limitations on suspension. Suspension shall be for a stated period or until the occurrence of an anticipated future event. The period shall not be unreasonably long. The Secretary concerned may further limit by regulations the period for which the execution of a sentence may be suspended. The convening authority shall provide in the action that unless the suspension is sooner vacated, the expiration of the period of suspension shall remit the suspended portion of the sentence. An appropriate authority may, before the expiration of the period of suspension, remit any part of the sentence, including a part which has been suspended; reduce the period of suspension; or, subject to R.C.M. 1109, vacate the suspension in whole or in part.

(e) Termination of suspension by remission. Expiration of the period provided in the action suspending a sentence or part of a sentence shall remit the suspended portion unless the suspension is sooner vacated. Death or separation which terminates status as a person subject to the code shall result in remission of the suspended portion of the sentence.

Rule 1109. Vacation of suspension of sentence

(a) In general. Suspension of execution of the sentence of a court-martial may be vacated for violation of the conditions of the suspension as provided in this rule.

(b) Timeliness.

(1) Violation of conditions. Vacation shall be based on a violation of the conditions of suspension which occurs within the period of suspension.

(2) Vacation proceedings. Vacation proceedings under this rule shall be completed within a reasonable time.

(3) Order vacating the suspension. The order vacating the suspension shall be issued before the expiration of the period of suspension.

(4) Interruptions to the period of suspension. Unauthorized absence of the probationer or the commencement of proceedings under this rule to vacate suspension interrupts the running of the period of suspension.

(c) Confinement of probationer pending vacation proceedings.

(1) In general. A probationer under a suspended sentence to confinement may be confined pending action under subsection (d)(2) of this rule in accordance with the procedures in subsection (c) of this rule.

(2) Who may order confinement. Any person who may order confinement under R.C.M. 304(b) may order confinement of a probationer under a suspended sentence to confinement.

(3) Basis for confinement. A probationer under a suspended sentence to confinement may be ordered into confinement upon probable cause to believe the probationer violated any conditions of the probation.

(4) Review of confinement. Unless proceedings under subsection (d)(1) or (e) of this rule are completed within 7 days of imposition of confinement of the probationer (not including any delays requested by probationer), a preliminary hearing shall be conducted by a neutral and detached officer appointed in accordance with regulations of the Secretary concerned.

(A) Rights of accused. Before the preliminary hearing the accused shall be notified of:

(i) the time, place, and purpose of the hearing, including the alleged violation(s) of the conditions of suspension;

(ii) the right to be present at the hearing;

(iii) the right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(iv) the opportunity to be heard, to present witnesses who are reasonably available and other evidence, and the right to confront and cross-examine adverse witnesses unless the hearing officer determines that this would subject these witnesses to risk or harm. For purposes of this subsection, a witness is not reasonably available if the witness requires reimbursement by the United States for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a miliary witness, cannot be excused from other important duties.

(B) Rules of evidence. Except for Mil. R. Evid. Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to matters considered at the preliminary hearing under this rule.

(C) Decision. The hearing officer shall determine whether there is probable cause to believe that the probationer violated the conditions of the probationer's suspension. If the hearing officer determines that probable cause is lacking, the hearing officer shall, in writing, order the probationer released from confinement. If the hearing officer determines that there is probable cause to believe that the probationer violated the conditions of suspension, the hearing officer shall set forth in a written memorandum the decision, the reasons for the decision, and the information relied on. The hearing officer shall forward the original memorandum or release order to the probationer's commander and forward a copy to the probationer and the officer in charge of the confinement facility.

(d) Vacation of suspended general court-martial sentence or of a suspended special court-martial sentence including a bad-conduct discharge.

(1) Action by officer having special court-martial jurisdiction over probationer.

(A) In general. Before vacation of the suspension of any general court-martial sentence, or of a special court-martial sentence which, as approved, includes a bad-conduct discharge, the officer having special court-martial jurisdiction over the probationer shall personally hold a hearing on the alleged violation of the conditions of probation. If there is no officer having special court-martial jurisdiction over the accused who is subordinate to the officer having general court-martial jurisdiction over the accused, the officer exercising general court-martial jurisdiction over the accused shall personally hold the hearing under subsection (d)(1) of this rule. In such cases subsection (d)(1)(D) of this rule shall not apply.

(B) Notice to probationer. Before the hearing the authority conducting the hearing shall cause the probationer to be notified of:

(i) the time, place, and purpose of the hearing;

(ii) the right to be present at the hearing;

(iii) the alleged violations of the conditions of probation and the evidence expected to be relied on;

(iv) the right to be represented at the hearing by civilian counsel provided by the probationer or, upon request, by military counsel detailed for this purpose; and

(v) the opportunity to be heard, to present witnesses and other evidence, and the right to confront and cross-examine adverse witnesses unless the hearing officer determines that there is good cause for not allowing confrontation and cross-examination.

(C) Hearing. The procedure for the vacation hearing shall follow that prescribed in R.C.M. 405(g), (h)(1), and (i).

(D) Record; recommendation. The officer who conducts the vacation proceeding shall make a summarized record of the proceeding and forward the record and that officer's recommendation concerning vacation to the officer exercising general court-martial jurisdiction over the probationer.

(E) Release from confinement. If the special court-martial convening authority finds there is not probable cause to believe that the probationer violated the conditions of the suspension, the special court-martial convening authority shall order the release of the probationer from any confinement ordered under subsection (c) of this rule. The special court-martial convening authority shall, in any event, forward the record and recommendation under subsection (d)(1)(D) of this rule.

(2) Action by officer exercising general court-martial jurisdiction over probationer.

(A) In general. The officer exercising general court-martial jurisdiction over the probationer shall, based upon the record produced by and the recommendation of the officer exercising special court-martial jurisdiction over the probationer, decide whether the probationer violated a condition of suspension, and, if so, whether to vacate the suspended sentence. If the officer exercising general court-martial jurisdiction decides to vacate, that officer shall prepare a written statement of the evidence relied on and the reasons for vacating.

(B) Execution. Any unexecuted part of a suspended sentence ordered vacated under this rule shall, subject to R.C.M. 1113(c), be ordered executed.

(e) Vacation of a suspended special court-martial sentence not including a bad-conduct discharge or of a suspended summary court-martial sentence.

(1) In general. Before vacation of the suspension of a special court-martial sentence not including a bad-conduct discharge or of a summary court-martial sentence, the officer having authority to convene for the command in which the probationer is serving or assigned the same kind of court-martial which imposed the sentence shall cause a hearing to be held on the alleged violation(s) of the conditions of suspension.

(2) Notice to probationer. The person conducting the hearing shall notify the probationer before the hearing of the rights specified in subsections (d)(1)(B)(i), (ii), (iii), and (v) of this rule. The authority conducting the hearing shall also notify the probationer that the probationer has the right to civilian counsel provided by the probationer or, upon request, counsel detailed for that purpose, if the probationer was entitled to such counsel under R.C.M. 506(a) at the court-martial which imposed the sentence.

(3) Hearing. The procedure for the vacation hearing shall follow that prescribed in R.C.M. 405(g), (h)(1), and (i).

(4) Record; recommendation. If the hearing is not held by the commander with authority to vacate the suspension, the person who conducts the vacation proceeding shall make a summarized record of the proceeding and forward the record and that officer's recommendation concerning vacation to the commander with authority to vacate the suspension.

(5) Decision. If the appropriate authority decides that the probationer violated a condition of probation, and to vacate, that person shall prepare a record of the hearing and a written statement indicating the decision, the reasons for the decision, and the evidence relied on.

Rule 1110. Waiver or withdrawal of appellate review

(a) In general. After any general court-martial, except one in which the approved sentence includes death, and after any special court-martial in which the approved sentence includes a bad-conduct discharge the accused may waive or withdraw appellate review.

(b) Right to counsel.

(1) In general. The accused shall have the right to consult with counsel qualified under R.C.M. 502(d)(1) before submitting a waiver or withdrawal of appellate review.

(2) Waiver.

(A) Counsel who represented the accused at the court-martial. The accused shall have the right to consult with any civilian, individual military, or detailed counsel who represented the accused at the court-martial concerning whether to waiver appellate review unless such counsel has been excused under R.C.M. 505(d)(2)(B).

(B) Associate counsel. If counsel who represented the accused at the court-martial has not been excused but is not immediately available to consult with the accused, because of physical separation or other reasons, associate defense counsel shall be detailed to the accused, upon request by the accused. Such counsel shall communicate with counsel who represented the accused at the court-martial, and shall advise the accused concerning whether to waive appellate review.

(C) Substitute counsel. If counsel who represented the accused at the court-martial has been excused under R.C.M. 505(d)(2)(B), substitute defense counsel shall be detailed to devise the accused concerning waiver of appellate rights.

(3) Withdrawal.

(A) Appellate defense counsel. If the accused is represented by appellate defense counsel, the accused shall have the right to consult with such counsel concerning whether to withdraw the appeal.

(B) Associate defense counsel. If the accused is represented by appellate defense counsel, and such counsel is not immediately available to consult with the accused, because of physical separation or other reasons, associate defense counsel shall be detailed to the accused, upon request by the accused. Such counsel shall communicate with appellate defense counsel and shall advise the accused whether to withdraw the appeal.

(C) No counsel. If appellate defense counsel has not been assigned to the accused, defense counsel shall be detailed for the accused. Such counsel shall advise the accused concerning whether to withdraw the appeal. If practicable, counsel who represented the accused at the court-martial shall be detailed.

(4) Civilian counsel. Whether or not the accused was represented by civilian counsel at the court-martial, the accused may consult with civilian counsel, at no expense to the United States, concerning whether to waive or withdraw appellate review.

(5) Record of trial. Any defense counsel with whom the accused consults under this rule shall be given reasonable opportunity to examine the record of trial.

(6) Consult. The right to consult with counsel, as used in this rule, does not require communication in the presence of one another.

(c) Compulsion, coercion, inducement prohibited. No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review.

(d) Form of waiver or withdrawal. A waiver or withdrawal of appellate review shall:

(1) Be written;

(2) State that the accused and defense counsel have discussed the accused's right to appellate review and the effect of waiver or withdrawal of appellate review and that the accused understands these matters;

(3) State that the waiver or withdrawal is submitted voluntarily; and

(4) Be signed by the accused and by defense counsel.

(e) To whom submitted.

(1) Waiver. A waiver of appellate review shall be filed with the convening authority. The waiver shall be attached to the record of trial.

(2) Withdrawal. A withdrawal of appellate review may be filed with the authority exercising general court-martial jurisdiction over the accused, who shall promptly forward it to the judge Advocate General, or directly with the Judge Advocate General.

(f) Time limit.

(1) Waiver. The accused may file a waiver of appellate review only within 10 days after the accused or defense counsel is served with a copy of the action under R.C.M. 1107(h). Upon written application of the accused, the convening authority may extend this period for good cause, for not more than 30 days.

(2) Withdrawal. The accused may file withdrawal from appellate review at any time before such review is completed.

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

(1) In general. A waiver or withdrawal of appellate review under this rule shall bar review by the Judge Advocate General under R.C.M. 1201(b)(1) and by the Court of Military Review. Once submitted, a waiver or withdrawal in compliance with this rule may not be revoked.

(2) Waiver. If the accused files a timely waiver of appellate review in accordance with this rule, the record shall be forwarded for review by a judge advocate under R.C.M. 1112.

(3) Withdrawal. Action on a withdrawal of appellate review shall be carried out in accordance with procedures established by the Judge Advocate General, or, if the case is pending before a Court of Military Review, in accordance with the rules of such court. If the appeal is withdrawn, the Judge Advocate General shall forward the record to an appropriate authority for compliance with R.C.M. 1112.

(4) Substantial compliance required. A purported waiver or withdrawal of an appeal which does not substantially comply with this rule shall have no effect.

Rule 1111. Disposition of the record of trial after action

(a) General courts-martial.

(1) Cases forwarded to the Judge Advocate General. A record of trial by general court-martial and the convening authority's action shall be sent directly to the Judge Advocate General concerned if the approved sentence includes death or if the accused has not waived review under R.C.M. 1110. Unless otherwise prescribed by regulations of the Secretary concerned, 10 copies of the order promulgating the result of trial as to each accused shall be forwarded with the original record of trial. Two additional copies of the record of trial shall accompany the original record if the approved sentence includes death or if it includes dismissal of an officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more and the accused has not waived appellate review.

(2) Cases forwarded to a judge advocate. A record of trial by general court-martial and the convening authority's action shall be sent directly to a judge advocate for review under R.C.M. 1112 if the sentence does not include death and if the accused has waived appellate review under R.C.M. 1110. Unless otherwise prescribed by the Secretary concerned, 4 copies of the order promulgating the result of trial shall be forwarded with the original record of trial.

(b) Special courts-martial.

(1) Cases including an approved bad-conduct discharge. If the approved sentence of a special court-martial includes a bad-conduct discharge, the record shall be disposed of as provided in subsection (a) of this rule for records of trial by general court-martial.

(2) Other cases. The record of trial by a special court-martial in which the approved sentence does not include a bad-conduct discharge shall be forwarded directly to a judge advocate for review under R.C.M. 1112. Four copies of the order promulgating the result of trial shall be forwarded with the record of trial, unless otherwise prescribed by regulations of the Secretary concerned.

(c) Summary courts-martial. The convening authority shall dispose of a record of trial by summary court-martial as provided in R.C.M. 1306.

Rule 1112. Review by a judge advocate

(a) In general. Except as provided in subsection (b) of this rule, under regulations of the Secretary concerned, a judge advocate shall review:

(1) Each general court-martial in which the accused has waived or withdrawn appellate review under R.C.M. 1110.

(2) Each special court-martial in which the accused has waived or withdrawn appellate review under R.C.M. 1110 or in which the approved sentence does not include a bad-conduct discharge; and

(3) Each summary court-martial.

(b) Exception. If the accused was not found guilty of any offense or if the convening authority disapproved all findings of guilty, no review under this rule is required.

(c) Disqualification. No person may review a case under this rule if that person has acted in the same case as an accuser, investigating officer, member of the court-martial, military judge, or counsel, or has otherwise acted on behalf of the prosecution or defense.

(d) Form and content of review. The judge advocate's review shall be in writing and shall contain the following:

(1) Conclusions as to whether --

(A) The court-martial had jurisdiction over the accused and each offense as to which there is a finding of guilty which has not been disapproved;

(B) Each specification as to which there is a finding of guilty which has not been disapproved stated an offense; and

(C) The sentence was legal;

(2) A response to each allegation of error made in writing by the accused. Such allegations may be filed under R.C.M. 1105, 1106(f), or directly with the judge advocate who reviews the case; and

(3) If the case is sent for action to the officer exercising general court-martial jurisdiction under subsection (e) of this rule, a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

(e) Forwarding to officer exercising general court-martial jurisdiction. In cases reviewed under subsection (a) of this rule, the record of trial shall be sent for action to the officer exercising general court-martial convening authority over the accused at the time the court-martial was held (or to that officer's successor) when:

(1) The judge advocate who reviewed the case recommends corrective action;

(2) The sentence approved by the convening authority includes dismissal, a dishonorable or bad-conduct discharge, or confinement for more than 6 months; or

(3) Such action is otherwise required by regulations of the Secretary concerned.

If the judge advocate's review is not forwarded under this subsection, it shall be attached to the original record of trial and a copy forwarded to the accused.

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

(1) Action. The officer exercising general court-martial jurisdiction who receives a record under subsection (e) of this rule may --

49 FR 17152

April 23, 1984

Presidential Documents

Reporter
49 FR 17152

Federal Register > *1984* > *April* > *April 23, 1984* > *Presidential Documents* > *FEDERAL REGISTER*

Notice

Part 2 of 4. You are viewing a very large document that has been divided into parts.

Title: Title 3--
The President
Manual for Courts-Martial, United States, 1984

Agency

FEDERAL REGISTER

Identifier: Executive Order 12473 of April 13, 1984

Text

(A) Disapprove or approve the findings or sentence in whole or in part;

(B) Remit, commute, or suspend the sentence in whole or in part;

(C) Except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(D) Dismiss the charges.

(2) Rehearing. If the officer exercising general court-martial jurisdiction orders a rehearing but the convening authority finds a rehearing impracticable, the convening authority shall dismiss the charges.

(3) Notification. After the officer exercising general court-martial jurisdiction has taken action, the accused shall be notified of that action and the accused shall be provided with a copy of the judge advocate's review.

(g) Forwarding following review under this rule.

(1) Records forwarded to the Judge Advocate General. If the judge advocate who reviews the case under this rule states that corrective action is required as a matter of law, and the officer exercising general court-martial jurisdiction does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and the action thereon shall be forwarded to the Judge Advocate General concerned for review under R.C.M. 1201(b)(2).

(2) Sentence including dismissal. If the approved sentence includes dismissal, the record shall be forwarded to the Secretary concerned.

(3) Other records. Records reviewed under this rule which are not forwarded under subsection (g)(1) of this rule shall be disposed of as prescribed by the Secretary concerned.

Rule 1113. Execution of sentences

(a) In general. No sentence of a court-martial may be executed unless it has been approved by the convening authority.

(b) Punishments which the convening authority may order executed in the initial action. Except as provided in subsection (c) of this rule, the convening authority may order all or part of the sentence of a court-martial executed when the convening authority takes initial action under R.C.M. 1107.

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

(1) Dishonorable or a bad-conduct discharge. Except as may otherwise be prescribed by the Secretary concerned, a dishonorable or a bad-conduct discharge may be ordered executed only by:

(A) The officer who reviews the case under R.C.M. 1112(f), as part of the action approving the sentence, except when that action must be forwarded under R.C.M. 1112(g)(1); or

(B) the officer then exercising general court-martial jurisdiction over the accused.

A dishonorable or a bad-conduct discharge may be ordered executed only after a final judgment within the meaning of R.C.M. 1209 has been rendered in the case. If more than 6 months have elapsed since approval of the sentence by the convening authority, before a dishonorable or a bad-conduct discharge may be executed, the officer exercising general court-martial jurisdiction over the accused shall consider the advice of that officer's staff judge advocate as to whether retention of the servicemember would be in the best interest of the service. Such advice shall include: the findings and sentence as finally approved; whether the servicemember has been on active duty since the court-martial, and if so, the nature and character of that duty; and a recommendation whether the discharge should be executed.

(2) Dismissal of a commissioned officer, cadet, or midshipman. Dismissal of a commissioned officer, cadet, or midshipman may be approved and ordered executed only by the Secretary concerned or such Undersecretary or Assistant Secretary as the Secretary concerned may designate.

(3) Sentences extending to death. A punishment of death may be ordered executed only by the President.

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

(1) Death. A sentence to death which has been finally ordered executed shall be carried out in the manner prescribed by the Secretary concerned.

(2) Confinement.

(A) Effective date of confinement. Any period of confinement included in the sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but the following shall be excluded in computing the service of the term of confinement:

(i) periods during which the sentence to confinement is suspended or deferred;

(ii) periods during which the accused is in custody of civilian authorities under Article 14 from the time of the delivery to the return to military custody, if the accused was convicted in the civilian court;

(iii) periods during which the accused has escaped or is absent without authority, or is absent under a parole which proper authority has later revoked, or is erroneously released from confinement through misrepresentation or fraud on the part of the prisoner, or is erroneously released from confinement upon the prisoner's petition for a writ of habeas corpus under a court order which is later reversed; and

(iv) periods during which another sentence by court-martial to confinement is being served. When a prisoner serving a court-martial sentence to confinement is later convicted by a court-martial of another offense and sentenced to confinement, the later sentence interrupts the running of the earlier sentence. Any unremitted remaining portion of the earlier sentence will be served after the later sentence is fully executed.

(B) Nature of the confinement. The omission of "hard labor" from any sentence of a court-martial which had adjudged confinement shall not prohibit the authority who orders the sentence executed from requiring hard labor as part of the punishment.

(C) Place of confinement. The authority who orders a sentence to confinement into execution shall designate the place of confinement under regulations prescribed by the Secretary concerned unless otherwise prescribed by the Secretary concerned. Under such regulations as the Secretary concerned may prescribe, a sentence to confinement adjudged by a court-martial or other military tribunal, regardless whether the sentence includes a punitive discharge or dismissal and regardless whether the punitive discharge or dismissal has been executed, may be ordered to be served in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States or which the United States may be allowed to use.

Persons so confined in a penal or correctional institution not under the control of one of the armed forces are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District of Columbia, or place in which the institution is situated. When the service of a sentence to confinement has been deferred and the deferment is later rescinded, the convening authority shall designate the place of confinement in the initial action on the sentence or in the order rescinding the deferment. No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces. The Secretary concerned may prescribe regulations governing the place and conditions of confinement.

(3) Confinement in lieu of fine. Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.

(4) Restriction; hard labor without confinement. When restriction and hard labor without confinement are included in the same sentence, they shall, unless one is suspended, be executed concurrently.

(5) Confinement on bread and water or diminished rations. A sentence to confinement on bread and water or diminished rations may be executed only if a medical officer examines the accused and the place of confinement and certifies in writing that service of such a sentence will not, in that officer's opinion, produce serious injury to the health of the accused. A sentence of confinement in bread and water or diminished rations may be executed in a place where the accused can communicate only with authorized personnel.

(6) More than one sentence. If at the time forfeitures may be ordered executed, the accused is already serving a sentence to forfeitures by another court-martial, the authority taking action may order that the later forfeitures will be executed when the earlier sentence to forfeitures is completed.

Rule 1114. Promulgating orders

(a) In general.

(1) Scope of rule. Unless otherwise prescribed by the Secretary concerned, orders promulgating the result of trial and the actions of the convening or higher authorities on the record shall be prepared, issued, and distributed as prescribed in this rule.

(2) Purpose. A promulgating order publishes the result of the court-martial and the convening authority's action and any later action taken on the case.

(3) Summary courts-martial. An order promulgating the result of a trial by summary court-martial need not be issued.

(b) By whom issued.

(1) Initial orders. The order promulgating the result of trial and the initial action of the convening authority shall be issued by the convening authority.

(2) Orders issued after the initial action. Any action taken on the case subsequent to the initial action shall be promulgated in supplementary orders.

(A) When the President or the Secretary concerned has taken final action. General court-martial orders publishing the final result in cases in which the President or the Secretary concerned has taken final action shall be promulgated as prescribed by regulations of the Secretary concerned.

(B) Other cases. In cases other than those in subsection (b)(2)(A) of this rule, the final action may be promulgated by an appropriate convening authority.

(c) Contents.

(1) In general. The order promulgating the initial action shall set forth: the type of court-martial and the command by which it was convened; the charges and specifications, or a summary thereof, on which the accused was arraigned; the accused's pleas; the findings or other disposition of each charge and specification; the sentence, if any; and, verbatim, the action of the convening authority. Subsequent actions shall recite, verbatim, the action or order of the appropriate authority.

(2) Dates. A promulgating order shall bear the date of the initial action, if any, of the convening authority. An order promulgating an acquittal, a court-martial terminated before findings, or action on the findings or sentence taken after the initial action of the convening authority shall bear the date of its publication. A promulgating order shall state the date the sentence was adjudged, the date on which the acquittal was announced, or the date on which the proceedings were otherwise terminated.

(3) Order promulgated regardless of the result of trial or nature of the action. An order promulgating the result of trial by general or special court-martial shall be issued regardless of the result and regardless of the action of the convening or higher authorities.

(d) Orders containing classified information. When an order contains information which must be classified, only the order retained in the unit files and those copies which accompany the record of trial shall be complete and contain the classified information. The order shall be assigned the appropriate security classification. Asterisks shall be substituted for the classified information in the other copies of the order.

(e) Authentication. The promulgating order shall be authenticated by the signature of the convening or other competent authority acting on the case, or a person acting under the direction of such authority. A promulgating order prepared in compliance with this rule shall be presumed authentic.

(f) Distribution. Promulgating orders shall be distributed as provided in regulations of the Secretary concerned.

CHAPTER XII. APPEALS AND REVIEW

Rule 1201. Action by the Judge Advocate General

(a) Cases required to be referred to a Court of Military Review. The Judge Advocate General shall refer to a Court of Military Review the record in each trial by court-martial:

(1) In which the sentence, as approved, extends to death; or

(2) In which

(A) The sentence, as approved, extends to dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for 1 year or longer; and

(B) The accused has not waived or withdrawn appellate review.

(b) Cases reviewed by the Judge Advocate General.

(1) Mandatory examination of certain general courts-martial. Except when the accused has waived the right to appellate review or withdrawn such review, the record of trial by a general court-martial in which there has been a finding of guilty and a sentence, the appellate reviewof which is not provided for in subsection (a) of this rule, shall be examined in the office of the Judge Advocate General. If any part of the findings or sentence is found unsupported in law, or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both. If the Judge Advocate General so directs, the record shall be reviewed by a Court of Military Review in accordance with R.C.M. 1203. If the case is forwarded to a Court of Military Review, the accused shall be informed and shall have the rights under R.C.M. 1202(b)(2).

(2) Mandatory review of cases forwarded under R.C.M. 1112(g)(1). The Judge Advocate General shall review each case forwarded under R.C.M. 1112(g)(1). On such review, the Judge Advocate General may vacate or modify, in whole or part, the findings or sentence, or both, of a court-martial on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(3) Review by the Judge Advocate General after final review.

(A) In general. Notwithstanding R.C.M. 1208, the Judge Advocate General may, sua sponte or upon application of the accused or a person with authority to act for the accused, vacate or modify, in whole or in part, the findings, sentence, or both of a court-martial which has been finally reviewed, but has not been reviewed by a Court of Military Review, on the ground of newly discovered evidence, fraud on the court-martial, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

(B) Procedure. Each Judge Advocate General shall provide procedures for considering all cases properly submitted under subsection (b)(3) of this rule and may prescribe the manner by which an application for relief under

subsection (b)(3) of this rule may be made and, if submitted by a person other than the accused, may require that the applicant show authority to act on behalf of the accused.

(C) Time limits on applications. Any application for review by the Judge Advocate General under Article 69 must be made on or before the last day of the two year period beginning

on the date the sentence is approved by the convening authority or unless the accused establishes good cause for failure to file within that time.

(4) Rehearing. If the Judge Advocate General sets aside the findings or sentence, the Judge Advocate General may, except when the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the Judge Advocate General sets aside the findings and sentence and does not order a rehearing, the Judge Advocate General shall order that the charges be dismissed. If the Judge Advocate General orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.

(c) Remission and suspension. The Judge Advocate General may, when so authorized by the Secretary concerned under Article 74, at any time remit or suspend the unexecuted part of any sentence, other than a sentence approved by the President.

Rule 1202. Appellate Counsel

(a) In general. The Judge Advocate General concerned shall detail one or more commissioned officers as appellate Government counsel and one or more commissioned officers as appellate defense counsel who are qualified under Article 27(b)(1).

(b) Duties.

(1) Appellate Government counsel. Appellate Government counsel shall represent the United States before the Court of Military Review or the United States Court of Military Appeals when directed to do so by the Judge Advocate General concerned. Appellate Government counsel may represent the United States before the United States Supreme Court when requested to do so by the Attorney General.

(2) Appellate defense counsel. Appellate defense counsel shall represent the accused before the Court of Military Review, the Court of Military Appeals, or the Supreme Court when the accused is a party in the case before such court and:

(A) The accused requests to be represented by appellate defense counsel;

(B) The United States is represented by counsel; or

(C) The Judge Advocate General has sent the case to the United States Court of Military Appeals. Appellate defense counsel is authorized to communicate directly with the accused. The accused is a party in the case when

named as a party in pleadings before the court or, even if not so named, when the military judge is named as respondent in a petition by the Government for extraordinary relief from a ruling in favor of the accused at trial.

Rule 1203. Review by a Court of Military Review

(a) In general. Each Judge Advocate General shall establish a Court of Military Review composed of appellate military judges.

(b) Cases reviewed by a Court of Military Review. A Court of Military Review shall review cases referred to it by the Judge Advocate General under R.C.M. 1201(a) or (b)(1).

(c) Action on cases reviewed by a Court of Military Review.

(1) Forwarding by the Judge Advocate General to the Court of Military Appeals. The Judge Advocate General may forward the decision of the Court of Military Review to the Court of Military Appeals for review with respect to any matter of law. In such a case, the Judge Advocate General shall cause a copy of the decision of the Court of Military Review and the order forwarding the case to be served on the accused and on appellate defense counsel.

(2) Action when sentence is set aside. In a case reviewed by it under this rule in which the Court of Military Review has set aside the sentence and which is not forwarded to the Court of Military Appeals under subsection (c)(1) of this rule, the Judge Advocate General shall instruct an appropriate convening authority to take action in accordance with the decision of the Court of Military Review. If the Court of Military Review has ordered a rehearing, the record shall be sent to an appropriate convening authority. If that convening authority finds a rehearing impracticable that convening authority may dismiss the charges.

(3) Action when sentence is affirmed in whole or part.

(A) Sentence requiring approval by the President. If the Court of Military Review affirms any sentence which includes death, the Judge Advocate General shall transmit the record of trial and the decision of the Court of Military Review directly to the Court of Military Appeals when any period for reconsideration provided by the rules of the Courts of Military Review has expired.

(B) Other cases. If the Court of Military Review affirms any sentence other than one which includes death, the Judge Advocate General shall cause a copy of the decision of the Court of Military Review to be served on the accused in accordance with subsection (d) of this rule.

(4) Remission or suspension. If the Judge Advocate General believes that a sentence as affirmed by the Court of Military Review, other than one wich includes death, should be remitted or suspended in whole or part, the Judge Advocate General may, before taking action under subsections (c)(1) or (3) of this rule, transmit the record of trial and the decision of the Court of Military Review to the Secretary concerned with a recommendation for action under Article 74 or may take such action as may be authorized by the Secretary concerned under Article 74(a).

(d) Notification to accused.

(1) Notification of decision. The accused shall be notified of the decision of the Court of Military Review in accordance with regulations of the Secretary concerned.

(2) Notification o right to petition the Court of Military Appeals for review. If the accused has the right to petition the Court of Military Appeals for review, the accused shall be provided with a copy of the decision of the Court of Military Review bearing an endorsement notifying the accused of this right. The endorsement shall inform the accused that such a petition:

(A) May be filed only within 60 days from the time the accused was in fact notified of the decision of the Court of Military Review or the mailed copy of the decision was postmarked, whichever is earlier; and

(B) May be forwarded through the officer immediately exercising general court-martial jurisdiction over the accused and through the appropriate Judge Advocate General or filed directly with the Court of Military Appeals.

(3) Receipt by the accused -- disposition. When the accused has the right to petition the Court of Military Appeals for review, the receipt of the accused for the copy of the decision of the Court of Military Review, a certificate of service on the accused, or the postal receipt for delivery of certified mail shall be transmitted in duplicate by expeditious means to the appropriate Judge Advocate General. If the accused is personally served, the receipt or certificate of service shall show the date of service. The Judge Advocate General shall forward one copy of the receipt, certificate, or postal receipt to the clerk of the Court of Military Appeals when required by the court.

(e) Cases not reviewed by the Court of Military Appeals. If the decision of the Court of Military Review is not subject to review by the Court of Military Appeals, or if the Judge Advocate General has not forwarded the case to the Court of Military Appeals and the accused has not filed or the Court of Military Appeals has denied a petition for review, the Judge Advocate General shall --

(1) if the sentence affirmed by the Court of Military Review includes a dismissal, transmit the record, the decision of the Court of Military Review, and the Judge Advocate General's recommendation to the Secretary concerned for action under R.C.M. 1206; or

(2) if the sentence affirmed by the Court of Military Review does not include a dismissal, notify the convening authority, the officer exercising general court-martial jurisdiction over the accused, or the Secretary concerned, as appropriate, who, subject to R.C.M. 1113(c)(1), may order into execution any unexecuted sentence affirmed by the Court of Military Review or take other action, as authorized.

(f) Scope. Except as otherwise expressly provided in this rule, this rule does not apply to appeals by the Government under R.C.M. 908.

Rule 1204. Review by the Court of Military Appeals

(a) Cases reviewed by the Court of Military Appeals. Under such rules as it may prescribe, the Court of Military Appeals shall review the record in all cases:

(1) In which the sentence, as affirmed by a Court of Military Review, extends to death;

(2) Reviewed by a Court of Military Review which the Judge Advocate General orders sent to the Court of Military Appeals for review; and

(3) Reviewed by a Court of Military Review, except those referred to it by the Judge Advocate General under R.C.M. 1201(b)(1), which, upon petition by the accused and on good cause shown, the Court of Military Appeals has granted a review.

(b) Petition by the accused for review by the Court of Military Appeals.

(1) Counsel. When the accused is notified of the right to forward a petition for review by the Court of Military Appeals, if requested by the accused associate counsel qualified under R.C.M. 502(d)(1) shall be detailed to advise and assist the accused in connection with preparing a petition for further appellate review.

(2) Forwarding petition. The accused shall file any petition for review by the Court of Military Appeals under subsection (a)(3) of this rule directly with the Court of Military Appeals.

(c) Action on decision by the Court of Military Appeals.

(1) In general. After it has acted on a case, the Court of Military Appeals may direct the Judge Advocate General to return the record to the Court of Military Review for further proceedings in accordance with the decision of the court. Otherwise, unless the decision is subject to review by the Supreme Court, or there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the Court has ordered a rehearing, but the convening authority to whom the record is transmitted finds a rehearing impracticable, the convening authority may dismiss the charges.

(2) Sentence requiring approval of the President. If the Court of Military Appeals has affirmed a sentence which must be approved by the President before it may be executed, the Judge Advocate General shall transmit the record of trial, the decision of the Court of Military Review, the decision of the Court of Military Appeals, and the recommendation of the Judge Advocate General to the Secretary concerned for the action of the President.

(3) Sentence requiring approval of the Secretary concerned. If the Court of Military Appeals has affirmed a sentence which requires approval of the Secretary concerned before it may be executed, the Judge Advocate General shall follow the procedure in R.C.M. 1203(e)(1).

(4) Decision subject to review by the Supreme Court. If the decision of the Court of Military Appeals is subject to review by the Supreme Court, the Judge Advocate General shall take no action under subsections (c)(1), (2), or (3) of this rule until: (A) the time for filing a petition for a writ of certiorari with the Supreme Court has expired; or (B) the Supreme Court has denied any petitions for writ of certiorari filed in the case. After (A) or (B) has occurred, the Judge Advocate General shall take action under subsection (c)(1), (2), or (3). If the Supreme Court grants a writ of certiorari, the Judge Advocate General shall take action under R.C.M. 1205(b).

Rule 1205. Review by the Supreme Court

(a) Cases subject to review by the Supreme Court. Under 28 U.S.C. § 1259 and Article 67(h), decisions of the Court of Military Appeals may be reviewed by the Supreme Court by writ of certiorari in the following cases:

(1) Cases reviewed by the Court of Military Appeals under Article 67(b)(1);

(2) Cases certified to the Court of Military Appeals by the Judge Advocate General under Article 67(b)(2);

(3) Cases in which the Court of Military Appeals granted a petition for review under Article 67(b)(3); and

(4) Cases other than those described in subsections (a)(1), (2), and (3) of this rule in which the Court of Military Appeals granted relief.

The Supreme Court may not review by writ of certiorari any action of the Court of Military Appeals in refusing to grant a petition for review.

(b) Action by the Supreme Court. After the Supreme Court has taken action, other than denial of a petition for writ of certiorari, in any case, the Judge Advocate General shall, unless the case is returned to the Court of Military Appeals for further proceedings, forward the case to the President or the Secretary concerned in accordance with R.C.M. 1204(c)(2) or (3) when appropriate, or instruct the convening authority to take action in accordance with the decision.

Rule 1206. Powers and responsibilities of the Secretary

(a) Sentences requiring approval by the Secretary. No part of a sentence extending to dismissal of a commissioned officer, cadet, or midshipman may be executed until approved by the Secretary concerned or such Under Secretary or Assistant Secretary as may be designated by the Secretary.

(b) Remission and suspension.

(1) In general. The Secretary concerned and, when designated by the Secretary concerned, any Under Secretary, Assistant Secretary, Judge Advocate General, or commander may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures, other than a sentence approved by the President.

(2) Substitution of discharge. The Secretary concerned may, for good cause, substitute an administrative discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

(3) Sentence commuted by the President. When the President has commuted a death sentence to a lesser punishment, the Secretary concerned may remit or suspend any remaining part or amount of the unexecuted portion of the sentence of a person convicted by a military tribunal under the Secretary's jurisdiction.

Rule 1207. Sentences requiring approval by the President

No part of a court-martial sentence extending to death may be executed until approved by the President.

Rule 1208. Restoration

(a) New trial. All rights, privileges, and property affected by an executed portion of a court-martial sentence -- except an executed dismissal or discharge -- which has not again been adjudged upon a new trial or which, after the new trial, has not been sustained upon the action of any reviewing authority, shall be restored. So much of the findings and so much of the sentence adjudged at the earlier trial shall be set aside as may be required by the findings and sentence at the new trial. Ordinarily, action taken under this subsection shall be announced in the court-martial order promulgating the final results of the proceedings.

(b) Order cases. In cases other than those in subsection (a) of this rule, all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved by any competent authority shall be restored unless a new trial, other trial, or rehearing is ordered and such executed part is included in a sentence imposed at the new trial, other trial, or rehearing. Ordinarily, any restoration shall be announced in the court-martial order promulgating the final results of the proceedings.

Rule 1209. Finally of courts-martial

(a) When a conviction is final. A court-martial conviction is final when:

(1) Review is completed by a Court of Military Review and --

(A) The accused does not file a timely petition for review by the Court of Military Appeals and the case is not otherwise under review by that court;

(B) A petition for review is denied or otherwise rejected by the Court of Military Appeals; or

(C) Review is completed in accordance with the judgment of the Court of Military Appeals and --

(i) A petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court,

(ii) A petition for writ of certiorari is denied or otherwise rejected by the Supreme Court, or

(iii) Review is otherwise completed in accordance with the judgment of the Supreme Court; or

(2) In cases not reviewed by a Court of Military Review --

(A) The findings and sentence have been found legally sufficient by a judge advocate and, when action by such officer is required, have been approved by the officer exercising general court-martial jurisdiction over the accused at the time the court-martial was convened (or that officer's successor), or

(B) The findings and sentence have been affirmed by the Judge Advocate General when review by the Judge Advocate General is required under R.C.M. 1112(g)(1) or 1201(b)(1).

(b) Effect of finality. The appellate review of records of trial provided by the code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by the code, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by the code, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial under Article 73, to action by the Judge Advocate General under Article 69(b), to action by the Secretary concerned as provided in Article 74, and the authority of the President.

Rule 1210. New Trial

(a) In general. At any time within 2 years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the ground of newly discovered evidence or fraud on the court-martial. A petition may not be submitted after the death of the accused.

(b) Who may petition. A petition for a new trial may be submitted by the accused personally, or by accused's counsel, regardless whether the accused has been separated from the service.

(c) Form of petition. A petition for a new trial shall be written and shall be signed under oath or affirmation by the accused, by a person possessing the power of attorney of the accused for that purpose, or by a person with the authorization of an appropriate court to sign the petition as the representative of the accused. The petition shall contain the following information, or an explanation why such matters are not included:

(1) The name, service number, and current address of the accused;

(2) The date and location of the trial;

(3) The type of court-martial and the title or position of the convening authority;

(4) The request for the new trial;

(5) The sentence or a description thereof as approved or affirmed, with any later reduction thereof by clemency or otherwise;

(6) A brief description of any finding or sentence believed to be unjust;

(7) A full statement of the newly discovered evidence or fraud on the court-martial which is relied upon for the remedy sought;

(8) Affidavits pertinent to the matters in subsection (c)(6) of this rule; and

(9) The affidavit of each person whom the accused expects to present as a witness in the event of a new trial. Each such affidavit should set forth briefly the relevant facts within the personal knowledge of the witness.

(d) Effect of petition. The submission of a petition for a new trial does not stay the execution of a sentence.

(e) Who may act on petition. If the accused's case is pending before a Court of Military Review or the Court of Military Appeals, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise, the Judge Advocate General of the armed force which reviewed the previous trial shall act on the petition, except that petitions submitted by persons who, at the time of trial and sentence from which the petitioner seeks relief, were members of the Coast Guard, and who are members of the Coast Guard at the time the petition is submitted, shall be acted on in the Department in which the Coast Guard is serving at the time the petition is so submitted.

(f) Grounds for new trial.

(1) In general. A new trial may be granted only on grounds of newly discovered evidence or fraud on the court-martial.

(2) Newly discovered evidence. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:

(A) The evidence was discovered after the trial;

(B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

(C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

(3) Fraud on court-martial. No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentence adjudged.

(g) Action on the petition.

(1) In general. The authority considering the petition may cause such additional investigation to be made and such additional information to be secured as that authority believes appropriate. Upon written request, and in its discretion, the authority considering the petition may permit oral argument on the matter.

(2) Courts of Military Review; Court of Military Appeals. The Courts of Military Review and the Court of Military Appeals shall act on a petition for a new trial in accordance with their respective rules.

(3) The Judge Advocates General. When a petition is considered by the Judge Advocate General, any hearing may be before the Judge Advocate General or before an officer or officers designated by the Judge Advocate General. If the Judge Advocate General believes meritorious grounds for relief under Article 74 have been established but that a new trial is not appropriate, the Judge Advocate General may act under Article 74 if authorized to do so, or transmit the petition and related papers to the Secretary concerned with a recommendation. The Judge Advocate General may also, in cases which have been finally reviewed but have not been reviewed by a Court of Military Review, act under Article 69.

(h) Action when new trial is granted.

(1) Forwarding to convening authority. When a petition for a new trial is granted, the Judge Advocate General shall select and forward the case to a convening authority for disposition.

(2) Charges at new trial. At a new trial, the accused may not be tried for any offense of which the accused was found not guilty or upon which the accused was not tried at the earlier court-martial.

(3) Action by convening authority. The convening authority's action on the record of a new trial is the same as in other courts-martial.

(4) Disposition of record. The disposition of the record of a new trial is the same as for other courts-martial.

(5) Court-martial orders. Court-martial orders promulgating the final action taken as a result of a new trial, including any restoration of rights, privileges, and property, shall be promulgated in accordance with R.C.M. 1114.

(6) Action by persons charged with execution of the sentence. Persons charged with the administrative duty of executing a sentence adjudged upon a new trial after it has been ordered executed shall credit the accused with any executed portion or amount of the original sentence included in the new sentence in computing the term or amount of punishment actually to be executed pursuant to the sentence.

CHAPTER XIII. SUMMARY COURTS-MARTIAL

Rule 1301. Summary courts-martial generally

(a) Composition. A summary court-martial is composed of one commissioned officer on active duty. Unless otherwise prescribed by the Secretary concerned a summary court-martial shall be of the same armed force as the accused. Whenever practicable, a summary court-martial should be an officer whose grade is not below lieutenant of the Navy or Coast Guard or captain of the Army, Air Force, or Marine Corps. When only one commissioned officer is present with a command or detachment, that officer shall be the summary court-martial of that command or detachment. When more than one commissioned officer is present with a command or detachment, the convening authority may not be the summary court-martial of that command or detachment.

(b) Function. The function of the summary court-martial is to promptly adjudicate minor offenses under a simple procedure. The summary court-martial shall thoroughly and impartially inquire into both sides of the matter and shall ensure that the interests of both the Government and the accused are safeguarded and that justice is done. A summary court-martial may seek advice from a judge advocate or legal officer on questions of law, but the summary court-martial may not seek advice from any person on factual conclusions which should be drawn from evidence or the sentence which should be imposed, as the summary court-martial has the independent duty to make these determinations.

(c) Jurisdiction. Subject to Chapter II, summary courts-martial have the power to try persons subject to the code, except commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by the code.

(d) Punishments.

(1) Limitations -- amount. Subject to R.C.M. 1003, summary courts-martial may adjudge any punishment not forbidden by the code except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than 1 month, hard labor without confinement for more than 45 days, restriction to specified limits for more than 2 months, or forfeiture of more than two-thirds of 1 month's pay.

(2) Limitations -- pay grade. In the case of enlisted members above the fourth enlisted pay grade, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next pay grade.

(e) Counsel. The accused at a summary court-martial does not have the right to counsel. If the accused has civilian counsel provided by the accused and qualified under R.C.M. 502(d)(3), that counsel shall be permitted to represent the accused at the summary court-martial if such appearance will not unreasonably delay the proceedings and if military exigencies do not preclude it.

(f) Power to obtain witnesses and evidence. A summary court-martial may obtain evidence pursuant to R.C.M. 703.

(g) Secretarial limitations. The Secretary concerned may prescribe procedural or other rules for summary courts-martial not inconsistent with this Manual or the Code.

Rule 1302. Convening a summary court-martial

(a) Who may convene summary courts-martial. Unless limited by competent authority summary courts-martial may be convened by:

(1) any person who may convene a general or special court-martial;

(2) the commander of a detached company or other detachment of the Army;

(3) the commander of a detached squadron or other detachment of the Air Force;

(4) the commander or officer in charge of any other command when empowered by the Secretary concerned; or

(5) a superior competent authority to any of the above.

(b) When convening authority is accuser. If the convening authority or the summary court-martial is the accuser, it is discretionary with the convening authority whether to forward the charges to a superior authority with a recommendation to convene the summary court-martial. If the convening authority or the summary court-martial is the accuser, the jurisdiction of the summary court-martial is not affected.

(c) Procedure. After the requirements of Chapters III and IV of this Part have been satisfied, summary courts-martial shall be convened in accordance with R.C.M. 504(d)(2). The convening order may be by notation signed by the convening authority on the charge sheet. Charges shall be referred to summary courts-martial in accordance with R.C.M. 601.

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

No person who objects thereto before arraignment may be tried by summary court-martial even if that person also refused punishment under Article 15 and demanded trial by court-martial for the same offenses.

Rule 1304. Trial procedure

(a) Pretrial duties.

(1) Examination of file. The summary court-martial shall carefully examine the charge sheet, allied papers, and immediately available personnel records of the accused before trial.

(2) Report of irregularity. The summary court-martial shall report to the convening authority any substantial irregularity in the charge sheet, allied papers, or personnel records.

(3) Correction and amendment. The summary court-martial may, subject to R.C.M. 603, correct errors on the charge sheet and amend charges and specifications. Any such corrections or amendments shall be initialed.

(b) Summary court-martial procedure.

(1) Preliminary proceeding. After complying with R.C.M. 1304(a), the summary court-martial shall hold a preliminary proceeding during which the accused shall be given a copy of the charge sheet and informed of the following:

(A) the general nature of the charges;

(B) the fact that the charges have been referred to a summary court-martial for trial and the date of referral;

(C) the identity of the convening authority;

(D) the name(s) of the accuser(s);

(E) the names of the witnesses who could be called to testify and any documents or physical evidence which the summary court-martial expects to introduce into evidence;

(F) the accused's right to inspect the allied papers and immediately avaialble personnel records;

(G) that during the trial the summary court-martial will not consider any matters, including statements previously made by the accused to the officer detailed as summary court-martial officer, unless admitted in accordance with the Military Rules of Evidence;

(H) the accused's right to plead not guilty or guilty;

(I) the accused's right to cross-examine witnesses and have the summary court-martial cross-examine witnesses on behalf of the accused;

(J) the accused's right to call witnesses and produce evidence with the assistance of the summary court-martial as necessary;

(K) the accused's right to testify on the merits, or to remain silent with the assurance that no adverse inference will be drawn by the summary court-martial from such silence;

(L) if any findings of guilty are announced, the accused's rights to remain silent, to make an unsworn statement, oral or written or both, and to testify, and to introduce evidence in extenuation or mitigation;

(M) the maximum sentence which the summary court-martial may adjudge if the accused is found guilty of the offense or offenses alleged; and

(N) the accused's right to object to trial by summary court-martial.

(2) Trial proceeding.

(A) Objection to trial. The summary court-martial shall give the accused a reasonable period of time to decide whether to object to trial by summary court-martial. The summary court-martial shall thereafter record the response. If the accused objects to trial by summary court-martial, the summary court-martial shall return the charge sheet, allied papers, and personnel records to the convening authority. If the accused fails to object to trial by summary court-martial, trial shall proceed.

(B) Arraignment. After complying with R.C.M. 1304(b)(1) and (2)(A), the summary court-martial shall read and show the charges and specifications to the accused and, if necessary, explain them. The accused may waive the reading of the charges. The summary court-martial shall then ask the accused to plead to each specification and charge.

(C) Motions. Before receiving pleas the summary court-martial shall allow the accused to make motions to dismiss or for other relief. The summary court-martial shall take such action on behalf of the accused, if requested by the accused, or if it appears necessary in the interests of justice.

(D) Pleas.

(i) Not guilty pleas. When a not guilty plea is entered, the summary court-martial shall proceed to trial.

(ii) Guilty pleas. If the accused pleads guilty to any offense, the summary court-martial shall comply with R.C.M. 910.

(iii) Rejected guilty pleas. If the summary court-martial is in doubt that the accused's pleas of guilty are voluntarily and understandingly made, or if at any time during the trial any matter inconsistent with pleas of guilty arises, which inconsistency cannot be resolved, the summary court-martial shall enter not guilty pleas as to the affected charges and specifications.

(iv) No plea. If the accused refuses to plead, the summary court-martial shall enter not guilty pleas.

(v) Changed pleas. The accused may change any plea at any time before findings are announced. The assused may change pleas from guilty to not guilty after findings are announced only for good cause.

(E) Presentation of evidence.

(i) The Military Rules of Evidence (Part III) apply to summary courts-martial.

(ii) The summary court-martial shall arrange for the attendance of necessary witnesses for the prosecution and defense, including those requested by the accused.

(iii) Witnesses for the prosecution shall be called first and examined under oath. The accused shall be permitted to cross-examine these witnesses. The summary court-martial shall aid the accused in cross-examination if such assistance is requested or appears necessary in the interests of justice. The witnesses for the accused shall then be called and similarly examined under oath.

(iv) The summary court-martial shall obtain evidence which tends to disprove the accused's guilt or establishes extenuating circumstances.

(F) Findings and sentence.

(i) The summary court-martial shall apply the principles in R.C.M. 918 in determining the findings. The summary court-martial shall announce the findings to the accused in open session.

(ii) The summary court-martial shall follow the procedures in R.C.M. 1001 and apply the principles in the remainder of Chapter X in determining a sentence. The summary court-martial shall announce the sentence to the accused in open session.

(iii) If the sentence includes confinement, the summary court-martial shall advise the accused of the right to apply to the convening authority for deferment of the service of the confinement.

(iv) If the accused is found guilty, the summary court-martial shall advise the accused of the rights under R.C.M. 1306(a) and (d) after the sentence is announced.

(v) The summary court-martial shall, as practicable, inform the convening authority of the findings, sentence, recommendations, if any, for suspension of the sentence, and any deferment request.

(vi) If the sentence includes confinement, the summary court-martial shall cause the delivery of the accused to the accused's commanding officer or the commanding officer's designee.

Rule 1305. Record of trial.

(a) In general. The record of trial of a summary court-martial shall be prepared as prescribed in subsection (b) of this rule. The convening or higher authority may prescribe additional requirements for the record of trial.

(b) Contents. The summary court-martial shall prepare an original and at least two copies of the record of trial, which shall include:

(1) The pleas, findings, and sentence, and if the accused was represented by counsel at the summary court-martial, a notation to that effect;

(2) The number of previous convictions considered and the fact that the accused was advised of the matters set forth in R.C.M. 1304(b)(1);

(3) If the summary court-martial is the convening authority, a notation to that effect.

(c) Authentication. The summary court-martial shall authenticate the record by signing each copy.

(d) Medical certificate. If the sentence ordered executed includes confinement on bread and water or diminished rations, the convening authority shall cause the medical certificate required by R.C.M. 1113(d)(5) to be attached to the original copy of the record of trial.

(e) Forwarding copies of the record.

(1) Accused's copy.

(A) Service. The summary court-martial shall cause a copy of the record of trial to be served on the accused as soon as it is authenticated.

(B) Receipt. The summary court-martial shall cause the accused's receipt for the copy of the record of trial to be obtained and attached to the original record of trial or shall attach to the original record of trial a certificate that the accused was served a copy of the record. If the record of trial was not served on the accused personally, the summary court-martial shall attach a statement explaining how and when such service was accomplished. If the accused was represented by counsel, such counsel may be served with the record of trial.

(C) Classified information. If classified information is included in the record of trial of a summary court-martial, R.C.M. 1104(b)(1)(D) shall apply.

(2) Forwarding to the convening authority. The original and one copy of the record of trial shall be forwarded to the convening authority after compliance with subsection (e)(1) of this rule.

(3) Further disposition. After compliance with R.C.M. 1306(b) and (c), the record of trial shall be disposed of under regulations prescribed by the Secretary concerned.

Rule 1306. Post-trial procedure

(a) Matters submitted by the accused. After a sentence is adjudged, the accused may submit written matters to the convening authority in accordance with R.C.M. 1105.

(b) Convening authority's action.

(1) Who shall act. Except as provided herein, the convening authority shall take action in accordance with R.C.M. 1107. The convening authority shall not take action before the period prescribed in R.C.M. 1105(c)(3) has expired, unless the right to submit matters has been waived under R.C.M. 1105(d).

(2) Action. The action of the convening authority shall be shown on all copies of the record of trial except that provided the accused if the accused has retained that copy. An order promulgating the result of a trial by summary court-martial need not be issued. A copy of the action shall be forwarded to the accused.

(3) Signature. The action on the original record of trial shall be signed by the convening authority. The convening authority's action on other copies of the record of trial shall either be signed by the convening authority or be prepared and certified as true copies of the original.

(4) Subsequent action. Any action taken on a summary court-martial after the initial action by the convening authority shall be in writing, signed by the authority taking the action, and promulgated in appropriate orders.

(c) Review by a judge advocate. Unless otherwise prescribed by regulations of the Secretary concerned, the original record of the summary court-martial shall be reviewed by a judge advocate in accordance with R.C.M. 1112.

(d) Review by the Judge Advocate General. The accused may request review of a final conviction by summary court-martial by the Judge Advocate General in accordance with R.C.M. 1201(b)(3).

PART III

MILITARY RULES OF EVIDENCE

SECTION I. GENERAL PROVISIONS

Rule 101. Scope

(a) Applicability. These rules are applicable in courts-martial, including summary courts-martial, to the extent and with the exceptions stated in Mil. R. Evid. 1101.

(b) Secondary Sources. If not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this Manual, courts-martial shall apply:

(1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and

(2) Second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.

(c) Rule of construction. Except as otherwise provided in these rules, the term "military judge" includes the president of a special court-martial without a military judge and a summary court-martial officer.

Rule 102. Purpose and construction

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 103. Rulings on evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless the ruling materially prejudices a substantial right of a party, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked.

The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United States as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard.

(b) Record of offer and ruling. The military judge may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The military judge may direct the making of an offer in question and answer form.

(c) Hearing of members. In a court-martial composed of a military judge and members, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge.

Rule 104. Preliminary questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations the military judge is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except where these rules or this Manual provide expressly to the contrary.

(c) Hearing of members. Except in cases tried before a special court-martial without a military judge, hearings on the admissibility of statements of an accused under Mil. R. Evid. 301-306 shall in all cases be conducted out of the hearing of the members. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the members evidence relevant to weight or credibility.

Rule 105. Limited admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly.

Rule 106. Remainder of or related writings or recorded statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

SECTION II. JUDICIAL NOTICE

Rule 201. Judicial notice of adjudicative facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. The military judge may take judicial notice, whether requested or not. The parties shall be informed in open court when, without being requested, the military judge takes judicial notice of an adjudicative fact essential to establishing an element of the case.

(d) When mandatory. The military judge shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing members. The military judge shall instruct the members that they may, but are not required to, accept as conclusive any matter judicially noticed.

Rule 201A. Judicial notice of law

(a) Domestic law. The military judge may taken judicial notice of domestic law. Insofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Mil. R. Evid. 201 -- except Mil. R. Evid. 201(g) -- apply.

(b) Foreign law. A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The military judge, in determining foreign law, may consider any relevant material or source including testimony whether or not submitted by a party or admissible under these rules. Such a determination shall be treated as a ruling on a question of law.

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

Rule 301. Privilege concerning compulsory self-incrimination

(a) General rule. The privileges against self-incrimination provided by the Fifth Amendment to the Constitution of the United States and Article 31 are applicable only to evidence of a testimonial or communicative nature. The privilege most beneficial to the individual asserting the privilege shall be applied.

(b) Standing.

(1) In general. The privilege of a witness to refuse to respond to a question the answer to which may tend to incriminate the witness is a personal one that the witness may exercise or waive at the discretion of the witness.

(2) Judicial advice. If a witness who is apparently uninformed of the privileges under this rule appears likely to incriminate himself or herself, the military judge should advise the witness of the right to decline to make any answer that might tend to incriminate the witness and that any self-incriminating answer the witness might make can later be used as evidence against the witness. Counsel for any party or for the witness may request the military judge to so advise a witness provided that such a request is made out of the hearing of the witness and, except in a special court-martial without a military judge, the members. Failure to so advise a witness does not make the testimony of the witness inadmissible.

(c) Exercise of the privilege. If a witness states that the answer to a question may tend to incriminate him or her, the witness may not be required to answer unless facts and circumstances are such that no answer the witness might make to the question could have the effect of tending to incriminate the witness or that the witness has, with respect to the question, waived the privilege against self-incrimination. A witness may not assert the privilege if the witness is not subject to criminal penalty as a result of an answer by reason of immunity, running of the statute of limitations, or similar reason.

(1) Immunity generally. The minimum grant of immunity adequate to overcome the privilege is that which under either R.C.M. 704 or other proper authority provides that neither the testimony of the witness nor any evidence obtained from that testimony may be used against the witness at any subsequent trial other than in a prosecution for perjury, false swearing, the making of a false official statement, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

(2) Notification of immunity of leniency. When a prosecution witness before a court-martial has been granted immunity or leniency in exchange for testimony, the grant shall be reduced to writing and shall be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this rule, the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required.

(d) Waiver by a witness. A witness who answers a question without having asserted the privilege against self-incrimination and thereby admits a self-incriminating fact may be required to disclose all information relevant to that fact except when there is a real danger of further self-incrimination. This limited waiver of the privilege applies only at the trial in which the answer is given, does not extend to a rehearing or new or other trial, and is subject to Mil. R. Evid. 608(b).

(e) Waiver by the accused. When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified. This waiver is subject to Mil. R. Evid. 608(b).

(f) Effect of claiming the privilege.

(1) Generally. The fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government.

(2) On cross-examination. If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.

(3) Pretrial. The fact that the accused during official questioning and in exercise of rights under the Fifth Amendment to the Constitution of the United States or Article 31, remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated is inadmissible against the accused.

(g) Instructions. When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice.

Rule 302. Privilege concerning mental examination of an accused

(a) General rule. The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M. 706 and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Mil. R. Evid. 305 at the examination.

(b) Exceptions.

(1) There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence.

(2) An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reason therefor as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence, but such testimony may not extend to statements of the accused except as provided in (1).

(c) Release of evidence. If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.C.M. 706. If the defense offers statements made by the accused at such examination, the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

(d) Noncompliance by the accused. The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under R.C.M. 706 from presenting any expert medical testimony as to any issue that would have been the subject of the mental examination.

(e) Procedure. The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil. R. Evid. 304 for an objection or a motion to suppress.

Rule 303. Degrading questions

No person may be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade that person.

Rule 304. Confessions and admissions

(a) General rule. An involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule.

(b) Exception. Where the statement is involuntary only in terms of noncompliance with the requirements concerning counsel under Mil. R. Evid. 305(d), 305(e), and 305(g), this rule does not prohibit use of the statement to impeach

by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

(c) Definitions. As used in these rules:

(1) Confession. A "confession" is an acknowledgment of guilt.

(2) Admission. An "admission" is a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory.

(3) Involuntary. A statement is "involuntary" if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

(d) Procedure.

(1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces.

(2) Motions and objections.

(A) Motions to suppress or objections under this rule or Mil. R. Evid. 302 or 305 to statements that have been disclosed shall be made by the defense prior to submission of plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

(B) If the prosecution intends to offer against the accused a statement made by the accused that was not disclosed prior to arrangement, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interests of justice.

(C) If evidence is disclosed as derivative evicence under this subdivision prior to arraignment, any motion to suppress or objection under this rule or Mil. R. Evid. 302 or 305 shall be made in accordance with the procedure for challenging a statement under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

(3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement, the military judge may make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

(4) Rulings. A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at trial, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

(5) Effect of guilty plea. Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this rule with respect to that offense regardless of whether raised prior to plea.

(e) Burden of proof. When an appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence. When a specific motion or objection has been required under subdivision (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

(1) In general. The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. When trial is by a special court-martial without a military judge, a determination by the president of the court that a statement was made voluntarily is subject to objection by any member of the court. When such objection is made, it shall be resolved pursuant to R.C.M. 801(e)(3)(C).

(2) Weight of the evidence. If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence with respect to the voluntariness of the statement and shall instruct the numbers to give such weight to the statement as it deserves under all the circumstances. When trial is by military judge without members, the military judge shall determine the appropriate weight to give the statement.

(3) Derivative evidence. Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence either that the statement was made voluntarily or that the evidence was not obtained by use of the statement.

(f) Defense evidence. The defense may present evidence relevant to the admissibility of evidence as to which there has been an objection or motion to suppress under this rule. An accused may testify for the limited purpose of denying that the accused made the statement or that the statement was made voluntarily. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(g) Corroboration. An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other

uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, then the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to to the admissibility of admissions or confessions.

(1) Quantum of evidence needed. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

(2) Procedure. The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced but the military judge may admit evidence subject to later corroboration.

(h) Miscellaneous.

(1) Oral statements. A voluntary oral confession or amission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for.

(2) Completness. If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduced the remaining portions of the statement.

(3) Certain admissions by silence. A person's failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation.

Rule 305. Warnings about rights

(a) General rule. A statement obtained in violation of this rule is involuntary and shall be treated under Mil. R. Evid. 304.

(b) Definitions. As used in this rule:

(1) Person subject to the code. A "person subject to the code" includes a person acting as a knowing agent of a military unit or of a person subject to the code.

(2) Interrogation. "Interrogation" includes any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.

(c) Warnings concerning the accusation, right to remain silent, and use of statements. A person subject to the code who is required to give warnings under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(1) informing the accused or suspect of the nature of the accusation;

(2) advising the accused or suspect that the accused or suspect has the right to remain silent; and

(3) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

(d) Counsel rights and warnings.

(1) General rule. When evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the Constitution of the United States either is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel as provided by paragraph (2) of this subdivision, to have been counsel present at the interrogation, and to be warned of these rights prior to the interrogation if --

(A) The interrogation is conducted by a person subject to the code who is required to give warnings under Article 31 and the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way; or

(B) The interrogation is conducted by a person subject to the code acting in a law enforcement capacity, or an agent of such a person, the interrogation is conducted subsequent to preferral of charges or the imposition of pretrial restraint under R.C.M. 304, and the interrogation concerns the offenses or matters that were the subject of the preferral of charges or were the cause of the imposition of pretrial restraint.

(2) Counsel. When a person entitled to counsel under this rule requests counsel, a judge advocate or an individual certified in accordance with Article 27(b) shall be provided by the United States at no expense to the person and without regard to the person's indigency or lack thereof before the interrogation may proceed. In addition to counsel supplied by the United States, the person may retain civilian counsel at no expense to the United States. Unless otherwise provided by regulations of the Secretary concerned, an accused or suspect does not have a right under this rule to have military counsel of his or her own selection.

(e) Notice to Counsel. When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.

(f) Exercise of rights. If a person chooses to exercise the privilege against self-incrimination or the right to counsel under this rule, questioning must cease immediately.

(g) Waiver.

(1) General rule. After receiving applicable warnings under this rule, a person may waive the rights described therein and in Mil. R. Evid. 301 and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect must acknowledge affirmatively that he or she understands the rights involved, affirmatively decline the right to counsel and affirmatively consent to making a statement.

(2) Counsel. If the right to counsel in subdivision (d) is applicable and the accused or suspect does not decline affirmatively the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel. In addition, if the notice to counsel in subdivision (e) is applicable, a waiver of the right to counsel is not effective unless the prosecution demonstrates by a preponderance of the evidence that reasonable efforts to notify the counsel were unavailing or that the counsel did not attend an interrogation scheduled within a reasonable period of time after the required notice was given.

(h) Nonmilitary interrogations.

(1) General rule. When a person subject to the code is interrogated by an official or agent of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States, or any political subdivision of such a State, Commonwealth, or possession, and such official or agent is not required to give warnings under subdivision (c), the person's entitlement to rights warnings and the validity of any waiver of applicable rights shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar interrogations.

(2) Foreign interrogations. Neither warnings under subdivisions (c) or (d), nor notice to counsel under subdivision (e) are required during an interrogation conducted abroad by officials of a foreign government or their agents unless such interrogation is conducted, instigated, or participated in by military personnel or their agents or by those officials or agents listed in subdivision (h)(1). A statement obtained during such an interrogation is involuntary within the meaning of Mil. R. Evid. 304(b)(3) if it is obtained through the use of coercion, unlawful influence, or unlawful inducement. An interrogation is not "participated in" by military personnel or their agents or by the officials or agents listed in subdivision (h)(1) merely because such a person was present at an interrogation conducted in a foreign nation by officials of a foreign government or their agents, or because such a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign interrogation.

Rule 306. Statements by one of several accused

When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accused may not be received in evidence unless all references inculpating an accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination.

Rule 311. Evidence obtained from unlawful searches and seizures

(a) General rule. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) Objection. The accused makes a timely motion to suppress or an objection to the evidence under this rule; and

(2) Adequate interest. The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

(b) Exception. Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

(c) Nature of search or seizure. A search or seizure is "unlawful" if it was conducted, instigated, or participated in by:

(1) Military Personnel. Military personnel or their agents and was in violation of the Constitution of the United States as applied to members of the armed forces, an Act of Congress applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or Mil. R. Evid. 312-317;

(2) Other officials. Other officials or agents of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth, or possession and was in violation of the Constitution of the United States, or is unlawful under the principles of law generally applied in the trial of criminal cases in the United States district court involving a similar search or seizure; or

(3) Officials of a foreign government. Officials of a foreign government or their agents and was obtained as a result of a foreign search or seizure which subjected the accused to gross and brutal maltreatment.

A search or seizure is not "participated in" merely because a person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

(d) Motions to suppress and objections.

(1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, that it intends to offer into evidence against the accused at trial.

(2) Motion or objection.

(A) When evidence has been disclosed under subdivision (d)(1), any motion to suppress or objection under this rule shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the

defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

(B) If the prosecution intends to offer evidence seized from the person or property of the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

(C) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule shall be made in accordance with the procedure for challenging evidence under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

(3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

(4) Rulings. A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state essential findings of fact on the record.

(e) Burden of proof.

(1) In general. When a appropriate motion or objection has been made by the defense under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure.

(2) Derivative evidence. Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure.

(3) Specific motions or objections. When a specific motion or objection has been required under subdivision (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to supress or object to the evidence.

(f) Defense evidence. The defense may present evidence relevant to the admissibility of evidence as to which there has been an appropriate motion or objection under this rule. An accused may testify for the limited purpose of contesting the legality of the search or seizure giving rise to the challenged evidence. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this

subdivision. When the accused testifies under this subdivision, the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(g) Scope of motions and objections challenging probable cause.

(1) Generally. If the defense challenges evidence seized pursuant to a search warrant or search authorization on the grounds that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer, except as provided in paragraph (2).

(2) False statements. If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion shall be granted unless the search is otherwise lawful under these rules.

(h) Objections to evidence seized unlawfully. If a defense motion or objection under this rule is sustained in whole or in part, the members may not be informed of that fact except insofar as the military judge must instruct the members to disregard evidence.

(i) Effect of guilty plea. Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under the Fourth Amendment to the Constitution of the United States and Mil. R. Evid. 311-317 with respect to that offense whether or not raised prior to plea.

Rule 312. Body views and intrusions

(a) General rule. Evidence obtained from body views and intrusions conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) Visual examination of the body.

(1) Consensual. Visual examination of the unclothed body may be made with the consent of the individual subject to the inspection in accordance with Mil. R. Evid. 314(e).

(2) Involuntary. An involuntary display of the unclothed body, including a visual examination of body cavities, may be required only if conducted in reasonable fashion and authorized under the following provisions of the Military Rules of Evidence: inspections and inventories under Mil. R. Evid. 313; searches under Mil. R. Evid. 314(b) and

314(c) if there is a reasonable suspicion that weapons, contraband, or evidence of crime is concealed on the body of the person to be searched; searches within jails and similar facilities under Mil. R. Evid. 314(h) if reasonably necessary to maintain the security of the institution or its personnel; searches incident to lawful apprehension under Mil. R. Evid. 314(g); emergency searches under Mil. R. Evid. 314(i); and probable cause searches under Mil. R. Evid. 315. An examination of the unclothed body under this rule should be conducted whenever practicable by a person of the same sex as that of the person being examined; provieed, however, that failure to comply with this requirement does not make an examination an unlawful search within the meaning of Mil. R. Evid. 311.

(c) Intrusion into body cavities. A reasonable nonconsensual physical intrusion into the mouth, nose, and ears may be made when a visual examination of the body under subdivision (b) is permissible. Nonconsensual intrusions into other body cavities may be made:

(1) For purposes of seizure. When there is a clear indication that weapons, contraband, or evidence of crime is present, to remove weapons, contraband, or evidence of crime discovered under subdivisions (b) and (c)(2) of this rule or under Mil. R. Evid. 316(d)(4)(C) is such intrusion is made in a reasonable fashion by a person with appropriate medical qualifications; or

(2) For purposes of search. To search for weapons, contraband, or evidence of crime if authorized by a search warrant or search authorization under Mil. R. Evid. 315 and conducted by a person with appropriate medical qualifications.

Notwithstanding this rule, a search under Mil. R. Evid. 314(h) may be made without a search warrant or authorization if such search is based on a reasonable suspicion that the individual is concealing weapons, contraband, or evidence of crime.

(d) Extraction of body fluids. Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a search authorization under Mil. R. Evid. 315. Nonconsensual extraction of body fluids may be made without such warrant or authorization, notwithstanding Mil. R. Evid. 315(g), only when there is a clear indication that evidence of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of the evidence. Involuntary extraction of body fluids under this rule must be done in a reasonable fashion by a person with appropriate medical qualifications.

(e) Other intrusive searches. Nonconsensual intrusive searches of the body made to locate or obtain weapons, contraband, or evidence of crime and not within the scope of subdivisions (b) or (c) may be made only upon search warrant or search authorization under Mil. R. Evid. 315 and only if such search is conducted in a reasonable fashion by a person with appropriate medical qualifications and does not endanger the health of the person to be searched. Compelling a person to ingest substances for the purposes of locating the property described above or to compel the bodily elimination of such property is a search within the meaning of this section. Notwithstanding this rule, a person who is neither a suspect nor an accused may not be compelled to submit to an intrusive search of the body for the sole purpose of obtaining evidence of crime.

(f) Intrusions for valid medical purposes. Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a servicement. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

(g) Medical qualifications. The Secretary concerned may prescribe appropriate medical qualifications for persons who conduct searches and seizures under this rule.

Rule 313. Inspections and inventories in the armed forces

(a) General rule. Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) Inspections. An "inspection" is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehile. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately followed a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

(c) Inventories. Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

Rule 314. Searches not requiring probable cause

(a) General rule. Evidence obtained from reasonable searches not requiring probable cause conducted pursuant to this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) Border searches. Border searches for customs or immigration purposes may be conducted when authorized by Act of Congress.

(c) Searches upon entry to or exit from United States installations, aircraft, and vessels abroad. In addition to the authority to conduct inspections under Mil. R. Evid. 313(b), a commander of a United States military installation, enclave, or aircraft on foreign soil, or in foreign or international airspace, or a United States vessel in foreign or international waters, may authorize appropriate personnel to search persons or the property of such persons upon entry to or exit from the installation, enclave, aircraft, or vessel to ensure the security, military fitness, or good order and discipline of the command. Such searches may not be conducted at a time or in a manner contrary to an express provision of a treaty or agreement to which the United States is a party. Failure to comply with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311. A search made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceeding is not authorized by this subdivision.

(d) Searches of government property. Government property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use; but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.

(e) Consent searches.

(1) General rule. Searches may be conducted of any person or property with lawful consent.

(2) Who may consent. A person may consent to a search of his or her person or property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.

(3) Scope of consent. Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time.

(4) Voluntariness. To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.

(5) Burden of proof. Consent must be shown by clear and convincing evidence. The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of the consent, but it does not affect the burden of proof.

(f) Searches incident to a lawful stop.

(1) Stops. A person authorized to aprehend under R.C.M. 302(b) and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

(2) Frisks. When a lawful stop is performed, the person stopped may be frisked for weapons when that person is reasonably believed to be armed and presently dangerous. Contraband or evidence located in the process of a lawful frisk may be seized.

(3) Motor vehicles. When a person lawfully stopped is the driver or a passenger in a motor vehicle, the passenger compartment of the vehicle may be searched for weapons if the official who made the stop has a reasonable belief that the person stopped is dangerous and that the person stopped may gain immediate control of a weapon.

(g) Searches incident to a lawful apprehension.

(1) General rule. A person who has been lawfully apprehended may be searched.

(2) Search for weapons and destructible evidence. A search may be conducted for weapons or destructible evidence in the area within the immediate control of a person who has been apprehended. The area within the person's "immediate control" is the area which the individual searching could reasonably believe that the person apprehended could reach with a sudden movement to obtain such property; provided, that the passenger compartment of an automobile, and containers within the passenger compartment may be searched as a contemporaneous incident of the apprehension of an occupant of the automobile, regardless whether the person apprehended has been removed from the vehicle.

(3) Examination for other persons. When an apprehension takes place at a location in which other persons reasonably might be present who might interfere with the apprehension or endanger those apprehending, a reasonable examination may be made of the general area in which such other persons might be located.

(h) Searches within jails, confinement facilities, or similar facilities. Searches within jails, confinement facilities, or similar facilities may be authorized by persons with authority over the institution.

(i) Emergency searches to save life or for related purposes In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury.

(j) Searches of open fields or woodlands. A search of open fields or woodlands is not an unlawful search within the meaning of Mil. R. Evid. 311.

(k) Other searches. A search of a type not otherwise included in this rule and not requiring probable cause under Mil. R. Evid. 315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces.

Rule 315. Probable cause searches

(a) General rule. Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) Definitions. As used in these rules:

(1) Authorization to search. An "authorization to search" is an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(2) Search warrant. A "search warrant" is an express permission to search and seize issued by competent civilian authority.

(c) Scope of authorization. A search authorization may be issued under this rule for a search of:

(1) Persons. The person of anyone subject to military law or the law of war wherever found;

(2) Military property. Military property of the United States or of nonappropriated fund activities of an armed force of the United States wherever located;

(3) Persons and property within military control. Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located; or

(4) Nonmilitary property within a foreign country.

(A) Property owned, used, occupied by, or in the possession of an agency of the United States other than the Department of Defense when situated in a foreign country. A search of such property may not be conducted without the concurrence of an appropriate representative of the agency concerned. Failure to obtain such concurrence, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311.

(B) Other property situated in a foreign country. If the United States is a party to a treaty or agreement that governs a search in a foreign country, the search shall be conducted in accordance with the treaty or agreement. If there is no treaty or agreement, concurrence should be obtained from an appropriate representative of the foreign country with respect to a search under paragraph (4)(B) of this subdivision. Failure to obtain such concurrence or

noncompliance with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311.

(d) Power to authorize. Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

(1) Commander. A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war; or

(2) Military judge. A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned.

An otherwise impartial authorizing official does not lose that character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(e) Power to search. Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard of police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision (g).

(f) Basis for search authorizations.

(1) Probable cause requirement. A search authorization issued under this rule must be based upon probable cause.

(2) Probable cause determination. Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule shall be based upon any or all of the following:

(1) Written statements communicated to the authorizing officer;

(2) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

(3) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion.

The Secretary of Defense or the Secretary concerned may prescribe additional requirements.

(g) Exigencies. A search warrant or search authorization is not required under this rule for a search based on probable cause when:

(1) Insufficient time. There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(2) Lack of communications. There is a reasonable military operational necessity that is reasonably believed to prohibit or prevent communication with a person empowered to grant a search warrant or authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(3) Search of operable vehicle. An operable vehicle is to be searched, except in the circumstances where a search warrant or authorization is required by the Constitution of the United States, this Manual, or these rules; or

(4) Not required by the Constitution. A search warrant or authorization is not otherwise required by the Constitution of the United States as applied to members of the armed forces.

For purpose of this rule, a vehicle is "operable" unless a reasonable person would have known at the time of search that the vehicle was not functional for purposes of transportation.

(h) Execution.

(1) Notice. If the person whose property is to be searched is present during a search conducted pursuant to a search authorization granted under this rule, the person conducting the search should when possible notify him or her of the act of authorization and the general substance of the authorization. Such notice may be made prior to or contemporaneously with the search. Failure to provide such notice does not make a search unlawful within the meaning of Mil. R. Evid. 311.

(2) Inventory. Under regulations prescribed by the Secretary concerned, and with such exceptions as may be authorized by the Secretary, an inventory of the property seized shall be made at the time of a seizure under this rule or as soon as practicable thereafter. At an approipriate time, a copy of the inventory shall be given to a person from whose possession or premises the property was taken. Failure to make an inventory, furnish a copy thereof, or otherwise comply with this paragraph does not render a search or seizure unlawful within the meaning of Mil. R. Evid. 311.

(3) Foreign searches. Execution of a search authorization outside the United States and within the jurisdiction of a foreign nation should be in conformity with existing agreements between the United States and the foreign nation. Noncompliance with such an agreement does not make an otherwise lawful search unlawful.

(4) Search warrants. Any civilian or military criminal investigator authorized to request search warrants pursuant to applicable law or regulation is authorized to serve and execute search warrants. The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or an applicable Act of Congress.

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Rule 316. Seizures

(a) General rule. Evidence obtained from seizures conducted in accordance with this rule is admissible at trial if the evidence was not obtained as a result of an unlawful search and if the evidence is relevant and not otherwise inadmissible under these rules.

(b) Seizure of property. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape.

(c) Apprehension. Apprehension is governed by R.C.M. 302.

(d) Seizure of property of evidence.

(1) Abandoned property. Abandoned property may be seized without probable cause and without a search warrant or search authorization. Such seizure may be made by any person.

(2) Consent. Property or evidence may be seized with consent consistent with the requirements applicable to consensual searches under Mil. R. Evid. 314.

(3) Government property. Government property may be seized without probable cause and without a search warrant or search authorization by any person listed in subdivision (e), unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein, as provided in Mil. R. Evid. 314(d), at the time of the seizure.

(4) Other property. Property or evidence not included in paragraph (1)-(3) may be seized for use in evidence by any person listed in subdivision (e) if:

(A) Authorization. The person is authorized to seize the property or evidence by a search warrant or a search authorization under Mil. R. Evid. 315;

(B) Exigent circumstances. The person has probable cause to seize the property or evidence and under Mil. R. Evid. 315(g) a search warrant or search authorization is not required; or

(C) Plain view. The person while in the course of otherwise lawful activity observes in a reasonable fashion property or evidence that the person has probable cause to seize.

(5) Temporary detention. Nothing in this rule shall prohibit temporary detention of property on less than probable cause when authorized under the Constitution of the United States.

(e) Power to seize. Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or individual designated by proper authority to perform guard or police duties, or any agent of any such person, may seize property pursuant to this rule.

(f) Other seizures. A seizure of a type not otherwise included in this rule may be made when permissible under the Constitution of the United States as applied to members of the armed forces.

Rule 317. Interception of wire and oral communications

(a) General rule. Wire or oral communications constitute evidence obtained as a result of an unlawful search or seizure within the meaning of Mil. R. Evid. 311 when such evidence must be excluded under the Fourth Amendment to the Constitution of the United States as applied to members of the armed forces or if such evidence must be excluded under a statute applicable to members of the armed forces.

(b) Authorization for judicial applications in the United States. Under 18 U.S.C. § 2516(1), the Attorney General, or any Assistant Attorney General specially designated by the Attorney General may authorize an application to a federal judge of competent jurisdiction for, and such judge may grant in conformity with 18 U.S.C. § 2518, an order authorizing or approving the interception of wire or oral communications by the Department of Defense, the Department of Transportation, or any Military Department for purposes of obtaining evidence concerning the offenses enumerated in 18 U.S.C. § 2516(1), to the extent such offenses are punishable under the Uniform Code of Military Justice.

(c) Regulations. Notwithstanding any other provision of these rules, members of the armed forces or their agents may not intercept wire or oral communications for law enforcement purposes unless such interception:

(1) takes place in the United States and is authorized under subdivision (b);

(2) takes place outside the United States and is authorized under regulations issued by the Secretary of Defense or the Secretary concerned; or

(3) is authorized under regulations issued by the Secretary of Defense or the Secretary concerned and is not unlawful under 18 U.S.C. § 2511.

Rule 321. Eyewitness identification

(a) General rule.

(1) Admissibility. Testimony concerning a relevant out of court identification by any person is admissible, subject to an appropriate objection under this rule, if such testimony is otherwise admissible under these rules. The witness making the identification and any person who has observed the previous identification may testify concerning it. When in testimony a witness identifies the accused as being, or not being, a participant in an offense or makes any other relevant identification concerning a person in the courtroom, evidence that on a previous occasion the witness made a similar identification is admissible to corroborate the witness' testimony as to identity even if the credibility of the witness has not been attacked directly, subject to appropriate objection under this rule.

(2) Exclusionary rule. An identification of the accused as being a participant in an offense, whether such identification is made at the trial or otherwise, is inadmissible against the accused if

(A) the accused makes a timely motion to suppress or an objection to the evidence under this rule and if the identification is the result of an unlawful lineup or other unlawful identification process conducted by the United States or other domestic authorities; or

(B) exclusion of the evidence is required by the due process clause of the Fifth Amendment to the Constitution of the United States as applied to members of the armed forces. Evidence other than an identification of the accused that is obtained as a result of the unlawful lineup or unlawful identification process is inadmissible against the accused if the accused makes a timely motion to suppress or an objection to the evidence under this rule and if exclusion of the evidence is required under the Constitution of the United States as applied to members of the armed forces.

(b) Definition of "unlawful".

(1) Lineups and other identification processes. A lineup or other identification process is "unlawful" if the identification is unreliable. An identification is unreliable if the lineup or other identification process, under the circumstances, is so suggestive as to create a substantial likelihood of misidentification.

(2) Lineups: right to counsel. A lineup is "unlawful" if it is conducted in violation of the following rights to counsel:

(A) Military lineups. An accused or suspect is entitled to counsel if, after preferral of charges or imposition of pretrial restraint under R.C.M. 304 for the offense under investigation, the accused is subjected by persons subject to the code or other agents to a lineup for the purpose of identification. When a person entitled to counsel under this rule requests counsel, a judge advocate or a person certified in accordance with Article 27(b) shall be provided by the United States at no expense to the accused or suspect and without regard to indigency or lack thereof before the lineup may proceed. The accused or suspect may waive the rights provided in this rule if the waiver is freely, knowingly, and intelligently made.

(B) Nonmilitary lineups. When a person subject to the code is subjected to a lineup for purposes of identification by an official or agent of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States, or any political subdivision of such a State, Commonwealth, or possession, and the provisions of paragraph (A) do not apply, the person's entitlement to counsel and the validity of any waiver of applicable rights shall be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar lineups.

(c) Motions to suppress and objections.

(1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense all evidence of a prior identification of the accused at a lineup or other identification process that it intends to offer into evidence against the accused at trial.

(2) Motion or objection.

(A) When such evidence has been disclosed, any motion to suppress or objection under this rule shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move constitutes a waiver of the motion or objection.

(B) If the prosecution intends to offer such evidence and the evidence was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interests of justice.

(C) If evidence is disclosed as derivative evidence under this subdivision prior to arraignment, any motion to suppress or objection under this rule shall be made in accordance with the procedure for challenging evidence under (A). If such evidence has not been so disclosed prior to arraignment, the requirements of (B) apply.

(3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the lineup or other identification process, the military judge may enter any other required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

(d) Burden of proof. When a specific motion or objection has been required under subdivision (c)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence. When an appropriate objection under this rule has been made by the defense, the issue shall be determined by the military judge as follows:

(1) Right to counsel. When an objection raises the right to presence of counsel under this rule, the prosecution must prove by a preponderance of the evidence that counsel was present at the lineup or that the accused, having been advised of the right to the presence of counsel, voluntarily and intelligently waived that right prior to the lineup. When the military judge determines that an identification is the result of a lineup conducted without the presence of counsel or an appropriate waiver, any later identification by one present at such unlawful lineup is also a result thereof unless the military judge determines that the contrary has been shown by clear and convincing evidence.

(2) Unreliable identification. When an objection raises the issue of an unreliable identification, the prosecution must prove by a preponderance of the evidence that the identification was reliable under the circumstances; provided, however, that if the military judge finds the evidence of an identification inadmissible under this subdivision, a later identification may be admitted if the prosecution proves by clear and convincing evidence that the later identification is not the result of the inadmissible identification.

(e) Defense evidence. The defense may present evidence relevant to the issue of the admissibility of evidence as to which there has been an appropriate motion or objection under this rule. An accused may testify for the limited purpose of contesting the legality of the lineup or identification process giving rise to the challenged evidence. Prior to the introduction of such testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subdivision. When the accused testifies under this subdivision, the accused may be cross-

examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(f) Rulings. A motion to suppress or an objection to evidence made prior to plea under this rule shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. Where factual issues are involved in ruling upon such motion or objection, the military judge shall state his or her essential findings of fact on the record.

(g) Effect of guilty pleas. Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under this rule with respect to that offense whether or not raised prior to the plea.

SECTION IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "relevant evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes

(a) Character evidence generally. Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) Character of the accused. Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide or assault case to rebut evidence that the victim was an aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Mil. R. Evid. 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 405. Methods of proving character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of an offense or defense, proof may also be made of specific instances of the person's conduct.

(c) Affidavits. The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(c) Definitions. "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" in the armed forces includes a post, camp, ship, station, or other military organization regardless of size.

Rule 406. Habit; routine practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 407. Subsequent remedial measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence of culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Rule 408. Compromise and offer to compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either

validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Payment of medical and similar expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410. Inadmissibility of pleas, plea discussions, and related statements

(a) In general. Except as otherwise provided in this rule, evidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the Government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a court-martial proceeding for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel.

(b) Definitions. A "statement made in the course of plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" includes the written statement submitted by the accused in furtherance of such request.

Rule 411. Liability insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

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Rule 412. Nonconsensual sexual offenses; relevance of victim's past behavior

(a) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, reputation or opinion evidence of the past sexual behavior of an alleged victim of such nonconsensual sexual offense is not admissible.

(b) Notwithstanding any other provision of these rules or this Manual, in a case in which a person is accused of a nonconsensual sexual offense, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is --

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of --

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.

(c)(1) If the person accused of committing a nonconsensual sexual offense intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall serve notice thereof on the military judge and the trial counsel.

(2) The notice described in paragraph (1) shall be accompanied by an offer of proof. If the military judge determines that the offer of proof contains evidence described in subdivision (b), the military judge shall conduct a hearing, which may be closed, to determine if such evidence is admissible. At such hearings the parties may call witnesses, including the alleged victim, and offer relevant evidence. In a case before a court-martial composed of a military judge and members, the military judge shall conduct such hearings outside the presence of the members pursuant to Article 39(a).

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

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which a nonconsensual sexual offense is alleged.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempt to commit such offenses.

SECTION V. PRIVILEGES

Rule 501. General rule

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States as applied to members of the armed forces;

(2) An Act of Congress applicable to trials by courts-martial;

(3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.

(b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term "person" includes an appropriate representative of the Federal Government, a State, or political subdivision thereof, or any other entity claiming to be the holder of a privilege.

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileges on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

Rule 502. Lawyer-client privilege

(a) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(b) Definitions. As used in this rule:

(1) A "client" is a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding. The term "lawyer" does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist as defined in Article 1, unless the member: (a) is detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding; (b) is authorized by the armed forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces; or (c) is authorized to practice law and renders professional legal services during off-duty employment.

(3) A "representative" of a lawyer is a person employed by or assigned to assist a lawyer in providing professional legal services.

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

(c) Who may claim the privilege. The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer or the lawyer's representative who receiving the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

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

(1) Crime or fraud. If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Cliamants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) Jont clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Rule 503. Communications to clergy

(a) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) Definitions. As used in this rule:

(1) A clergyman" is a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

(c) Who may claim the privilege. The privilege may be claimed by the person, by the guardian, or conservator, or by a personal representative of the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

Rule 504. Husband-wife privilege

(a) Spousal incapacity. A person has a privilege to refuse to testify against his or her spouse.

(b) Confidential communication made during marriage.

(1) General rule of privilege. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

(2) Definition. A communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

(3) Who may claim the privilege. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) Exceptions.

(1) Spousal incapacity only. There is no privilege under subdivision (a) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

(2) Spousal incapacity and confidential communications. There is no privilege under subdivisions (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or with respect to the privilege in subdivision (b), the relationship was a sham at the time of the communication; or

(C) In proceedings in which a spouse is charged, in accordance with Articles 133 or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328; with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424; or with violation of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.

Rule 505. Classified information

(a) General rule of privilege. Classified information is privileged from disclosure if disclosure would be detrimental to the national security.

(b) Definitions. As used in this rule:

(1) Classified information. "Classified information" means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y).

(2) National security. "National security" means the national defense and foreign relations of the United States.

(c) Who may claim the privilege. The privilege may be claimed by the head of the executive or military department or government agency concerned based on a finding that the information is properly classified and that disclosure would be detrimental to the national security. A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his or her behalf. The authority of the witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

(d) Action prior to referral of charges. Prior to referral of charges, the convening authority shall respond in writing to a request by the accused for classified information if the privilege in this rule is claimed for such information. The convening authority may:

(1) Delete specified items of classified information from documents made available to the accused;

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

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

(4) Provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused; or

(5) Withhold disclosure if actions under (1) through (4) cannot be taken without causing identifiable damage to the national security.

Any objection by the accused to withholding of information or to the conditions of disclosure shall be raised through a motion for appropriate relief at a pretrial session.

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

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

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

(2) dismiss the charges;

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

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

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

(g) Disclosure of classified information to the accused.

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

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

(B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

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

(D) Requiring appropriate security clearances for persons having a need to examine the information in connection with the preparation of the defense;

(E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

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

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

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

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

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

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

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

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

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

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

(3) Content of notice. The notice required by this subdivision shall include a brief description of the classified information.

(4) Prohibition against disclosure. The accused may not disclose any information known or believed to be classified until notice has been given under this subdivision and until the Government has been afforded a reasonable opportunity to seek a determination under subdivision (i).

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

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

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

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

(3) Demonstration of national security nature of the information. In order to obtain an in camera proceeding under this rule, the Government shall submit the classified information for examination only by the military judge and shall demonstrate by affidavit that disclosure of the information reasonably could be expected to cause damage to the

national security in the degree required to warrant classification under the applicable executive order, statute, or regulation.

(4) In camera proceeding.

(A) Procedure. Upon finding that the Government has met the standard set forth in subdivision (i)(3) with respect to some or all of the classified information at issue, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information when the Government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the in camera proceeding the military judge shall determine whether the information may be disclosed at the court-martial proceeding. Where the Government's motion under this subdivision is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

(B) Standard. Classified information is not subject to disclosure under this subdivision unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence.

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

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

(E) Sanctions. If the military judge determines that alternatives to full disclosure may not be used and the Government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice require. Such an order may include an order:

(i) striking or precluding all or part of the testimony of a witness;

(ii) declaring a mistrial;

(iii) finding against the Government on any issue as to which the evidence is relevant and material to the defense;

(iv) dismissing the charges, with or without prejudice; or

(v) dismissing the charges or specifications or both to which the information relates.

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

(j) Introduction of classified information.

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

(2) Precautions by the military judge. In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein.

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

(4) Taking of testimony. During the examination of a witness, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be relevant and necessary to the defense. Following such an objection, the military judge shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the Government to provide the military judge with a profeer of the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

(5) Closed session. If counsel for all parties, the military judge, and the members have received appropriate security clearances, the military judge may exclude the public during that portion of the testimony of a witness that discloses classified information.

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

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

Rule 506. Government information other than classified information

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

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

(c) Who may claim the privilege. The privilege may be claimed by the head of the executive or military department or government agency concerned. The privilege for investigations of the Inspectors General may be claimed by the authority ordering the investigation or any superior authority. A person who may claim the privilege may authorize a witness or the trial counsel to claim the privilege on his or her behalf. The authority of a witness or the trial counsel to do so is presumed in the absence of evidence to the contrary.

(d) Action prior to referral of charges. Prior to referral of charges, the Government shall respond in writing to a request for government information if the privilege in this rule is claimed for such information. The Government shall:

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

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

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

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

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

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

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

(2) dismiss the charges;

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

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

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

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

(g) Disclosure of government information to the accused. If the Government agrees to disclose government information to the accused subsequent to a claim of privilege under this rule, the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

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

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

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

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

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

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

(h) Prohibition against disclosure. The accused may not disclose any information known or believed to be subject to a claim of privilege under this rule until the Government has been afforded a reasonable opportunity to seek a determination under subdivision (i).

(i) In camera proceedings.

(1) Definition. For the purposes of this subdivision, an "in camera proceeding" is a closed session under Article 39(a).

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

(3) Demonstration of public interest nature of the information. In order to obtain an in camera proceeding under this rule, the Government shall demonstrate through submission of affidavits and the information for examination only

by the military judge that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

(4) In camera proceeding

(A) Procedure. Upon finding that the disclosure of some or all of the information submitted by the Government under subsection (1) reasonably could be expected to cause identifiable damage to the public interest, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the Government shall provide the accused with notice of the information that will be at issue. This notice shall identify the information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The Government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the specific information of concern to the Government when the Government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the in camera proceeding, the military judge shall determine whether the information may be disclosed at the court-martial proceeding. When the Government's motion under this subdivision is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to commencement of the relevant proceeding.

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

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

(D) Sanction. If the military judge makes a determination under this subdivision that permits disclosure of the information and the Government continues to object to disclosure of the information, the military judge shall dismiss the charges or specifications or both to which the information relates.

(j) Introduction of government information subject to a claim of privilege.

(1) Precautions by military judge. In order to prevent unnecessary disclosure of government information after there has been a claim of privilege under this rule, the military judge may order admission into evidence of only part of a writing, recording, or photograph or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the government information contained therein.

(2) Contents of writing, recording, or photograph. The military judge may permit proof of the contents of a writing, recording, or photograph that contains government information that is the subject of a claim of privilege under this rule without requiring introduction into evidence of the original or a duplicate.

(3) Taking of testimony. During examination of a witness, the prosecution may object to any question or line of inquiry that may require the witness to disclose government information not previously found relevant and necessary to the defense if such information has been or is reasonably likely to be the subject of a claim of privilege under this rule.

Following such an objection, the military judge shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any government information. Such action may include requiring the Government to provide the military judge with a proffer of the witness' response to the question or line of inquiry and requiring the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

(k) Procedures to safeguard against compromise of government information disclosed to courts-martial. The Secretary of Defense may prescribe procedures for protection against the compromise of government information submitted to courts-martial and appellate authorities after a claim of privilege.

Rule 507. Identity of informant

(a) Rule of privilege. The United States or a State or subdivision thereof has a privilege to refuse to disclose the identity of an informant. An "informant" is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation, or prosecution of crime. Unless otherwise privileged under these rules, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity.

(b) Who may claim the privilege. The privilege may be claimed by an appropriate representative of the United States, regardless of whether information was furnished to an officer of the United States or of a State or subdivision thereof. The privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof, except the privilege shall not be allowed if the prosecution objects.

(c) Exceptions.

(1) Voluntary disclosures; informant as witness. No privilege exists under this rule: (A) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informant's own action; or (B) if the informant appears as a witness for the prosecution.

(2) Testimony on the issue of guilt or innocence. If a claim of privilege has been made under this rule, the military judge shall, upon motion by the accused, determine whether disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defenses, the possible significance of the informant's testimony, and other relevant factors. If it appears from the evidence in the case or from other showing by a party that an informant may be able to give testimony necessary to the accused's defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

(3) Legality of obtaining evidence. If a claim of privilege has been made under this rule with respect to a motion under Mil. R. Evid. 311, the military judge shall, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the Constitution of the United States as applied to members of the armed forces. In making this determination, the military judge may make any order required by the interests of justice.

(d) Procedures. If a claim of privilege has been made under this rule, the military judge may make any order required by the interests of justice. If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this rule, and the prosecution elects not to disclose the identity of the informant, the matter shall be reported to the convening authority. The convening authority may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances. If, after a reasonable period of time disclosure is not made, the military judge, sua sponte or upon motion of either counsel and after a hearing if requested by either party, may dismiss the charges or specifications or both to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused.

Rule 508. Political vote

A person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

Rule 509. Deliberations of courts and juries

Except as provided in Mil. R. Evid. 606, the deliberations of courts and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged.

Rule 510. Waiver of privilege by voluntary disclosure

(a) A person upon whom these rules confer a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This rule does not apply if the disclosure is itself a privileged communication.

(b) Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he or she may be entitled pertaining to the confidential matter or communication.

Rule 511. Privileged matter disclosed under compulsion or without opportunity to claim privilege

(a) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

(b) The telephonic transmission of information otherwise privileged under these rules does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under these rules does not affect the privileged character of such information if use of such means of communication is necessary and in furtherance of the communication.

Rule 512. Comment upon or inference from claim of privilege; instruction

(a) Comment or inference not permitted.

(1) The claim of a privilege by the accused whether in the present proceeding or upon a prior occasion is not a proper subject of comment by the military judge or counsel for any party. No inference may be drawn therefrom.

(2) The claim of a privilege by a person other than the accused whether in the present proceeding or upon a prior occasion normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn therefrom except when determined by the military judge to be required by the interests of justice.

(b) Claiming privilege without knowledge of members. In a trial before a court-martial with members, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members. This subdivision does not apply to a special court-martial without a military judge.

(c) Instruction. Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom except as provided in subdivision (a)(2).

SECTION VI. WITNESSES

Rule 601. General rule of competency

Every person is competent to be a witness except as otherwise provided in this rules.

Rule 602. Lack of personal knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of Mil. R. Evid. 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

Rule 604. Interpreters

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

Rule 605. Competency of military judge as witness

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

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

Rule 606. Competency of court member as witness

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

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

Rule 607. Who may impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

Rule 608. Evidence of character, conduct, and bias of witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Mil. R. Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

(c) Evidence of bias. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

Rule 609. Impeachment by evidence of conviction of crime

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death, dishonorable discharge, or imprisonment in excess of one year under the law under which the witness was convicted, and the military judge determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused, or (2) involved dishonesty or false statement, regardless of the punishment. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death, dishonorable discharge, or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The military judge, however, may allow evidence of a juvenile adjudication of a witness other than the accused if

conviction of the offense would be admissible to attack the credibility of a adult and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appea therefrom does not render evidence of a conviction inadmissible except that a conviction by summary court-martial or special court-martial without a military judge may not be used for purposes of impeachment until review has been completed pursuant to Article 65(c) or Article 66 if applicable. Evidence of the pendency of an appeal is admissible.

(f) Definition. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

Rule 610. Religious beliefs or opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reaon of their nature the credibility of the witness is impaired or enhanced.

Rule 611. Mode and order of interrogation and presentation

(a) Control by the military judge. The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 612. Writing used to refresh memory

If a witness uses a writing to refresh his or her memory for the purpose of testifying, either

(1) while testifying, or

(2) before testifying if the military judge determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or portions not so related, and order

delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit. If a writing is not produced or delivered pursuant to order under this rule, the military judge shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony or, if in discretion of the military judge it is determined that the interests of justice so require, declaring a mistrial. This rule does not preclude disclosure of information required to be disclosed under other provisions of these rules or this Manual.

Rule 613. Prior statements of witnesses

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Mil. R. Evid. 801(d)(2).

Rule 614. Calling and interrogation of witnesses by the court-martial

(a) Calling by the court-martial. The military judge may, sua sponte, or at the request of the members or the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. When the members with to call or recall a witness, the military judge shall determine whether it is appropriate to do so under these rules or this Manual.

(b) Interrogation by the court-martial. The military judge or members may interrogate witnesses, whether called by the military judge, the members, or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

(c) Objections. Objections to the calling of witnesses by the military judge or the members or to the interrogation by the military judge or the members may be made at hhe time or at the next available opportunity when the members are not present.

Rule 615. Exclusion of witnesses

At the request of the prosecution or defense the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the order sua sponte. This rule does not authorize exclusion of (1) the accused, or (2) a member of an armed service or an employee of the United States

designated as representative of the United States by the trial counsel, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's case.

SECTION VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

Rule 702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703. Bases of opinion testimony by experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. Opinion on ultimate issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of facts or data underlying expert opinion

The expert may testify in terms of opinior, or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the military judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court appointed experts.

(a) Appointment and compensation. The trial counsel, the defense counsel, and the court-martial have equal opportunity to obtain expert witnesses under Article 46. The employment and compensation of expert witnesses is governed by R.C.M. 703.

(b) Disclosure of employment. In the exercise of discretion, the military judge may authorize disclosure to hhe members of the fact that the military judge called an expert witness.

(c) Accused's experts of own selection. Nothing in this rule limits the accused in calling expert witnesses of the accused's own selection and at the accused's own expense.

SECTION VIII. HEARSAY

Rule 801. Definitions

The following definitions apply under this section:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testmony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either the party's individual or representative capacity, or (B) a statement of which the party has manifested the party's adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay rule

Hearsay is not admissible except as provided by these rules or by any Act of Congress applicable in trials by court-martial.

Rule 803. Hearsay exceptions; availability of declarant immateral

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immedistely thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence, but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum. report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes the armed forces, a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Among those memoranda, reports, records, or data compilations normally admissible pursuant to this paragraph are enlistment papers, physical examination papers, outline-figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, logs, unit personnel diaries, individual equipment records, daily strength records of prisoners, and rosters of prisoners.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public office or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which mattes there was a duty to report, excluding, however, matters observed by police officers and other personnel acting in a law enforcement capacity, or (C) against the government, factual findings resulting from

an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. Notwithstanding (B), the following are admissible under this paragraph as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record such fact or event: enlistment papers, physical examination papers, outline figure and fingerprint cards, forensic laboratory reports, chain of custody documents, morning reports and other personnel accountability documents, service records, officer and enlisted qualification records, records of court-martial convictions, logs, unit personnel diaries, individual equipment records, guard reports, daily strength records of prisoners, and rosters of prisoners.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Mil. R. Evid. 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at time of the act or within a time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, generalogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents effecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, directories, lists (including government price lists), or other published compilations generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of the person's family by blood, adoption, or marriage, or among the person's associates, or in the community, concerning the person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character. Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death, dishonorable discharge, or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by the President under Article 56 at the time of the conviction applies without regard to whether the case was tried by general, special, or summary court-martial.

(23) Judgment as to personal, family or general history, or boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules

and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 804. Hearsay exceptions; declarant unavailable

(a) Definitions of unavailability. "Unavailability as a witness" includes situations in which the declarant --

(1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means; or

(6) is unavailable within the meaning of Article 49(d)(2).

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim or lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attanding or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, other military tribunals, and before proceedings pursuant to or equivalent to those required by Article 32 is admissible under this subdivision if such a record is a verbatim record. This paragraph is subject to the limitations set forth in Articles 49 and 50.

(2) Statement under belief of impending death. In a prosecution for homicide or for any offense resulting in the death of the alleged victim, a statement made by a declarant while believing that the declarant's death was

imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the military judge determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative of the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this a exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 805. Hearsay within hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. Attacking and supporting credibility of declarant

When a hearsay statement, or a statement defined in Mil. R. Evid. 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

SECTION IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular persons or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress, by rules prescribed by the Supreme Court pursuant to statutory authority, or by applicable regulations prescribed pursuant to statutory authority.

Rule 902. Self-authentication

Extrinsic evicence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or exception.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraphs (1), (2), or (3) of this rule or complying with any Act of Congress, rule prescribed by the Supreme Court pursuant to statutory authority, or an applicable regulation prescribed pursuant to statutory authority.

(4a) Documents or records of the United States accompanied by attesting certificates. Documents or records kept under the authority of the United States by any department, bureau, agency, office, or court thereof when attached to or accompanied by an attesting certificate of the custodian of the document or record without further authentication.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions under Acts of Congress and regulations. Any signature, document, or other matter declared by Act of Congress or any applicable regulation prescribed pursuant to statutory authority to be presumptively or prima facie genuine or authentic.

Rule 903. Subscribing witness' testimony unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

SECTION X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions

For purposes of this section the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

Rule 1002. Requirement of an original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, this Manual, or by Act of Congress.

Rule 1003. Admissibility of duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of other evidence of contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct or attested to in accordance with Mil. R. Evid. 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The military judge may order that they be produced in court.

Rule 1007. Testimony or written admission of party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the nonproduction of the original.

Rule 1008. Functions of military judge and members

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the military judge to determine in accordance with the provisions of Mil. R. Evid. 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph

produced at trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

SECTION XI. MISCELLANEOUS RULES

Rule 1101. Applicability of rules

(a) Rules applicable. Except as otherwise provided in this Manual, these rules apply generally to all courts-martial, including summary courts-martial, to proceedings pursuant to Article 39(a); to limited factfinding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.

(b) Rules of privilege. The rules with respect to privileges in Sections III and V Apply at all stages of all actions, cases, and proceedings.

(c) Rules relaxed. The application of these rules may be relaxed in sentencing proceedings as provided under R.C.M. 1001 and otherwise as provided in this Manual.

(d) Rules inapplicable. These rules (other than with respect to privileges) do not apply in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this Manual and not listed in subdivision (a).

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 180 days after the effective date of such amendments unless action to the contrary is taken by the President.

Rule 1103. Title

These rules may be known and cited as the Military Rules of Evidence.

PART IV

PUNITIVE ARTICLES

1. Article 77 -- Principals

a. Text.

"Any person punishable under this chapter who--

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or

(2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal."

b. Explanation.

(1) Purpose. Article 77 does not define an offense. Its purpose is to make clear that a person need not personally perform the acts necessary to constitute an offense to be guilty of it. A person who aids, abets, counsels, commands, or procures the commission of an offense, or who causes an act to be done which, if done by that person directly, would be an offense is equally guilty of the offense as one who commits it directly, and may be punished to the same extent.

Article 77 eliminates the common law distinctions between principal in the first degree ("perpetrator"); principal in the second degree (one who aids, counsels, commands, or encourages the commission of an offense and who is present at the scene of the crime--commonly known as an "aider and abettor"); and accessory before the fact (one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime). All of these are now "principals."

(2) Who may be liable for an offense.

(a) Perpetrator. A perpetrator is one who actually commits the offense, either by the perpetrator's own hand, or by causing an offense to be committed by knowingly or intentionally inducing or setting in motion acts by an animate or inanimate agency or instrumentality which result in the commission of an offense. For example, a person who knowingly conceals contraband drugs in an automobile, and then induces another person, who is unaware and has no reason to know of the presence of drugs, to drive the automobile onto a military installation, is, although not present in the automobile, guilty of wrongful introduction of drugs onto a military installation. (On these facts, the driver would be guilty of no crime.) Similarly, if, upon orders of a superior, a soldier shot a person who appeared to the soldier to be an enemy, but was known to the superior as a friend, the superior would be guilty of murder (but the soldier would be guilty of no offense).

(b) Other parties. If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must:

(i) Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and

(ii) Share in the criminal purpose 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 paragraph 1b(2)(a) above. In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (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 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 paragraph 1b(2)(a) or (b) have been met.

(4) Parties whose intent differs from the perpetrator's. When an offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must prove that the accused had that intent or state of mind, whether the accused is charged as a perpetrator or an "other party" to the 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 commited by the perpetrator. For example, when a homicide is committed, the perpetrator may act in the heat of sudden passion caused by adequate provocation and be guilty of manslaughter, while the party who, without such passion, hands the perpetrator a weapon and encourages the perpetrator to kill the victim, would be guilty of murder. On the other hand, if a party assists a perpetrator in an assault on a person who, known only to the perpetrator, is an officer, the party would be guilty only of assault, while the perpetrator would be guilty of assault on an officer.

(5) Responsibility for other crimes. A principal may be convicted of crimes committed by another principal if such crimes are likely to result as a natural and probable consequence of the criminal venture or design. For example, the accused who is a party to a burglary is guilty as a principal not only of the offense of burglary, but also, if the perpetrator kills an occupant in the course of the burglary, of murder. (See also paragraph 5 concerning liability for offenses committed by coconspirators.)

(6) Principals independently liable. One may be a principal, even if the perpetrator is not identified or prosecuted, or is acquitted.

(7) Withdrawal. A person may withdraw from a common venture or design and avoid liability for any offenses committed after the withdrawal. To be effective, the withdrawal must meet the following requirements:

(a) It must occur before the offense is committed;

(b) The assistance, encouragement, advice, instigation, counsel, command, or procurement given by the person must be effectively countermanded or negated; and

(c) The withdrawal must be clearly communicated to the would-be perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for law enforcement authorities to prevent the offense.

2. Article 79 -- Conviction of lesser included offenses

a. Text.

"An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."

b. Explanation.

(1) In general. A lesser offense is included in a charged offenses when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged. This requirement of notice may be met when:

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

(b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is legally less serious (for example, housebreaking as a lesser included offense of burglary); or

(c) All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element is legally less serious (for example, wrongful appropriation as a lesser included offense of larceny).

The notice requirement may also be met, depending on the allegations in the specification, even though an included offense requires proof of an element not required in the offense charged. For example, assault with a dangerous weapon may be included in a robbery.

(2) Multiple lesser included offenses. When the offense charged is a compound offense comprising two or more included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged. For example, robbery includes both larceny and assault. Therefore, in a proper case, a court-martial may find an accused not guilty of robbery but guilty of wrongful appropriation and assault.

(3) Findings of guilty to a lesser included offense. A court-martial may find an accused not guilty of the offense charged, but guilty of a lesser included offenses 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 therefore 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.

(4) Specific lesser included offenses. Specific lesser included offenses, if any, are listed for each offense discussed in this Part, but the lists are not all-inclusive.

3. Article 78 -- Accessory after the fact

a. Text.

"Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct."

b. Elements.

(1) That an offense punishable by the code was committed by a certain person;

(2) That the accused knew that this person had committed such offense;

(3) That thereafter the accused received, comforted, or assisted the offender; and

(4) That the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

c. Explanation.

(1) In general. The assistance given a principal by an accessory after the fact is not limited to assistance designed to effect the escape or concealment of the principal, but also includes acts performed to conceal the commission of the offense by the principal (for example, by concealing evidence of the offense).

(2) Failure to report offense. The mere failure to report a known offense will not make one an accessory after the fact. Such failure may violate a general order or regulation, however, and thus constitute an offense under Article 92. See paragraph 16. If the offense involved is a serious offense, failure to report it may constitute the offense of misprision of a serious offense, under Article 134. See paragraph 95.

(3) Offense punishable by the code. The term "offense punishable by this chapter" in the text of the article means any offense described in the code.

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

(5) Conviction or acquittal of principal. The prosecution must prove that a principal committed the offense to which the accused is allegedly an accessory after the fact. However, evidence of the conviction or acquittal of the principal in a separate trial is not admissible to show that the principal did or did not commit the offense. Furthermore, an accused may be convicted as an accessory after the fact despite the acquittal in a separate trial of the principal whom the accused allegedly comforted, received, or assisted.

(6) Accessory after the fact not a lesser included offense. The offense of being an accessory after the fact is not a lesser included offense of the primary offense.

(7) Actual knowledge. Actual knowledge is required but may be proved by circumstantial evidence.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Any person subject to the code who is found guilty as an accessory after the fact to an offense punishable by the code shall be subject to the maximum punishment authorized for the principal offense, except that in no case shall the death penalty nor more than one-half of the maximum confinement authorized for that offense be adjudged, nor shall the period of confinement exceed 10 years in any case, including offenses for which life imprisonment may be adjudged.

f. Sample specification.

In that (personal jurisdiction data), knowing that (at/on board -- location), on or about 19 , 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 19 , in order to (hinder) (prevent) the (apprehension) (trial) (punishment) of the said , (receive) (comfort) (assist) the said by .

4. Article 80 -- Attempts

a. Text.

"(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated."

b. Elements.

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

c. Explanation.

(1) In general. To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose.

(2) More than preparation. Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The over 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, contitutes 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) Solicitation. Soliciting another to commit an offense does not constitute an attempt. See paragraph 6 for a discussion of Article 82, solicitation.

(5) 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 104 -- aiding the enemy

(e) Article 128 -- assault

(6) Regulations. An attempt to commit conduct which would violate a lawful general order or regulation under Article 92 (see paragraph 16) should be charged under Article 80. It is not necessary in such cases to prove that the accused intended to violate the order or regulation, but it must be proved that the accused intended to commit the prohibited conduct.

d. Lesser included offenses. If the accused is charged with an attempt under Article 80, and the offense attempted has a lesser included offense, then the offense of attempting to commit the lesser included offense would ordinarily be a lesser included offense to the charge of attempt. For example, if an accused was charged with attempted larceny, the offense of attempted wrongful appropriation would be a lesser included offense, although it, like the attempted larceny, would be a violation of Article 80.

e. Maximum punishment. Any person subject to the code who is found guilty of an attempt under Article 80 to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty or confinement exceeding 20 years be adjudged.

f. Sample specification.

In that (personal jurisdiction data) did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

5. Article 81 -- Conspiracy

a. Text.

"Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct."

b. Elements.

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

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the coconspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

c. Explanation.

(1) Coconspirators. Two or more persons are required in order to have a conspiracy. Knowledge of the identity of coconspirators and their particular connection with the criminal purpose need not be established. The accused must be subject to the code, but the other coconspirators 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 code. An agreement to commit several offenses is ordinarily but a single conspiracy. Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense. Examples include dueling, bigamy, incest, adultery, and bribery.

(4) Overt act.

(a) The overt act must be independent of the agreement to commit the offense; must take place at the time of or after the agreement; must be done by one or more of the conspirators, but not necessarily the accused; and must be done to effectuate the object of the agreement.

(b) The overt act need not be in itself criminal, but it must be a manifestation that the agreement is being executed. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough, no matter how preliminary or preparatory in nature, as long as it is a manifestation that the agreement is being executed.

(c) An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details of the execution of the conspiracy.

(5) Liability for offenses. Each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the coconspirators 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 conspiray to commit that offense.

(9) Special conspiracies under Article 134. The United States Code prohibits conspiracies to commit certain specific offenses which do not require an overt act. These conspiracies should be charged under Article 134. Examples include conspiracies to impede or injure any Federal officer in the discharge of duties under 18 U.S.C. § 372, conspiracies against civil rights under 18 U.S.C. § 241, and certain drug conspiracies under 21 U.S.C. § 846. See paragraph 60c(4)(c)(ii).

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Any person subject to the code who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense which is the object of the conspiracy, except that in no case shall the death penalty be imposed.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location (subject-matter jurisdiction data, if required), on or about 19 , conspire with (and) to commit an offense under the Uniform Code of Military Justice, to wit: (larceny) of , of a value of (about) $, the property of), and in order to effect the object of the conspiracy the said (and did .

6. Article 82 -- Solicitation

a. Text.

"(a) Any person subject to this chapter who solicits or advises another or others to desert in violation of section 885 of this title (article 85) or mutiny in violation of section 894 of this title (article 94) shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of section 899 of this title (article 99) or sedition in violation of section 894 of this title (article 94) shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused solicited or advised a certain person or persons to commit any of the four offenses named in Article 82; and

(2) That the accused did so with the intent that the offense actually be committed.

[Note: if the offense solicited or advised was attempted or committed, add the following element]

(3) That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation.

c. Explanation.

(1) Instantaneous offense. The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to influence another or others to commit any of the four offenses named in Article 82. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice.

(2) Form of solicitation. Solicitation may be by means other than word of mouth or writing. Any act or conduct which reasonably may be construed as a serious request or advice to commit one of the four offenses named in Article 82 may constitute solicitation. It is not necessary that the accused act alone in the solicitation or in the advising; the accused may act through other persons in committing this offense.

(3) Solicitations in violation of Article 134. Solicitation to commit offenses other than violations of the four offenses named in Article 82 may be charged as violations of Article 134. See paragraph 105. However, some offenses require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under Articles 82 and 134. When the accused's act of solicitation constitutes, by itself, a separate offense, the accused should be charged with that separate, distinct offense -- for example, pandering (see paragraph 97) and obstruction of justice (see paragraph 96) in violation of Article 134.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. If the offense solicited or advised is committed or (in the case of soliciting desertion or mutiny) attempted, then the accued shall be punished with the punishment provided for the commission of the offense solicited or advised. If the offense solicited or advised is not committed or (in the case of soliciting desertion or mutiny) attempted, then the following punishment may be imposed:

(1) To desert -- Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) To mutiny -- Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) To commit an act of misbehavior before the enemy -- Dishonorable discharge, forfeiture of all pay and allowance, and confinement for 10 years.

(4) To commit an act of sedition -- Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. Sample specifications.

(1) For soliciting desertion (Article 85) or mutiny (Article 94).

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise) (and) to (desert in violation of Article 85) (mutiny in violation of Article 94) [Note: If the offense solicited or advised is attempted or committed, add the

following at the end of the specification:] and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about 19 , (at/on board--location), (attempted) (committed) by (and).

(2) For soliciting an act of misbehavior before the enemy (Article 99) or sedition (Article 94).

In that (personal jurisdiction data) did, (at/on board--location), on or about 19 , (a time of war) by (here state the manner and form of solicitation or advice), (solicit) (advise) (and) to commit (an act of misbehavior before the enemy in violation of Article 99) (sedition in violation of Article 94) [Note: If the offense solicited or advised is committed, add the following at the end of the specification:] and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about 19 , (at/on board--location), committed by (and).

7. Article 83 -- Fraudulent enlistment, appointment, or separation

a. Text.

"Any person who --

(1) procures his own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for that elistment 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 the 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 or disqualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or a deliberate concealment as to any of those disqualifications. Matters that may be material to an enlistment, appointment, or separation include any information used by the recruiting, appointing, or separating officer in reaching a decision as to enlistment, appointment, or separation in any particular case, and any information that normally would have been so considered had it been provided to that officer.

(2) Receipt of pay or allowances. A member of the armed forces who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under Article 83 only if that member has received pay or allowances under the fraudulent enlistment or appointment. Acceptance of food, clothing, shelter, or transportation from the government constitutes receipt of allowances. However, whatever is furnished the accused while in custody, confinement, arrest, or other restraint pending trial for fraudulent enlistment or appointment is not considered an allowance. The receipt of pay or allowances may be proved by circumstantial evidence.

(3) One offense. One who procures one's own enlistment, appointment, or separation by several misrepresentations or concealments as to qualifications for the one enlistment, appointment, or separation so procured, commits only one offense under Article 83.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment.

(1) Fraudulent enlistment or appointment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) Fraudulent separation. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) For fraudulent enlistment or appointment.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , 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) on or about 19 , 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 of facts) [deliberate concealment of the fact that (here state the facts or facts concealed which made the accused ineligible for separation)], procure himself/herself to be separated from the (here state the armed force from which the accused procured his/her separation).

8. Article 84 -- Effecting unlawful enlistment, appointment, or separation

a. Text.

"Any person subject to this chapter who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused effected the enlistment, appointment, or separation of the person named;

(2) That this person was ineligible for this enlistment, appointment, or separation because it was prohibited by law, regulation, or order; and

(3) That the accused knew of the ineligibility at the time of the enlistment, appointment, or separation.

c. Explanation. It must be proved that the enlistment, appointment, or separation was prohibited by law, regulation, or order when effected and that the accused then knew that the person enlisted, appointed, or separated was ineligible for the enlistment, appointment, or separation.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , effect [the (enlistment) (appointment) of as a in (here state the armed force in which the person was enlisted or appointed)] [the separation of from (here state the armed force from which the person was separated)], then well knowing that the said was ineligible for such (enlistment) (appointment) (separation) because (here state facts whereby the enlistment, appointment, or separation was prohibited by law, regulation, or order).

9. Article 85 -- Desertion

a. Text.

"(a) Any member of the armed forces who --

(1) without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away therefrom permanently;

(2) quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; or

(3) without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully dislosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States [Note: This provision has been held not to state a separate offense by the United States Court of Military Appeals in United States v. Huff, 7 U.S.C.M.A. 247, 22 C.M.R. 37 (1956)];

is guilty of desertion.

(b) Any commissioned officer of the armed forces who, after tender of his resignation and before notice of its acceptance, quits his post or proper duties without leave and with intent to remain away therefrom permanently is guilty of desertion.

(c) Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment, other than death, as a court-martial may direct."

b. Elements.

(1) Desertion with intent to remain away permanently.

(a) That the accused absented himself or herself from his or her unit, organization, or place of duty;

(b) That such absence was without authority;

(c) That the accused, at the time the absence began or at some time during the absence, intended to remain away from his or her unit, organization, or place of duty permanently; and

(d) That the accused remained absent until the date alleged.

[Note: If the absence was terminated by apprehension, add the following element]

(e) That the accused's absence was terminated by apprehension.

(2) Desertion with intent to avoid hazardous duty or to shirk important service.

(a) That the accused quit his or her unit, organization, or other place of duty;

(b) That the accused did so with the intent to avoid a certain duty or shirk a certain service;

(c) That the duty to be performed was hazardous or the service important;

(d) That the accused knew that he or she would be required for such duty or service; and

(e) That the accused remained absent until the date alleged.

(3) Desertion before notice of acceptance of resignation.

(a) That the accused was a commissioned officer of an armed force of the United States, and had tendered his or her resignation;

(b) That before he or she received notice of the acceptance of the resignation, the accused quit his or her post or proper duties;

(c) That the accused did so with the intent to remain away permanently from his or her post or proper duties; and

(d) That the accused remained absent until the date alleged.

[Note: If the absence was terminated by apprehension, add the following element]

(e) That the accused's absence was terminated by apprehension.

(4) Attempted desertion.

(a) That the accused did a certain over 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 repentence and return, while material in extenuation, is no defense. It is not necessary that the person be absent entirely from military jurisdiction and control.

(b) Absence without authority -- inception, duration, termination. See paragraph 10c.

(c) Intent to remain away permanently.

(i) The intent to remain away permanently from the unit, organization, or place of duty may be formed any time during the unauthorized absence. The intent need not exist throughout the absence, or for any particular period of time, as long as it exists at some time during the absence.

(ii) The accused must have intended to remain away permanently from the unit, organization, or place of duty. When the accused had such an intent, it is no defense that the accused also intended to report for duty elsewhere, or to enlist or accept an appointment in the same or a different armed force.

(iii) The intent to remain away permanently may be established by circumstantial evidence. Among the circumstances from which an inference may be drawn that an accused intended to remain absent permanently 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 85a(3) does not state a separate offense. Rather, it is a rule of evidence by which the prosecution may prove intent to remain away permanently. Proof of an enlistment or acceptance of an appointment in a service without disclosing a preexisting duty status in the same or a different service provides the basis from which an inference of intent to permanently remain away from the earlier unit, organization, or place of duty may be drawn. Furthermore, if a person, without being regularly separated from one of the armed forces, enlists or accepts an appointment in the same or another armed force, the person's presence in the military service under such an enlistment or appointment is not a return to military control and does not terminate any desertion or absence without authority from the earlier unit or organization, unless the facts of the earlier period of service are known to military authorities. If a person, while in desertion, enlists or accepts an appointment in the same or another armed force, and deserts while serving that 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 imortant 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 85a(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 subparagraph 9c(1)(c).

(4) Prisoner with executed punitive discharge. A prisoner whose dismissal or dishonorable or bad-conduct discharge has been executed is not a "member of the armed forces" within the meaning of Articles 85 or 86, although the prisoner may still be subject to military law under Article 2(a)(7). If the facts warrant, such a prisoner could be charged with escape from confinement under Article 95 or an offense under Article 134.

d. Lesser included offense. Article 86 -- absence without leave

e. Maximum punishment.

(1) Completed or attempted desertion with intent to avoid hazardous duty or to shirk important service. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) Other cases of completed or attempted desertion.

(a) Terminated by apprehension. Dishonorable discharge, forfeiture of all pay and allowance, and confinement for 3 years.

(b) Terminated otherwise. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

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

f. Sample specifications.

(1) Desertion with intent to remain away permenently.

In that (personal jurisdiction data), did, on or about 19 , (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 19 .

(2) Desertion with intent to avoid hazardous duty or shirk important service.

In that (personal jurisdiction data), did, on or about 19 , (a time of war) with intent to (avoid hazardous duty) (shirk important service), namely: , quit his/her (unit) (organization) (place of duty), to wit: , located at ( ), and did remain so absent in desertion until on or about 19 .

(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 19 , (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 19 .

(4) Attempted desertion.

In that (personal jurisdiction data), did (at/on board-location), on or about 19 , (a time of war) attempt to [absent himself/herself from his/her (unit) (organization) (place of duty) to wit: , without authority and with intent to remain away therefrom permanently] [quit his/her (unit) (organization) (place of duty), to wit: , located at , with intent to (avoid hazardous duty) (shirk important service) namely] [ ].

10. Article 86 -- Absence without leave

a. Text.

"Any member of the armed forces who, without authority --

(1) fails to go to his appointed place of duty at the time prescribed;

(2) goes from that place; or

(3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct."

b. Elements.

(1) Failure to go to appointed place of duty.

(a) That a certain authority appointed a certain time and place of duty for the accused;

(b) That the accused knew of that time and place; and

(c) That the accused, without authority, failed to go to the appointed place of duty at the time prescribed.

(2) Going from appointed place of duty.

(a) That a certain authority appointed a certain time and place of duty for the accused;

(b) That the accused knew of that time and place; and

(c) That the accused, without authority, went from the appointed place of duty after having reported at such place

(3) Absence from unit, organization, or place of duty.

(a) That the accused absented himself or herself from his or her unit, organization, or place of duty at which he or she was required to be;

(b) That the absence was without authority from anyone competent to give him or her leave; and

(c) That the absence was for a certain period of time.

[Note: if the absence was terminated by apprehension, add the following element]

(d) that the absence was terminated by apprehension.

(4) Abandoning watch or guard.

(a) That the accused was a member of a guard, watch, or duty;

(b) That the accused absented himself or herself from his or her guard, watch, or duty section;

(c) That the absence of the accused was without authority; and

(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 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 absence of 4 days. However, if the accused is found guilty simply of unauthorized absence from 4 April to 7 April, the maximum punishment would be based on an absence of 3 days.

(10) Termination -- methods of return to military control.

(a) Surrender to military authority. A surrender occurs when a person presents himself or herself to any military authority, whether or not a member of the same armed force, notifies that authority of his or her unauthorized absence status, and submits or demonstrates a willingness to submit to military control. Such a surrender terminates the unauthorized absence.

(b) Apprehension by military authority. Apprehension by military authority of a known absentee terminates an unauthorized absence.

(c) Delivery to military authority. Delivery of a known absentee by anyone to military authority terminates the unauthorized absence.

(d) Apprehension by civilian authorities at the request of the military. When an absentee is taken into custody by civilian authorities at the request of military authorities, the absence is terminated.

(e) Apprehension by civilian authorities without prior military request. When an absentee is in the hands of civilian authorities for other reasons and these authorities make the absentee available for return to military control, the absence is terminated when the military authorities are informed of the absentee's availability.

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

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment.

(1) Failing to go to, or going from, the appointed place of duty. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(2) Absence from unit, organization, or other place of duty.

(a) For not more than 3 days. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(b) For more than 3 days but not more than 30 days. Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

(c) For more than 30 days. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(d) For more than 30 days and terminated by apprehension. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(3) From guard or watch. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(4) From guard or watch with intent to abandon. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(5) With intent to avoid maneuvers or field exercises. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. Sample specifications.

(1) Failing to go or leaving place of duty.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , 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 19 , 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 19 .

(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 19 , without authority and 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 19 .

(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 19 , without authority, go from his/her (guard) (watch) (duty section) with intent to abandon the same.

11. Article 87 -- Missing movement

a. Text.

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

b. Elements.

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

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

(3) That the accused missed the movement of the ship, aircraft or unit; and

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

c. Explanation.

(1) Movement. "Movement" as used in Article 87 includes a move, transfer, or shift of a ship, aircraft, or unit involving a substantial distance and period of time. Whether a particular movement is substantial is a question to be determined by the court-martial considering all the circumstances. Changes which do not constitute a "movement" include practice marches of a short duration with a return to the point of departure, and minor changes

in location of ships, aircraft, or units, as when a ship is shifted from one berth to another in the same shipyard or harbor or when a unit is moved from one barracks to another on the same post.

(2) Mode of movement.

(a) Unit. If a person is required in the course of duty to move with a unit, the mode of travel is not important, whether it be military or commercial, and includes travel by ship, train, aircraft, truck, bus, or walking. The word "unit" is not limited to any specific technical category such as those listed in a table of organization and equipment, but also includes units which are created before the movement with the intention that they have organizational continuity upon arrival at their destination regardless of their technical designation, and units intended to be disbanded upon arrival at their destination.

(b) Ship, aircraft. If a person is assigned as a crew member or is ordered to move as a passenger aboard a particular ship or aircraft, military or chartered, then missing the particular sailing or flight is essential to establish the offense of missing movement.

(3) Design. "Design" means on purpose, intentionally, or according to plan and requires specific intent to miss the movement.

(4) Neglect. "Neglect" means the omission to take such measures as are appropriate under the circumstances to assure presence with a ship, aircraft, or unit at the time of a scheduled movement, or doing some act without giving attention to its probable consequences in connection with the prospective movement, such as a departure from the vicinity of the prospective movement to such a distance as would make it likely that one could not return in time for the movement.

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

(6) Proof of absence. That the accused actually missed the movement may be proved by documentary evidence, as by a proper entry in a log or a morning report. This fact may also be proved by the testimony of personnel of the ship, aircraft, or unit (or by other evidence) that the movement occurred at a certain time, together with evidence that the accused was physically elsewhere at that time.

d. Lesser included offenses.

(1) Design.

(a) Article 87 -- missing movement through neglect

(b) Article 86 -- absence without authority

(c) Article 80 -- attempts

(2) Neglect. Article 86 -- absence without authority

e. Maximum punishment.

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

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location), on or about , 19 , No.) (Flight) (the USS) (Company A, 1st Battalion, 7th Infantry) ( ) with which he/she was required in the course of duty to move.

12. Article 88 -- Contempt toward officials

a. Text.

"Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of the Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused was a commissioned officer of the United States armed forces;

(2) That the accused used certain words against an official or legislature named in the article;

(3) That by an act of the accused these words came to the knowledge of a person other than the accused; and

(4) That the words used were contemptuous, either in themselves or by virtue of the circumstances under which they were used.

[Note: if the words were against a Governor or legislature, add the following element]

(5) That the accused was then present in the State, Territory, Commonwealth, or possession of the Governor or legislature concerned.

c. Explanation. The official or legislature against whom the words are used must be occupying one of the offices or be one of the legislatures named in Article 88 at the time of the offense. Neither "Congress" nor "legislature" includes its members individually. "Governor" does not include "lieutenant governor." It is immaterial whether the words are used against the official in an official or private capacity. If not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion, even though emphatically expressed, may not be charged as a violation of the article. Similarly, expressions of opinion made in

a purely private conversation should not ordinarily be charged. Giving broad circulation to a written publication containing contemptuous words of the kind made punishable by this article, or the utterance of contemptuous words of this kind in the presence of military subordinates, aggravates the offense. The truth or falsity of the statements is immaterial.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Dismissal, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , [use (orally and publicly) ( ) the following contemptuous words] [in a contemptuous manner, use (orally and publicly) ( ) the following words] against the [(President) (Vice President) (Congress) (Secretary of)] [(Governor) (legislature) of the (State of) (Territory of) ( ), a (State) (Territory) ( ) in which he/she, the said , was then (on duty), (present)], to wit: " ," or words to that effect.

13. Article 89 -- Disrespect toward a superior commissioned officer

a. Text.

"Any person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct."

b. Elements.

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

(2) That such behavior or language was directed toward that officer;

(3) That the officer toward whom the acts, omissions, or words were directed was the superior commissioned officer of the accused;

(4) That the accused then knew that the commissioned officer toward whom the acts, omissions, or words were directed was the accused's superior commissioned officer; and

(5) That, under the circumstances, the behavior or language was disrespectful to that commissioned officer.

c. Explanation.

(1) Superior commissioned officer.

(a) Accused and victim in same armed force. If the accused and the victim are in the same armed force, the victim is a "superior commissioned officer" of the accused when either superior in rank or command to the accused;

however, the victim is not a "superior commissioned officer" of the accused if the victim is inferior in command, even though superior in rank.

(b) Accused and victim in different armed forces. If the accused and the victim are in different armed forces, the victim is a "superior commissioned officer" of the accused when the victim is a commissioned officer and superior in the chain of command over the accused or when the victim, not a medical officer or a chaplain, is senior in grade to the accused and both are detained by a hostile entity so that recourse to the normal chain of command is prevented. The victim is not a "superior commissioned officer" of the accused merely because the victim is superior in grade to the accused.

(c) Execution of office. It is not necessary that the "superior commissioned officer" be in the execution of office at the time of the disrespectful behavior.

(2) Knowledge. If the accused did not know that the person against whom the acts or words were directed was the accused's superior commissioned officer, the accused may not be convicted of a violation of this article. Knowledge may be proved by circumstantial evidence.

(3) Disrespect. Disrespectful behavior is that which detracts from the respect due the authority and person of a superior commissioned officer. It may consist of acts or language, however expressed, and it is immaterial whether they refer to the superior as an officer or as a private individual. Disrespect by words may be conveyed by abusive epithets or other contemptuous or denunciatory language. Truth is no defense. Disrespect by acts includes neglecting the customary salute, or showing a marked disdain, indifference, insolence, impertinence, undue familiarity, or other rudeness in the presence of the superior officer.

(4) Presence. It is not essential that the disrespectful behavior be in the presence of the superior, but ordinarily one should not be held accountable under this article for what was said or done in a purely private conversation.

(5) Special defense -- unprotected victim. A superior commissioned officer whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that officer's rank or position under similar circumstances loses the protection of this article. That accused may not be convicted of being disrespectful to the officer who has so lost the entitlement to respect protected by Article 89.

d. Lesser included offenses.

(1) Article 117 -- provoking speeches or gestures

(2) Article 80 -- attempts

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , behave himself/herself with disrespect toward , his/her superior commissioned officer, then known by the said to be his/her superior

commissioned officer, by (saying to him/her " ," or words to that effect) (contemptuously turning from and leaving him/her while he/she, the said , was talking to him/her, the said) ( ).

14. Article 90 -- Assaulting or willfully disobeying superior commissioned officer.

a. Text.

"Any person subject to this chapter who --

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct."

b. Elements.

(1) Striking or assaulting superior commissioned officer.

(a) That the accused struck, drew, or lifted up a weapon against, or offered violence against, a certain commissioned officer;

(b) That the officer was the superior commissioned officer of the accused;

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

(d) That the superior commissioned officer was then in the execution of office.

(2) Disobeying superior commissioned officer.

(a) That the accused received a lawful command from a certain commissioned officer;

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

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

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

c. Explanation.

(1) Striking or assaulting superior commissioned officer.

(a) Definitions.

(1) Superior commissioned officer. The definitions in paragraph 13c(1)(a) and (b) apply here and in subparagraph c(2).

(ii) Strikes. "Strikes" means an intentional blow, and includes any offensive touching of the person of an officer, however slight.

(iii) Draws or lifts up any weapon against. The phrase "draws or lifts up any weapon against" covers any simple assault committed in the manner stated. The drawing of any weapon in an aggressive manner or the raising or brandishing of the same in a threatening manner in the presence of and at the superior is the sort of act proscribed. The raising in a threatening manner of a firearm, whether or not loaded, of a club, or of anything by which a serious blow or injury could be given is included in "lifts up."

(iv) Offers any violence against. The phrase "offers any violence against" includes any form of battery or of mere assault not embraced in the preceding more specific terms "strikes" and "draws or lifts up." If not executed, the violence must be physically attempted or menaced. A mere threatening in words is not an offering of violence in the sense of this article.

(b) Execution of office. An officer is in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage. In general, any striking or use of violence against any superior officer by a person over whom it is the duty of that officer to maintain discipline at the time, would be striking or using violence against the officer in the execution of office. The commanding officer on board a ship or the commanding officer of a unit in the field is generally considered to be on duty at all times.

(c) Knowledge. If the accused did not know the officer was the accused's superior commissioned officer, the accused may not be convicted of this offense. Knowledge may be proved by circumstantial evidence.

(d) Defenses. In a prosecution for striking or assaulting a superior commissioned officer in violation of this article, it is a defense that the accused acted in the proper discharge of some duty, or that the victim behaved in a manner toward the accused such as to lose the protection of this article (see paragraph 13c(5)). For example, if the victim initiated an unlawful attack on the accused, this would deprive the victim of the protection of this article, and, in addition, could excuse any lesser included offense of assault as done in self-defense, depending on the circumstances (see paragraph 54c; R.C.M. 916(e)).

(2) Disobeying superior commissioned officer.

(a) Lawfulness of the order.

(i) Inference of lawfulness. An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime.

(ii) Authority of issuing officer. The commissioned officer issuing the order must have authority to give such an order. Authorization may be based on law, regulation, or custom of the service.

(iii) Relationship to military duty. The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

(iv) Relationship to statutory or constitutional rights. The order must not conflict with the statutory or constitutional rights of the person receiving the order.

(b) Personal nature of the order. The order must be directed specifically to the subordinate. Violations of regulations, standing orders or directives, or failure to perform previously established duties 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. In 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 an order does not indicate the time within which it is to be complied with, either expressly or by implication, then a reasonable delay in compliance does not violate this article. If an order requires performance in the future, an accused's present statement of intention to disobey the order does not constitute disobedience of that order, although carrying out that intention may.

(3) Civilians and discharged prisoners. A discharged prisoner or other civilian subject to military law (see Article 2) and under the command of a commissioned officer is subject to the provisions of this article.

d. Lesser included offenses.

(1) Striking superior commissioned officer in execution of office.

(a) Article 90 -- drawing or lifting up a weapon or offering violence to superior commissioned officer in execution of office

(b) Article 128 -- assault; assault consummated by a battery; assault with a dangerous weapon

(c) Article 128 -- assault or assault consummated by a battery upon commissioned officer not in the execution of office

(d) Article 80 -- attempts

(2) Drawing or lifting up a weapon or offering violence to superior commissioned officer in execution of office.

(a) Article 128 -- assault, assault with dangerous weapon

(b) Article 128 -- assault upon a commissioned officer not in the execution of office

(c) Article 80 -- attempts

(3) Willfully disobeying lawful order of superior commissioned officer.

(a) Article 92 -- failure to obey lawful order

(b) Article 89 -- disrespect to superior commissioned officer

(c) Article 80 -- attempts

e. Maximum punishment.

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

(2) Willfully disobeying a lawful order of superior commissioned officer. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

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

f. Sample specifications.

(1) Striking superior commissioned officer.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , (a time of war) strike , his/her superior commissioned officer, then known by the said to be his/her superior commissioned officer, who was then in the execution of his/her office, (in) (on) the with (a) (his/her) .

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

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , (a time of war) (draw) (lift up) a weapon, to wit: a , against , his/her superior commissioned officer, then known by the said to be his/her superior commissioned officer, who was then in the execution of his/her office.

(3) Offering violence to superior commissioned officer.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , (a time of war) offer violence against , his/her superior commissioned officer, then known by the said to be his/her superior commissioned officer, who was then in the execution of his/her office, by .

(4) Willful disobedience of superior commissioned officer.

In that (personal jurisdiction data), having received a lawful command from , his/her superior commissioned officer, then known by the said to be his/her superior commissioned officer, to , or words to that effect, did, (at/on board--location), on or about 19 , willfully disobey the same.

15. Article 91 -- Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

a. Text.

"Any warrant officer or enlisted member who --

(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office;

(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office;

shall be punished as a court-martial may direct."

b. Elements.

(1) Striking or assaulting warrant, noncommissioned, or petty officer.

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused struck or assaulted a certain warrant, noncommissioned, or petty officer;

(c) That the striking or assault was committed while the victim was in the execution of office; and

(d) That the accused then knew that the person struck or assaulted was a warrant, noncommissioned, or petty officer.

[Note: If the victim was the superior noncommissioned or petty officer of the accused, add the following elements]

(e) That the victim was the superior noncommissioned, or petty officer of the accused; and

(f) That the accused then knew that the person struck or assaulted was the accused's superior noncommissioned, or petty officer.

(2) Disobeying a warrant, noncommissioned, or petty officer.

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused received a certain lawful order from a certain warrant, noncommissioned, or petty officer;

(c) That the accused then knew that the person giving the order was a warrant, noncommissioned, or petty officer;

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

(e) That the accused willfully disobeyed the order.

(3) Treating with contempt or being disrespectful in language or deportment toward a warrant, noncommissioned, or petty officer.

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused did or omitted certain acts, or used certain language;

(c) That such behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer;

(d) That the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;

(e) That the victim was then in the execution of office; and

(f) That under the circumstances the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned, or petty officer.

[Note: If the victim was the superior noncommissioned, or petty officer of the accused, add the following elements]

(g) That the victim was the superior noncommissioned, or petty officer of the accused; and

(h) That the accused then knew that the person toward whom the behavior or language was directed was the accused's superior noncommissioned, or petty officer.

c. Explanation.

(1) In general. Article 91 has the same general objects with respect to warrant, noncommissioned, and petty officers as Articles 89 and 90 have with respect to commissioned officers, namely, to ensure obedience to their lawful orders, and to protect them from violence, insult, or disrespect. Unlike Articles 89 and 90, however, this article does not require a superior-subordinate relationship as an element of any of the offenses denounced. This article does not protect an acting noncommissioned officer or acting petty officer, nor does it protect military police or members of the shore patrol who are not warrant, noncommissioned, or petty officers.

(2) Knowledge. All of the offenses prohibited by Article 91 require that the accused have actual knowledge that the victim was a warrant, noncommissioned, or petty officer. Actual knowledge may be proved by circumstantial evidence.

(3) Striking or assaulting a warrant, noncommissioned, or petty officer. For a discussion of "strikes" and "in the execution of office," see paragraph 14c. For a discussion of "assault," see paragraph 54c. An assault by a prisoner who has been discharged from the service, or by any other civilian subject to military law, upon a warrant, noncommissioned, or petty officer should be charged under Article 128 or 134.

(4) Disobeying a warrant, noncommissioned, or petty officer. See paragraph 14c(2) for a discussion of lawfulness, personal nature, form, transmission, and specificity of the order, nature of the disobedience, and time for compliance with the order.

(5) Treating with contempt or being disrespectful in language or deportment toward a warrant, noncommissioned, or petty officer. "Toward" requires that the behavior and language be within the sight or hearing of the warrant, noncommissioned, or petty officer concerned. For a discussion of "in the execution of his office," see paragraph 14c. For a discussion of disrespect, see paragraph 13c.

d. Lesser included offenses.

(1) Striking or assaulting warrant, noncommissioned, or petty officer in the execution of office.

(a) Article 128 -- assault; assault consummated by a battery; assault with a dangerous weapon

(b) Article 128 -- assault upon warrant, noncommissioned, or petty officer not in the execution of office

(c) Article 80 -- attempts

(2) Disobeying a warrant, noncommissioned, or petty officer.

(a) Article 92 -- failure to obey a lawful order

(b) Article 80 -- attempts

(3) Treating with contempt or being disrespectful in language or deportment toward warrant, noncommissioned, or petty officer in the execution of office.

(a) Article 117 -- using provoking or reproachful speech

(b) Article 80 -- attempts

e. Maximum punishment.

(1) Striking or assaulting warrant officer. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) Striking or assaulting superior noncommissioned or petty officer. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(3) Striking or assaulting other noncommissioned or petty officer. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(4) Willfully disobeying the lawful order of a warrant officer. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(5) Willfully disobeying the lawful order of a noncommissioned or petty officer. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(6) Contempt or disrespect to warrant officer. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

(7) Contempt or disrespect to superior noncommissioned or petty officer. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(8) Contempt or disrespect to other noncommissioned or petty officer. Forfeiture of two-thirds pay per month for 3 months, and confinement for 3 months.

f. Sample specifications.

(1) Striking or assaulting warrant, noncommissioned, or petty officer.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , (strike) (assault) , a officer, then known to the said to be a (superior) officer who was then in the execution of his/her office, by him/her (in) (on) (the) with (a) (his/her) .

(2) Willful disobedience of warrant, noncommissioned, or petty officer.

In that (personal jurisdiction data), having received a lawful order from , a officer, then known by the said to be a officer, to , an order which it was his/her duty to obey, did (at/on board--location), on or about 19 , willfully disobey the same.

(3) Contempt or disrespect toward warrant, noncommissioned, or petty officer.

In that (personal jurisdiction data) (at/on board--location), on or about 19 , [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) ( ).

16. Article 92 -- Failure to obey order or regulation

a. Text.

"Any person subject to this chapter who --

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct."

b. Elements.

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

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

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

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

(2) Failure to obey other lawful order.

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

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

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

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

(3) Dereliction in the performance of duties.

(a) That the accused had certain duties;

(b) That the accused had knowledge of the duties; and

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

c. Explanation.

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

(a) Authority to issue general orders and regulations. General orders or regulations are those orders or regulations generally applicable to an armed force which are properly published by the President or the Secretary of Defense, of Transportation, or of a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by:

(i) an officer having general court-martial jurisdiction;

(ii) a general or flag officer in command; or

(iii) a commander superior to (i) or (ii).

(b) Effect of change of command on validity of order. A general order or regulation issued by a commander with authority under Article 92(1) retains its character as a general order or regulation when another officer takes command, until it expires by its own terms or is rescinded by separate action, even if it is issued by an officer who is a general or flag officer in command and command is assumed by another officer who is not a general or flag officer.

(c) Lawfulness. A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. See the discussion of lawfulness in paragraph 14c(2)(a).

(d) Knowledge. Knowledge of a general order or regulation need not be alleged or proved, as knowledge is not an element of this offense and a lack of knowledge does not constitute a defense.

(e) Enforceability. Not all provisions in general orders or regulations can be enforced under Article 92(1). Regulations which only supply general guidelines or advice for conducting military functions may not be enforceable under Article 92(1).

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

(a) Scope. Article 92(2) includes all other lawful orders which may be issued by a member of the armed forces, violations of which are not chargeable under Article 90, 91, or 92(1). It includes the violation of written regulations which are not general regulations. See also subparagraph (1)(e) above as applicable.

(b) Knowledge. In order to be guilty of this offense, a person must have had actual knowledge of the order or regulation. Knowledge of the order may be proved by circumstantial evidence.

(c) Duty to obey order.

(i) From a superior. A member of one armed force who is senior in rank to a member of another armed force is the superior of that member with authority to issue orders which that member has a duty to obey under the same

circumstances as a commissioned officer of one armed force is the superior commissioned officer of a member of another armed force for the purposes of Articles 89 and 90. See paragraph 13c(1).

(ii) From one not a superior. Failure to obey the lawful order of one not a superior is an offense under Article 92(2), provided the accused had a duty to obey the order, such as one issued by a sentinel or a member of the armed forces police. See paragraph 15b(2) if the order was issued by a warrant, noncommissioned, or petty officer in the execution of office.

(3) Dereliction in the performance of duties.

(a) Duty. A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.

(b) Knowledge. In order to be guilty of this offense, a person must have had actual knowledge of the duties. Knowledge of the duties may be proved by circumstantial evidence.

(c) Derelict. A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner. "Willfully" means intentionally. It refers to the doing of an act knowingly and 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 not reasonable or just excuse.

(d) Ineptitude. A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment.

(1) Violation or failure to obey lawful general order or regulation. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

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

[Note: For (1) and (2), above, the punishment set forth does not apply in the following cases: if in the absence of the order or regulation which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or if the violation or failure to obey is a

breach of restraint imposed as a result of an order. In these instances, the maximum punishment is that specifically prescribed elsewhere for that particular offense.]

(3) Dereliction in the performance of duties.

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49 FR 17152

April 23, 1984

Presidential Documents

Reporter
49 FR 17152

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Notice

Part 3 of 4. You are viewing a very large document that has been divided into parts.

Title: Title 3--
The President
Manual for Courts-Martial, United States, 1984

Agency

FEDERAL REGISTER

Identifier: Executive Order 12473 of April 13, 1984

Text

(A) Through neglect or culpable inefficiency. Forfeiture of two-thirds pay per month for 3 months and confinement for 3 months.

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

f. Sample specifications.

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

In that (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , (violate) (fail to obey) a lawful general (order) (regulation), to wit: [paragraph , (Army) (Air Force) Regulation , dated 19] [Article , U.S. Navy Regulations, dated 19] [General Order No. , U.S. Navy, dated 19] [ ], 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 , Instruction), 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 19 , 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, did (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , fail to obey the same [by (wrongfully) .]

(4) Dereliction in the performance of duties.

In that , (personal jurisdiction data), (at/on board--location) (subject-matter jurisdiction data, if required), (on or about 19) (from about 19 to about 19), having knowledge of his/her duties, was derelict in the performance of those duties in that he/she (negligently) (willfully) (by culpable inefficiency) failed to , as it was his/her duty to do.

17. Article 93 -- Cruelty and maltreatment

a. Text.

"Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct."

b. Elements.

(1) That a certain person was subject to the orders of the accused; and

(2) That the accused was cruel toward, or oppressed, or maltreated that person.

c. Explanation.

(1) Nature of victim. "Any person subject to his orders" means not only those persons under the direct or immediate command of the accused but extends to all persons, subject to the code or not, who by reason of some duty are required to obey the lawful orders of the accused, regardless whether the accused is in the direct chain of command over the person.

(2) Nature of act. The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature. The

imposition of necessary or proper duties and the exaction of their performance does not constitute this offense even though the duties are arduous or hazardous or both.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that (personal jurisdiction data), (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , [was cruel toward] [did (oppress) (maltreat)] , a person subject to his/her orders, by (kicking him/her in the stomach) (confining him/her for twenty-four hours without water) ( ).

18. Article 94 -- Mutiny and sedition

a. Text.

"(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 to perform duty.

(a) That the accused refused to obey orders or otherwise do the accused's duty;

(b) That the accused in refusing to obey orders or perform duty acted in concert with another person or persons; and

(c) That the accused did so with intent to usurp or override lawful military authority.

(3) Sedition.

(a) That the accused created revolt, violence, or disturbance against lawful civil authority;

(b) That the accused acted in concert with another person or persons; and

(c) That the accused did so with the intent to cause the overthrow or destruction of that authority.

(4) Failure to prevent and suppress a mutiny or sedition.

(a) That an offense of mutiny or sedition was committed in the presence of the accused; and

(b) That the accused failed to do the accused's utmost to prevent and suppress the mutiny or sedition.

(5) Failure to report a mutiny or sedition.

(a) That an offense of mutiny or sedition occurred;

(b) That the accused knew or had reason to believe that the offense was taking place; and

(c) That the accused failed to take all reasonable means to inform the accused's superior commissioned officer or commander of the offense.

(6) Attempted mutiny.

(a) That the accused committed a certain overt act;

(b) That the act was done with specific intent to commit the offense of mutiny;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to effect the commission of the offense of mutiny.

c. Explanation.

(1) Mutiny. Article 94(a)(1) defines two types of mutiny, both requiring an intent to usurp or override military authority.

(a) Mutiny by creating violence or disturbance. Mutiny by creating violence or disturbance may be committed by one person acting alone or by more than one acting together.

(b) Mutiny by refusing to obey orders or perform duties. Mutiny by refusing to obey orders or perform duties requires collective insubordination and necessarily includes some combination of two or more persons in resisting lawful

military authority. This concert of insubordination need not be preconceived, nor is it necessary that the insubordination be active or violent. It may consist simply of a persistent and concerted refusal or omission to obey orders, or to do duty, with an insubordinate intent, that is, with an intent to usurp or override lawful military authority. The intent may be declared in words or inferred from acts, omissions, or surrounding circumstances.

(2) Sedition. Sedition requires a concert of action in resistance to civil authority. This differs from mutiny by creating violence or disturbance. See subparagraph c(1)(a) above.

(3) Failure to prevent and suppress a mutiny or sedition. "Utmost" means taking those measures to prevent and suppress a mutiny or sedition which may properly be called for by the circumstances, including the rank, responsibilities, or employment of the person concerned. "Utmost" includes the use of such force, including deadly force, as may be reasonably necessary under the circumstances to prevent and suppress a mutiny or sedition.

(4) Failure to report a mutiny or sedition. Failure to "take all reasonable means to inform" includes failure to take the most expeditious means available. When the circumstances known to the accused would have caused a reasonable person in similar circumstances to believe that a mutiny or sedition was occurring, this may establish that the accused had such "reason to believe" that mutiny or sedition was occurring. Failure to report an impending mutiny or sedition is not an offense in violation of Article 94. But see paragraph 16c(3) (dereliction of duty).

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

d. Lesser included offenses.

(1) Mutiny by creating violence or disturbance.

(a) Article 90 -- assault on commissioned officer

(b) Article 91 -- assault on warrant, noncommissioned, or petty officer

(c) Article 94 -- attempted mutiny

(d) Article 116 -- riot; breach of peace

(e) Article 128 -- assault

(f) Article 134 -- disorderly conduct

(2) Mutiny by refusing to obey orders or perform duties.

(a) Article 90 -- willful disobedience of commissioned officer

(b) Article 91 -- willful disobedience of warrant, noncommissioned, or petty officer

(c) Article 92 -- failure to obey lawful order

(d) Article 94 -- attempted mutiny

(3) Sedition.

(a) Article 116 -- riot; breach of peace

(b) Article 128 -- assault

(c) Article 134 -- disorderly conduct

(d) Article 80 -- attempts

e. Maximum punishment. For all offenses under Article 94, death or such other punishment as a court-martial may direct.

f. Sample specifications.

(1) Mutiny by creating violence or disturbance.

In that (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , create (violence) (a disturbance) by (attacking the officers of the said ship) (barricading himself/herself in Barracks T7, firing his/her rifle at , and exhorting other persons to join him/her in defiance of) ( ).

(2) Mutiny by refusing to obey orders or perform duties.

In that (personal jurisdiction data), with intent to (usurp) (override) (usurp and override) lawful military authority, did, (at/on board--location) on or about 19 , 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 19 , 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 19 , 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 to 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 19 , 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 19 , attempt to [create (violence) (a disturbance) by] [ ].

19. Article 95 -- Resistance, breach of arrest, and escape

a. Text.

"Any person subject to this chapter who resists apprehension or breaks arrest or who 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) 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.

(3) 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.

(4) 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.

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 or flight. 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) 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 paragraph 5c(3), Part V). This article prohibits breaking any arrest.

(b) Authority to order arrest. See R.C.M. 304(b) and paragraphs 2 and 5b, Part V 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.

(3) Escape from custody.

(a) Custody. "Custody" is restraint of free locomotion imposed by lawful apprehension. The restraint may be physical or, once there has been a submission to apprehension or a forcible taking into custody, it may consist of control exercised in the presence of the prisoner by official acts or orders. Custody is temporary restraint intended to continue until other restraint (arrest, restriction, confinement) is imposed or the person is released.

(b) Authority to apprehend. See subparagraph (1)(b) above.

(c) Escape. For a discussion of escape, see subparagraph c(4)(c), below.

(d) Illegal custody. A person may not be convicted of this offense if the custody was illegal. An apprehension effected by one authorized to apprehend is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of an apprehension is a question of law to be decided by the military judge.

(e) Correctional custody. See paragraph 70.

(4) Escape from confinement.

(a) Confinement. Confinement is physical restraint imposed under R.C.M. 305; 1101; or paragraph 5b, Part V.

(b) Authority to order confinement. See R.C.M. 304(b); 1101; and paragraphs 2 and 5b, Part V 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 paragraph 20c(1)(b). Any completed casting off of the restraint of confinement, before release by proper authority, is an escape, and lack of effectiveness of the restaint 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 shaken off.

(d) Status when temporarily outside confinement facility. A prisoner who is temporarily escorted outside a confinement facility for a work detail or other reason by a guard, who has both the duty and means to prevent that prisoner from escaping, remains in confinement.

(e) Legality of confinement. A person may not be convicted of escape from confinement if the confinement is illegal. Confinement ordered by one authorized to do so is presumed to be lawful in the absence of evidence to the contrary. Ordinarily, the legality of confinement is a question of law to be decided by the military judge.

d. Lesser included offenses.

(1) Resisting apprehension. Article 128 -- assault; assault consummated by a battery

(2) Breaking arrest.

(a) Article 134 -- breaking restriction

(b) Article 80 -- attempts

(3) Escape from custody. Article 80 -- attempts

(4) Escape from confinement. Article 80 -- attempts

e. Maximum punishment.

(1) Resisting apprehension. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) Breaking arrest. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) Escape from custody or confinement. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specifications.

(1) Resisting apprehension.

In that (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , resist being apprehended by , (an armed force policeman) ( ), a person authorized to apprehend the accused.

(2) 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 19 , break said arrest.

(3) Escape from custody.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , escape from the custody of , a person authorized to apprehend the accused.

(4) Escape from confinement.

In that (personal jurisdiction data), having been placed in confinement in (place of confinement), by a person authorized to order the accused into confinement did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , escape from confinement.

20. Article 96 -- Releasing prisoner without proper authority

a. Text.

"Any person subject to this chapter who, without proper authority, releases any prisoner committed to his charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law."

b. Elements.

(1) Releasing a prisoner without proper authority.

(a) That a certain prisoner was committed to the charge of the accused; and

(b) That the accused released the prisoner without proper authority.

(2) Suffering a prisoner to escape through neglect.

(a) That a certain prisoner was committed to the charge of the accused;

(b) That the prisoner escaped;

(c) That the accused did not take such care to prevent the escape as a reasonably careful person, acting in the capacity in which the accused was acting, would have taken in the same or similar circumstances; and

(d) That the escape was the proximate result of the accused's neglect.

(3) Suffering a prisoner to escape through design.

(a) That a certain prisoner was committed to the charge of the accused;

(b) That the design of the accused was to suffer the escape of that prisoner; and

(c) That the prisoner escaped as a result of the carrying out of the design of the accused.

c. Explanation.

(1) Releasing a prisoner without proper authority.

(a) Prisoner. "Prisoner" includes a civilian or military person who has been confined.

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

(c) Authority to release. See R.C.M. 305(g) as to who may release pretrial prisoners. Normally, the lowest authority competent to order release of a post-trial prisoner is the commander who convened the court-martial which sentenced the prisoner or the officer exercising general court-martial jurisdiction over the prisoner. See also R.C.M. 1101.

(d) Committed. Once a prisoner has been confined, the prisoner has been "committed" in the sense of Article 96, and only a competent authority (see subparagraph (c)) may order release, regardless of failure to follow procedures prescribed by the code, this Manual, or other law.

(2) Suffering a prisoner to escape through neglect.

(a) Suffer. "Suffer" means to allow or permit; not to forbid or hinder.

(b) Neglect. "Neglect" is a relative term. It is the absence of conduct which would have been taken by a reasonably careful person in the same or similar circumstances.

(c) Escape. Escape is defined in paragraph 19c(4)(c).

(d) Status of prisoner after escape not a defense. After escape, the fact that a prisoner returns, is captured, killed, or otherwise dies is not a defense.

(3) Suffering a prisoner to escape through design. An escape is suffered through design when it is intended. Such intent may be inferred from conduct so wantonly devoid of care that the only reasonable inference which may be drawn is that the escape was contemplated as a probable result.

d. Lesser included offenses.

(1) Releasing a prisoner without proper authority. Article 80 -- attempts

(2) Suffering a prisoner to escape through neglect. None

(3) Suffering a prisoner to escape through design.

(a) Article 96 -- suffering a prisoner to escape through neglect

(b) Article 80 -- attempts

e. Maximum punishment.

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

(2) Suffering a prisoner to escape through neglect. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) Suffering a prisoner to escape through design. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. Sample specifications.

(1) Releasing a prisoner without proper authority.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , without proper authority, release , a prisoner committed to his/her charge.

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

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , through (neglect) (design), suffer , a prisoner committed to his/her charge, to escape.

21. Article 97 -- Unlawful detention

a. Text.

"Any person subject to this chapter who, except as provided by law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused apprehended, arrested, or confined a certain person; and

(2) That the accused unlawfully exercised the accused's authority to do so.

c. Explanation.

(1) Scope. This article prohibits improper acts by those empowered by the code to arrest, apprehend, or confine. See Articles 7 and 9; R.C.M. 302, 304, 305, and 1101, and paragraphs 2 and 5b, Part V. It does not apply to private acts of false imprisonment or unlawful restraint of another's freedom of movement by one not acting under such a delegation of authority under the code.

(2) No force required. The apprehension, arrest, or confinement must be against the will of the person restrained, but force is not required.

(3) Defense. A reasonable belief held by the person imposing restraint that it is lawful is a defense.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , unlawfully (apprehend) (place in arrest) (confine in).

22. Article 98 -- Noncompliance with procedural rules

a. Text.

"Any person subject to this chapter who --

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;

shall be punished as a court-martial may direct."

b. Elements.

(1) Unnecessary delay in disposing of case.

(a) That the accused was charged with a certain duty in connection with the disposition of a case of a person accused of an offense under the code;

(b) That the accused knew that the accused was charged with this duty;

(c) That delay occurred in the disposition of the case;

(d) That the accused was responsible for the delay; and

(e) That, under the circumstances, the delay was unnecessary.

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code.

(a) That the accused failed to enforce or comply with a certain provision of the code regulating a proceeding before, during, or after trial;

(b) That the accused had the duty of enforcing or complying with that provision of the code;

(c) That the accused knew that the accused was charged with this duty; and

(d) That the accused's failure to enforce or comply with that provision was intentional.

c. Explanation.

(1) Unnecessary delay in disposing of case. The purpose of section (1) of Article 98 is to ensure expeditious disposition of cases of persons accused of offenses under the code. A person may be responsible for delay in the disposition of a case only when that person's duties require action with respect to the disposition of that case.

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code. Section (2) of Article 98 does not apply to errors made in good faith before, during, or after trial. It is designed to punish intentional failure to enforce or comply with the provisions of the code regulating the proceedings before, during, and after trial. Unlawful command influence under Article 37 may be prosecuted under this Article. See also Article 31 and R.C.M. 104.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment.

(1) Unnecessary delay in disposing of case. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Unnecessary delay in disposing of case.

In that (personal jurisdiction data), being charged with the duty of [(investigating) (taking immediate steps to determine the proper disposition of) charges preferred against , a person accused of an offense under the Uniform Code of Military Justice] [ ], was, (at/on board--location), on or about 19 , responsible for unnecessary delay in (investigating said charges) (determining the proper disposition of said charges) ( ), in that he/she (did) (failed to) ( ).

(2) Knowingly and intentionally failing to enforce or comply with provisions of the code.

In that (personal jurisdiction data), being charged with the duty of , did, (at/on board--location), on or about 19 , knowingly and intentionally fail to (enforce) (comply with) Article , Uniform Code of Military Justice, in that he/she .

23. Article 99-- Misbehavior before the enemy

a. Text

"Any member of the armed forces who before or in the presence of the enemy --

(1) runs away;

(2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;

(3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;

(4) casts away his arms or ammunition;

(5) is guilty of cowardly conduct;

(6) quits his place of duty to plunder or pillage;

(7) causes false alarms in any command, unit, or place under control of the armed forces;

(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or

(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle;

shall be punished by death or such other punishment as a court-martial may direct."

b. Elements.

(1) Running away.

(a) That the accused was before or in the presence of the enemy;

(b) That the accused misbehaved by running away; and

(c) That the accused intended to avoid actual or impending combat with the enemy by running away.

(2) Shamefully abandoning, surrendering, or delivering up command.

(a) That the accused was charged by orders or circumstances with the duty to defend a certain command, unit, place, ship, or military property;

(b) That, without justification, the accused shamefully abandoned, surrendered, or delivered up that command, unit, place, ship, or military property; and

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

(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 antiaircraft 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, 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; delivers up. "Surrenders" and "delivers 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. Lesser included offenses.

(1) Running away.

(a) Article 85 -- desertion with intent to avoid hazardous or important service

(b) Article 86 -- absence without authority; going from appointed place of duty

(c) Article 80 -- attempts

(2) Shamefully abandoning, surrendering, or delivering up command. Article 80 -- attempts

(3) Endangering safety of a command, unit, place, ship, or military property.

(a) Through disobedience of order. Article 92 -- failure to obey lawful order

(b) Article 80 -- attempts

(4) Casting away arms or ammunition.

(a) Article 108 -- military property of the United States -- loss, damage, destruction, or wrongful disposition

(b) Article 80 -- attempts

(5) Cowardly conduct.

(a) Article 85 -- desertion with intent to avoid hazardous duty or important service

(b) Article 86 -- absence without authority

(c) Article 99 -- running away

(d) Article 80 -- attempts

(6) Quitting place of duty to plunder or pillage.

(a) Article 86(2) -- going from appointed place of duty

(b) Article 80 -- attempts

(7) Causing false alarms. Article 80 -- attempts

(8) Willfully failing to do utmost to encounter enemy. Article 80 -- attempts

(9) Failing to afford relief and assistance. Article 80 -- attempts

e. Maximum punishment. All offenses under Article 99. Death or such other punishment as a court-martial may direct.

f. Sample specifications.

(1) Running away.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , (before) (in the presence of) the enemy, run away (from his/her company) (and hide) ( ), (and did not return until after the engagement had been concluded) ( ).

(2) Shamefully abandoning, surrendering, or delivering up command.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , (before) (in the presence of) the enemy, shamefully (abandon) (surrender) (deliver up) , which it was his/her duty to defend.

(3) Endangering safety of a command, unit, place, ship, or military property.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , (before) (in the presence of) the enemy, endanger the safety of , which it was his/her duty to defend, by (disobeying an order from to engage the enemy) (neglecting his/her duty as a sentinel by engaging in a card game while on his/her post) (intentional misconduct in that he/she became drunk and fired flares, thus revealing the location of his/her unit) ( ).

(4) Casting away arms or ammunition.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , (before) (in the presence of) the enemy, cast away his/her (rifle) (ammunition) ( ).

(5) Cowardly conduct.

In that (personal jurisdiction data), (at/on board--location), on or about 19 , (before) (in the presence of) the enemy, was guilty of cowardly conduct as a result of fear, in that .

(6) Quitting place of duty to plunder or pillage.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , (before) (in the presence of) the enemy, quit his/her place of duty for the purpose of (plundering) (pillaging) (plundering and pillaging).

(7) Causing false alarms.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , (before) (in the presence of) the enemy, cause a false alarm in (Fort) (the said ship) (the camp) ( ) by [needlessly and without authority (causing the call to arms to be sounded) (sounding the general alarm)] [ ].

(8) Willfully failing to do utmost to encounter enemy.

In that (personal jurisdiction data), being (before) (in the presence of) the enemy, did, (at/on board--location), on or about 19 , by, (ordering his/her troops to halt their advance) ( ), willfully fail to do his/her utmost to (encounter) (engage) (capture) (destroy), as it was his/her duty to do, (certain enemy troops which were in retreat) ( ).

(9) Failing to afford relief and assistance.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , (before) in the presence of) the enemy, fail to afford all practicable relief and assistance to (the USS , which was engaged in battle and had

run aground, in that he/she failed to take her in tow) (certain troops of the ground forces of , which were engaged in battle and were pinned down by enemy fire, in that he/she failed to furnish air cover) ( ) as he/she properly should have done.

24. Article 100 -- Subordinate compelling surrender

a. Text.

"Any person subject to this chapter who compels or attempts to compel the commander of any place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished by death or such other punishment as a court-martial may direct."

b. Elements.

(1) Compelling surrender.

(a) That a certain person was in command of a certain place, vessel, aircraft, or other military property or of a body of members of the armed forces;

(b) That the accused did an overt act which was intended to and did compel that commander to give it up to the enemy or abandon it, and

(c) That the place, vessel, aircraft, or other military property or body of members of the armed forces was actually given up to the enemy or abandoned.

(2) Attempting to compel surrender.

(a) That a certain person was in command of a certain place, vessel, aircraft, or other military property or of a body of members of the armed forces;

(b) That the accused did a certain overt act;

(c) That the act was done with the intent to compel that commander to give up to the enemy or abandon the place, vessel, aircraft, or other military property or body of members of the armed forces;

(d) That the act amounted to more than mere preparation; and

(e) That the act apparently tended to bring about the compelling of surrender or abandonment.

(3) Striking the colors or flag.

(a) That there was an offer of surrender to an enemy;

(b) That this offer was made by striking the colors or flag to the enemy or in some other manner;

(c) That the accused made or was responsible for the offer; and

(d) That the accused did not have proper authority to make the offer.

c. Explanation.

(1) Compelling surrender.

(a) Nature of offense. The offenses under this article are similar to mutiny or attempted mutiny designed to bring about surrender or abandonment. Unlike some cases of mutiny, however, concert of action is not an essential element of the offenses under this article. The offense is not complete until the place, military property, or command is actually abandoned or given up to the enemy.

(b) Surrender. "Surrender" and "to give it up to an enemy" are synonymous.

(c) Acts required. The surrender or abandonment must be compelled or attempted to be compelled by acts rather than words.

(2) Attempting to compel surrender. The offense of attempting to compel a surrender or abandonment does not require actual abandonment or surrender, but there must be some act done with this purpose in view, even if it does not accomplish the purpose.

(3) Striking the colors or flag.

(a) In general. To "strike the colors or flag" is to haul down the colors or flag in the face of the enemy or to make any other offer of surrender. It is traditional wording for an act of surrender.

(b) Nature of offense. The offense is committed when one assumes the authority to surrender a military force or position when not authorized to do so either by competent authority or by the necessities of battle. If continued battle has become fruitless and it is impossible to communicate with higher authority, those facts will constitute proper authority to surrender. The offense may be committed whenever there is sufficient contact with the enemy to give the opportunity of making an offer of surrender and it is not necessary that an engagement with the enemy be in progress. It is unnecessary to prove that the offer was received by the enemy or that it was rejected or accepted. The sending of an emissary charged with making the offer of surrender is an act sufficient to prove the offer, even though the emissary does not reach the enemy.

(4) Enemy. For a discussion of "enemy," see paragraph 23c(1)(b).

d. Lesser included offense. Striking the colors or flag. Article 80 -- attempts

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

f. Sample specifications.

(1) Compelling surrender or attempting to compel surrender.

In that (personal jurisdiction data), did, (at/on--board location), on or about 19 , (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), on or about 19 , without proper authority, offer to surrender to the enemy by [striking the (colors) (flag)] [ ].

25. Article 101 -- Improper use of countersign

a. Text.

"Any person subject to this chapter who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished by death or such other punishment as a court-martial may direct."

b. Elements.

(1) Disclosing the parole or countersign to one not entitled to receive it.

(a) That, in time of war, the accused disclosed the parole or countersign to a person, identified or unidentified; and

(b) That this person was not entitled to receive it.

(2) Giving a parole or countersign different from that authorized.

(a) That, in time of war, the accused knew that the accused was authorized and required to give a certain parole or countersign; and

(b) That the accused gave to a person entitled to receive and use this parole or countersign a different parole or countersign from that which the accused was authorized and required to give.

c. Explanation.

(1) Countersign. A countersign is a word, signal, or procedure given from the principal headquarters of a command to aid quards and sentinels in their scrutiny of persons who apply to pass the lines. It consists of a secret challenge and a password, signal, or procedure.

(2) Parole. A parole is a word used as a check on the countersign; it is given only to those who are entitled to inspect guards and to commanders of guards.

(3) Who may receive countersign. The class of persons entitled to receive the countersign or parole will expand and contract under the varying circumstances of war. Who these persons are will be determined largely, in any

particular case, by the general or special orders under which the accused was acting. Before disclosing such a word, a person subject to military law must determine at that person's peril that the recipient is a person authorized to receive it.

(4) Intent, motive, negligence, mistake, ignorance not defense. The accused's intent or motive in disclosing the countersign or parole is immaterial to the issue of guilt, as is the fact that the disclosure was negligent or inadvertent. It is no defense that the accused did not know that the person to whom the countersign or parole was given was not entitled to receive it.

(5) How accused received countersign or parole. It is immaterial whether the accused had received the countersign or parole in the regular course of duty or whether it was obtained in some other way.

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

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specifications.

(1) Disclosing the parole or countersign to one not entitled to receive it.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , a time of war, disclose the (parole) (countersign), to wit: , to , a person who was not entitled to receive it.

(2) Giving a parole or countersign different from that authorized.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , a time of war, give to , a person entitled to receive and use the (parole) (countersign), a (parole) (countersign), namely: which was different from that which, to his/her knowledge, he/she was authorized and required to give, to wit: .

26. Article 102 -- Forcing a safeguard

a. Text.

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

b. Elements.

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

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

(3) That the accused forced the safeguard.

c. Explanation.

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

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

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

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

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , force a safeguard, [known by him/her to have been placed over the premises occupied by at by (overwhelming the guard posted for the protection of the same) ( )] [ ].

27. Article 103 -- Captured or abandoned property

a. Text.

"(a) All persons subject to this chapter shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody, or control.

(b) Any person subject to this chapter who --

(1) fails to carry out the duties prescribed in subsection (a);

(2) buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he receives or expects any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or

(3) engages in looting or pillaging;

shall be punished as a court-martial may direct."

b. Elements.

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

(a) That certain public property was taken from the enemy;

(b) That this property was of a certain value; and

(c) That the accused failed to do what was reasonable under the circumstances to secure this property for the service of the United States.

(2) Failing to report and turn over captured or abandoned property.

(a) That certain captured or abandoned public or private property came into the possession, custody, or control of the accused;

(b) That this property was of a certain value; and

(c) That the accused failed to give notice of its receipt and failed to turn over to proper authority, 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 a certain value; and

(c) That by so doing the accused received or expected some profit, benefit, or advantage to the accused or to a certain person or persons connected directly or indirectly with the accused.

(4) Looting or pillaging.

(a) That the accused engaged in looting, pillaging, or looting and pillaging by unlawfully seizing or appropriating certain public or private property;

(b) That this property was located in enemy or occupied territory, or that it was on board a seized or captured vessel; and

(c) That this property was:

(i) left behind, owned by, or in the custody of the enemy, an occupied state, an inhabitant of an occupied state, or a person under the protection of the enemy or occupied state, or who, immediately prior to the occupation of the place where the act occurred, was under the protection of the enemy or occupied state; or

(ii) part of the equipment of a seized or captured vessel; or

(iii) owned by, or in the custody of the officers, crew, or passengers on board a seized or captured vessel.

c. Explanation.

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

(a) Nature of property. Unlike the remaining offenses under this article, failing to secure public property taken from the enemy involves only public property. Immediately upon its capture from the enemy, public property becomes the property of the United States. Neither the person who takes it nor any other person has any private right in this property.

(b) Nature of duty. Every person subject to military law has an immediate duty to take such steps as are reasonably within that person's power to secure public property for the service of the United States and to protect it from destruction or loss.

(2) Failing to report and turn over captured or abandoned property.

(a) Reports. Reports of receipt of captured or abandoned property are to be made directly or through such channels as are required by current regulations, orders, or the customs of the service.

(b) Proper authority. "Proper authority" is any authority competent to order disposition of the property in question.

(3) Dealing in captured or abandoned property. "Disposed of" includes destruction or abandonment.

(4) Looting or pillaging. "Looting or pillaging" means unlawfully seizing or appropriating property which is located in enemy or occupied territory.

(5) Enemy. For a discussion of "enemy," see paragraph 23c(1)(b).

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment.

(1) Failing to secure public property taken from the enemy; failing to secure, give notice and turn over, selling, or otherwise wrongfully dealing in or disposing of captured or abandoned property:

(a) of a value of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) of a value of more than $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) Looting or pillaging. Any punishment, other than death, that a court-martial may direct. See R.C.M. 1003.

f. Sample specifications.

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

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , fail to secure for the service of the United States certain public property taken from the enemy, to wit: , of a value of (about) $.

(2) Failing to report and turn over captured or abandoned property.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , fail to give notice and turn over to proper authority without delay certain (captured) (abandoned) property which had come into his/her (possession) (custody) (control), to wit: , of a value of (about) $.

(3) Dealing in captured or abandoned property.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , (buy) (sell) (trade) (deal in) (dispose of) ( ) certain (captured) (abandoned) property, to wit: , of a value of (about) $, thereby (receiving) (expecting) a (profit) (benefit) (advantage) to (himself/herself) (, his/her accomplice) (, his/her brother) ( ).

(4) Looting or pillaging.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , engage in (looting) (pillaging) (looting and pillaging) by unlawfully (seizing) (appropriating) , [property which had been left behind] [the property of , (an inhabitant of) ( )].

28. Article 104 -- Aiding the enemy

a. Text.

"Any person who --

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct."

b. Elements.

(1) Aiding the enemy.

(a) That the accused aided the enemy; and

(b) That the accused did so with certain arms, ammunition, supplies, money, or other things.

(2) Attempting to aid the enemy.

(a) That the accused did a certain overt act;

(b) That the act was done with the intent to aid the enemy with certain arms, ammunition, supplies, money, or other things;

(c) That the act amounted to more than mere preparation; and

(d) That the act apparently tended to bring about the offense of aiding the enemy with certain arms, ammunition, supplies, money, or other things.

(3) Harboring or protecting the enemy.

(a) That the accused, without proper authority, harbored or protected a person;

(b) That the person so harbored or protected was the enemy; and

(c) That the accused knew that the person so harbored or protected was an enemy.

(4) Giving intelligence to the enemy.

(a) That the accused, without proper authority, knowingly gave intelligence information to the enemy; and

(b) That the intelligence information was true, or implied the truth, at least in part.

(5) Communicating with the enemy.

(a) That the accused, without proper authority, communicated, corresponded, or held intercourse with the enemy, and;

(b) That the accused knew that the accused was communicating, corresponding, or holding intercourse with an enemy.

c. Explanation.

(1) Scope of Article 104. This article denounces offenses by all persons whether or not otherwise subject to military law. Offenders may be tried by court-martial or by military commission.

(2) Enemy. For a discussion of "enemy," see paragraph 23c(1)(b).

(3) Aiding or attempting to aid the enemy. It is not a violation of this article to furnish prisoners of war subsistence, quarters, and other comforts or aid to which they are lawfully entitled.

(4) Harboring or protecting the enemy.

(a) Nature of offense. An enemy is harbored or protected when, without proper authority, that enemy is shielded, either physically or by use of any artifice, aid, or representation from any injury or misfortune which in the chance of war may occur.

(b) Knowledge. Actual knowledge is required, but may be proved by circumstantial evidence.

(5) Giving intelligence to the enemy.

(a) Nature of offense. Giving intelligence to the enemy is a particular case of corresponding with the enemy made more serious by the fact that the communication contains intelligence that may be useful to the enemy for any of the many reasons that make information valuable to belligerents. This intelligence may be conveyed by direct or indirect means.

(b) Intelligence. "Intelligence" imports that the information conveyed is true or implies the truth, at least in part.

(c) Knowledge. Actual knowledge is required but may be proved by circumstantial evidence.

(6) Communicating with the enemy.

(a) Nature of the offense. No unauthorized communication, correspondence, or intercourse with the enemy is permissible. The intent, content, and method of the communication, correspondence, or intercourse are immaterial. No response or receipt by the enemy is required. The offense is complete the moment the communication, correspondence, or intercourse issues from the accused. The communication, correspondence, or intercourse may be conveyed directly or indirectly. A prisoner of war may violate this Article by engaging in unauthorized communications with the enemy. See also paragraph 29c(3).

(b) Knowledge. Actual knowledge is required but may be proved by circumstantial evidence.

(c) Citizens of neutral powers. Citizens of neutral powers resident in or visiting invaded or occupied territory can claim no immunity from the customary laws of war relating to communication with the enemy.

d. Lesser included offense. For harboring or protecting the enemy, giving intelligence to the enemy, or communicating with the enemy. Article 80 --attempts

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

f. Sample specifications.

(1) Aiding or attempting to aid the enemy.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , (attempt to) aid the enemy with (arms) (ammunition) (supplies) (money) ( ), by (furnishing and delivering to , members of the enemy's armed forces) ( ).

(2) Harboring or protecting the enemy.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , without proper authority, knowingly (harbor) (protect) , an enemy, by (concealing the said in his/her house) ( ).

(3) Giving intelligence to the enemy.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , without proper authority, knowingly give intelligence to the enemy, by (informing a patrol of the enemy's forces of the whereabouts of a military patrol of the United States forces) ( ).

(4) Communicating with the enemy.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , without proper authority, knowingly (communicate with) (correspond with) (hold intercourse with) the enemy [by writing and transmitting secretly through the lines to one , whom he/she, the said , knew to be (an officer of the enemy's armed forces) ( ) a communication in words and figures substantially as follows, to wit:)] [(indirectly by publishing in , a newspaper published at , a communication in words and figures as follows, to wit: , which communication was intended to reach the enemy)] [( )].

29. Article 105 --Misconduct as a prisoner

a. Text.

"Any person subject to this chapter who, while in the hands of the enemy in time of war --

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreats them without justifiable cause;

shall be punished as a court-martial may direct."

b. Elements.

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

(a) That without proper authority the accused acted in a manner contrary to law, custom, or regulation;

(b) That the act was committed while the accused was in the hands of the enemy in time of war;

(c) That the act was done for the purpose of securing favorable treatment of the accused by the captors; and

(d) That other prisoners held by the enemy, either military or civilian, suffered some detriment because of the accused's act.

(2) Maltreating prisoners while in a position of authority.

(a) That the accused maltreated a prisoner held by the enemy;

(b) That the act occurred while the accused was in the hands of the enemy in time of war;

(c) That the accused held a position of authority over the person maltreated; and

(d) That the act was without justifiable cause.

c. Explanation.

(1) Enemy. For a discussion of "enemy," see paragraph 23c(1)(b).

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

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

(a) Nature of offense. Unauthorized conduct by a prisoner of war must be intended to result in improvement by the enemy of the accused's condition and must operate to the detriment of other prisoners either by way of closer confinement, reduced rations, physical punishment, or other harm. Examples of this conduct include reporting plans or 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 prisoner while in a position of authority.

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

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

d. Lesser included offense. Article 80 --attempts

e. Maximum punishment. Any punishment other than death that a court-marital may direct. See R.C.M. 1003.

f. Sample specifications.

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

In that (personal jurisdiction data), while in the hands of the enemy, did, (at/on board--location) on or about 19 , a time of war, without proper authority and for the purpose of securing favorable treatment by his/her captors, (report to the commander of Camp the preparations by , a prisoner at said camp, to escape, as a result of which report the said was placed in solitary confinement) ( ).

(2) Maltreating prisoner while in a position of authority.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , a time of war, while in the hands of the enemy and in a position of authority over , a prisoner at , as (officer in charge of prisoners at) ( ), maltreat the said by (depriving him/her of) ( ), without justifiable cause.

30. Article 106 --Spies

a. Text.

"Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death."

b. Elements.

(1) That the accused was found in, about, or in and about a certain place, vessel, or aircraft within the control or jurisdiction of an armed force of the United States, or a shipyard, manufacturing or industrial plant, or other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere;

(2) That the accused was lurking, acting clandestinely or under false pretenses;

(3) That the accused was collecting or attempting to collect certain information;

(4) That the accused did so with the intent to convey this information to the enemy; and

(5) That this was done in time of war.

c. Explanation.

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

(2) Enemy. For a discussion of "enemy," see paragraph 23c(1)(b).

(3) Scope of offense. The words "any person" bring within the jurisdiction of general courts-martial and military commissions all persons of whatever nationality or status who commit spying.

(4) Nature of offense. A person can be a spy only when, acting clandestinely or under false pretenses, that person obtains or seeks to obtain information with the intent to convey it to a hostile party. It is not essential that the accused obtain the information sought or that it be communicated. The offense is complete with lurking or acting clandestinely or under false pretenses with intent to accomplish these objects.

(5) Intent. It is necessary to prove an intent to convey information to the enemy. This intent may be inferred from evidence of a deceptive insinuation of the accused among our forces, but evidence that the person had come within the lines for a comparatively innocent purpose, as to visit family or to reach friendly lines by assuming a disguise, is admissible to rebut this inference.

(6) Persons not included under "spying".

(a) Members of a military organization not wearing a disguise, dispatch drivers, whether 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 force to which the spy belongs, is later captured by the enemy incurs no responsibility for previous acts of espionage.

(c) A person living in occupied territory who, without lurking, or acting clandestinely or under false pretenses, merely reports what is seen or heard through agents to the enemy may be charged under Article 104 with giving intelligence to or communicating with the enemy, but may not be charged under this article as being a spy.

d. Lesser included offenses. None

e. Mandatory punishment. Death.

f. Sample specification.

In that (personal jurisdiction data), was, (at/on board--location), on or about 19 , 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.

31. Article 107 --False official statements

a. Text.

"Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct."

b. Elements.

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

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

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

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

c. Explanation.

(1) Official documents and statements. Official documents and official statements include all documents and statements made in the line of duty.

(2) Status of victim of the deception. The rank of any person intended to be deceived is immaterial if that person was authorized in the execution of a particular duty to require or receive the statement or document from the accused. The government may be the victim of this offense.

(3) Intent to deceive. The false representation must be made with the intent to deceive. It is not necessary that the false statement be material to the issue under inquiry. If, however, the falsity is in respect to a material matter, it may be considered as some evidence of the intent to deceive, while immateriality may tend to show an absence of this intent.

(4) Material gain. The expectation of material gain is not an element of this offense. Such expectation or lack of it, however, is circumstantial evidence bearing on the element of intent to deceive.

(5) Knowledge that the document or statement was false. The false representation must be one which the accused actually knew was false. Actual knowledge may be proved by circumstantial evidence. An honest, although erroneous, belief that a statement made is true, is a defense.

(6) Statements made during an interrogation.

(a) Person without an independent duty or obligation to speak. A statement made by an accused or suspect during an interrogation is not an official statment within the meaning of the article if that person did not have an independent duty or obligation to speak. But see paragraph 79 (false swearing).

(b) Person with an independent duty or obligation to speak. If a suspect or accused does have an independent duty or obligation to speak, as in the case of a custodian who is required to account for property, a statement made by that person during an interrogation into that matter is official. While the person could remain silent (Article 31(b)), if the person chooses to speak, the person must do so truthfully.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location), (subject-matter jurisdiction data, if required), on or about 19 , with intent to deceive, [sign an official (record) (return) ( ), to wit:] [make to , an official statement, to wit:], which (record) (return) (statement) ( ) was (totally false) (false in that), and was then known by the said to be so false.

32. Article 108 -- Military property of the United States -- sale, loss, damage, destruction, or wrongful disposition

a. Text.

"Any person subject to this chapter who, without proper authority --

(1) sells or otherwise disposes of;

(2) willfully or through neglect damages, destroys, or loses; or

(3) willfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of;

any military property of the United States, shall be punished as a court-martial may direct."

b. Elements.

(1) Selling or otherwise disposing of military property.

(a) That the accused sold or otherwise disposed of certain property (which was a firearm or explosive);

(b) That the sale or disposition was without proper authority;

(c) That the property was military property of the United States; and

(d) That the property was of a certain value.

(2) Damaging, destroying, or losing military property.

(a) That the accused, without proper authority, damaged or destroyed certain property in a certain way, or lost certain property;

(b) That the property was military property of the United States;

(c) That the damage, destruction, or loss was willfully caused by the accused or was the result of neglect by the accused; and

(d) That the property was of a certain value or the damage was of a certain amount.

(3) Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.

(a) That certain property (which was a firearm or explosive) was lost, damaged, destroyed, sold, or wrongfully disposed of;

(b) That the property was military property of the United States;

(c) That the loss, damage, destruction, sale, or wrongful disposition was suffered by the accused, without proper authority, through a certain omission of duty by the accused;

(d) That this omission was willfull 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 military departments of the United States. It is immaterial whether the property sold, disposed of, 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.

d. Lesser included offenses.

(1) Sale or disposition of military property. Article 80 --attempts

(2) Willfully damaging military property.

(a) Article 108 --damaging military property through neglect

(b) Article 80 --attempts

(3) Willfully suffering military property to be damaged.

(a) Article 108 --through neglect suffering military property to be damaged

(b) Article 80 --attempts

(4) Willfully destroying military property.

(a) Article 108 --through neglect destroying military property

(b) Article 108 --willfully damaging military property

(c) Article 108 --through neglect damaging military property

(d) Article 80 -- attempts

(5) Millfully suffering military property to be destroyed.

(a) Article 108 --through neglect suffering military property to be destroyed

(b) Article 108 --willfully suffering military property to be damaged

(c) Article 108 --through neglect suffering military property to be damaged

(d) Article 80 --attempts

(6) Willfully losing military property.

(a) Article 108 --through neglect, losing military property

(b) Article 80 --attempts

(7) Willfully suffering military property to be lost.

(a) Article 108 --through neglect, suffering military property to be lost

(b) Article 80 --attempts

(8) Willfully suffering military property to be sold.

(a) Article 108 --through neglect, suffering military property to be sold

(b) Article 80 --attempts

(9) Willfully suffering military property to be wrongfully disposed of.

(a) Article 108 --through neglect, suffering military property to be wrongfully disposed of in the manner alleged

(b) Article 80 --attempts

e. Maximum punishment.

(1) Selling or otherwise disposing of military property.

(a) Of a value of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) Of a value of more than $100.00 or of 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 of damage of $100.00 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 $100.00. 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 $100.00 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 $100.00, or of any firearm or explosive. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. Sample specifications.

(1) Selling or disposing of military property.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , 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 19 , 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 authority, (willfully) (through neglect) suffer , [(a firearm) (an explosive)] [of a value of (about) $] military property of the United States, to be (lost) (damaged by) (destroyed by) (sold to) (wrongfully disposed of by) [the amount of said damage being in the sum of (about) $].

33. Article 109. Property other than military property of the United States -- waste, spoilage, or destruction

a. Text.

"Any person subject to this chapter who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States shall be punished as a court-martial may direct."

b. Elements.

(1) Wasting or spoiling of non-military property.

(a) That the accused willfully or recklessly wasted or spoiled certain real property in a certain manner;

(b) That the property was that of another person; and

(c) That the property was of a certain value.

(2) Destroying or damaging non-military property.

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

(b) That the property was that of another person; and

(c) That the property was of a certain value or the damage was of a certain amount.

c. Explanation.

(1) Wasting or spoiling non-military property. This portion of Article 109 proscribes willful or reckless waste or spoliation of the real property of another. The terms "wastes" and "spoils" as used in this article refer to such wrongful acts of voluntary destruction of or permanent damage to real property as burning down buildings, burning piers, tearing down fences, or cutting down trees. This destruction is punishable whether done willfully, that is intentionally, or recklessly, that is through a culpable disregard of the foreseeable consequences of some voluntary act.

(2) Destroying or damaging non-military property. This portion of Article 109 proscribes the willful and wrongful destruction or damage of the personal property of another. To be destroyed, the property need not be completely demolished or annihilated, but must be sufficiently injured to be useless for its intended purpose. Damage consists

of any physical injury to the property. To constitute an offense under this section, the destruction or damage of the property must have been willful and wrongful. As used in this section "willfully" means intentionally and "wrongfully" means contrary to law, regulation, lawful order, or custom. Willfulness may be proved by circumstantial evidence, such as the manner in which the acts were done.

(3) Value and damage. In the case of destruction, the value of the property destroyed controls the maximum punishment which may be adjudged. In the case of damage, the amount of the damage controls. As a general rule, the amount of damage is the estimated or actual cost of repair by artisans employed in this work who are available to the community wherein the owner resides, or the replacement cost, whichever is less. See also paragraph 46c(1)(g).

d. Lesser included offense. Article 80 --attempts

e. Maximum punishment. Wasting, spoiling, destroying, or damaging any property other than military property of the United States of a value or damage.

(1) Of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) Of more than $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , [(willfully) (recklessly) waste] [(willfully) (recklessly) spoil] [willfully and wrongfully (destroy) (damage) by] , [of a value of (about) $] [the amount of said damage being in the sum of (about) $], the property of .

34. Article 110 --Improper hazarding of vessel

a. Text.

"(a) Any person subject to this chapter who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such other punishment as a court-martial may direct.

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

b. Elements.

(1) That a vessel of the armed forces was hazarded in a certain manner; and

(2) That the accused by certain acts or omissions, willfully and wrongfully, or negligently, caused or suffered the vessel to be hazarded.

c. Explanation.

(1) Hazard. "Hazard" means to put in danger of loss or injury. Actual damage to, or loss of, a vessel of the armed forces by collision, stranding, running upon a shoal or a rock, or by any other cause, is conclusive evidence that the vessel was hazarded but not of the fact of culpability on the part of any particular person. "Stranded" means run aground so that the vessel is fast for a time. If the vessel "touches goes," she is not stranded; if she "touches and sticks," she is. A shoal is a sand, mud, or gravel bank or bar that makes the water shallow.

(2) Willfully and wrongfully. As used in this article, "willfully" means intentionally and "wrongfully" means contrary to law, regulation, lawful order, or custom.

(3) Negligence. "Negligence" as used in this article means the failure to exercise the care, prudence, or attention to duties, which the interests of the government require a prudent and reasonable person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something which such a person would not have done under the circumstances. No person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or order. However, a mere error in judgment that a reasonably able person might have committed under the same circumstances does not constitute an offense under this article.

(4) Suffer. "To suffer" means to allow or permit. A ship is willfully suffered to be hazarded by one who, although not in direct control of the vessel, knows a danger to be imminent but takes no steps to prevent it, as by a plotting officer of a ship under way who fails to report to the officer of the deck a radar target which is observed to be on a collision course with, and dangerously close to, the ship. A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a foreseeable danger.

d. Lesser included offenses.

(1) Willfully and wrongfully hazarding a vessel.

(a) Article 110 --negligently hazarding a vessel

(b) Article 80 --attempts

(2) Willfully and wrongfully suffering a vessel to be hazarded.

(a) Article 110 --negligently suffering a vessel to be hazarded

(b) Article 80 --attempts

e. Maximum punishment. Hazarding or suffering to be hazarded any vessel of the armed forces:

(1) Willfully and wrongfully. Death or such other punishment as a court-martial may direct.

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

f. Sample specifications.

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

In that (personal jurisdiction data), did, on 19 , while serving as aboard the in the vicinity of , willfully and wrongfully (hazard the said vessel) (suffer the said vessel to be hazarded) by (causing the said vessel to collide with) (allowing the said vessel to run aground) ( ).

(2) Hazarding of vessel, negligently.

(a) Example 1.

In that (personal jurisdiction data), on 19 , while serving in command of the , making entrance to (Boston Harbor), did negligently hazard the said vessel by failing and neglecting to maintain or cause to be maintained an accurate running plot of the true position of said vessel while making said approach, as a result of which neglect the said , at or about , hours on the day aforesaid, became stranded in the vicinity of (Channel Buoy Number Three).

(b) Example 2.

In that (personal jurisdiction data), on 19 , while serving as navigator of the , cruising on special service in the ocean off the coast of , notwithstanding the fact that at about midnight, 19 , the northeast point of Island bore abeam and was about six miles distant, the said ship being then under way and making a speed of about ten knots, and well knowing the position of the said ship at the time stated, and that the charts of the locality were unreliable and the currents thereabouts uncertain, did then and there negligently hazard the said vessel by failing and neglecting to exercise proper care and attention in navigating said ship while approaching Island, in that he/she neglected and failed to lay a course that would carry said ship clear of the last aforesaid island, and to change the course in due time to avoid disaster; and the said ship, as a result of said negligence on the part of said , ran upon a rock off the southwest coast of Island, at about hours, , 19 , in consequence of which the said was lost.

(c) Example 3.

In that (personal jurisdiction data), on 19 , while serving as navigator of the and well knowing that at about sunset of said day the said ship had nearly run her estimated distance from the position, obtained and plotted by him/her, to the position of , and well knowing the difficulty of sighting from a safe distance after sunset, did then and there negligently hazard the said vessel by failing and neglecting to advise his/her commanding officer to lay a safe course for said ship to the northward before continuing on a westerly course, as it was the duty of said to do; in consequence of which the said ship was, at about hours on the day above mentioned, run upon bank in the sea, about latitude degrees, minutes, north, and longitude $? degrees, minutes west, and seriously injured.

(3) Suffering a vessel to be hazarded, negligently.

In that (personal jurisdiction data), while serving as combat intelligence center officer on board the , making passage from Boston to Philadelphia, and having, between and hours on , 19 , been duly informed of decreasing radar ranges and constant radar bearing indicating that the said was upon a collision course approaching a radar target, did then and there negligently suffer the said vessel to be hazarded by failing and neglecting to report said collision course with said radar target to the officer of the deck, as it was his/her duty to do, and he/she, the said , through said negligence, did cause the said to collide with the at or about hours on said date, with resultant damage to both vessels.

35. Article 111 -- Drunken or reckless driving

a. Text.

"Any person subject to this chapter who operates any vehicle while drunk, or in a reckless or wanton manner, shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused was operating a vehicle; and

(2) That the accused was drunk while operating the vehicle; or that the accused operated the vehicle in a reckless or wanton manner.

[Note: If injury resulted add the following element]

(3) That the accused thereby caused the vehicle to injure a person.

c. Explanation.

(1) Vehicle. See 1 U.S.C. § 4. Drunken or reckless operation of water and air transportation may be alleged under other articles of the code, as appropriate.

(2) Operating. Operating a vehicle includes not only driving or guiding it while in motion, either in person or through the agency of another, but also the setting of its motive power in action or the manipulation of its controls so as to cause the particular vehicle to move.

(3) Drunk. "Drunk" means any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties. Whether the drunkeness was caused by liquor or drugs is immaterial.

(4) Reckless. The operation of a vehicle 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 of the vehicle 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 driving with such a high degree of negligence that if death were caused, the accused would have committed involuntary manslaughter, at least. The condition of the surface on which the vehicle is operated, the time of day or night, the traffic, and the condition of the vehicle 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.

(5) Wanton. "Wanton" includes "reckless," but in describing the operation of a vehicle, it may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(6) Separate offenses. While the same course of conduct may constitute both drunken and reckless driving, this article proscribes these as separate offenses, and both offenses may be charged. However, as recklessness is a relative matter, evidence of all the surrounding circumstances which made the operation dangerous, whether alleged or not, may be admissible. Thus, on a charge of reckless driving, evidence of drunkenness might be admissible as establishing one aspect of the recklessness, and evidence that the vehicle exceeded a safe speed, at a relevant prior point and time, might be admissible as corroborating other evidence of the specific recklessness charged. Similarly, on a charge of drunken driving, relevant evidence of recklessness might have probative value as corroborating other proof of drunkenness.

d. Lesser included offenses. Drunken driving.

(1) Article 112 -- drunk on duty

(2) Article 134 -- drunk on station

e. Maximum punishment.

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

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

f. Sample specification.

In that (personal jurisdiction data), did (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , (in the motor pool area) (near the Officer's Club) (on Street between and Avenues) ( ) operate a vehicle, to wit: (a truck) (a passenger car) ( ), [while drunk] [in a (reckless) (wanton) manner by (attempting to pass another vehicle on a sharp curve) (driving at a speed in excess of 50 miles per hour on the sidewalk and wrong side of said street) ( )] (and did thereby cause said vehicle to (strike and) injure).

36. Article 112 -- Drunk on duty

a. Text.

"Any person subject to this chapter other than a sentinel or look-out, who is found drunk on duty, shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused was on a certain duty; and

(2) That the accused was found drunk while on this duty.

c. Explanation.

(1) Drunk. See paragraph 35c(3).

(2) Duty. "Duty" as used in this article means military duty. Every duty which an officer or enlisted person may legally be required by superior authority to execute is necessarily a military duty. Within the meaning of this article, when in the actual exercise of command, the commander of a post, or of a command, or of a detachment in the field is constantly on duty, as is the commanding officer on board a ship. In the case of other officers or enlisted persons, "on duty" relates to duties of routine or detail, in garrison, at a station, or in the field, and does not relate to those periods when, no duty being required of them by orders or regulations, officers and enlisted persons occupy the status of leisure known as "off duty" or "on liberty." In a region of active hostilities, the circumstances are often such that all members of a command may properly be considered as being continuously on duty within the meaning of this article. So also, an officer of the day and members of the guard, or of the watch, are on duty during their entire tour within the meaning of this article.

(3) Nature of offense. It is necessary that the accused be found drunk while actually on the duty alleged, and the fact the accused became drunk before going on duty, although material in extenuation, does not affect the question of guilt. If, however, the accused does not undertake the responsibility or enter upon the duty at all, the accused's conduct does not fall within the terms of this article, nor does that of a person who absents himself or herself from duty and is found drunk while so absent. Included within the article is drunkenness while on duty of an anticipatory nature such as that of an aircraft crew ordered to stand by for flight duty, or of an enlisted person ordered to stand by for guard duty.

(4) Defenses. If the accused is known by superior authorities to be drunk at the time a duty is assigned, and the accused is thereafter allowed to assume that duty anyway, or if the drunkenness resulted from an accidental overdosage administered for medicinal purposes, the accused will have a defense to this offense. But see paragraph 76 (incapacitation for duty).

d. Lesser included offense. Article 134 -- drunk on station

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

f. Sample specification.

In that (personal jurisdiction data), was, (at/on board--location), on or about 19 , found drunk while on duty as .

37. Article 112a -- Wrongful use, possession, etc., of controlled substances

a. Text.

"(a) Any person subject to this chapter who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces a substance described in subsection (b) shall be punished as a court-martial may direct.

(b) The substances referred to in subsection (a) are the following:

(1) opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, 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.

n(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 (possessio() (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 (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, use, distribution, introduction, or manufacture of a controlled substance is not wrongful if such act or acts are: (A) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession); (B) done by authorized personnel in the performance of medical duties; or (C) without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

(6) Intent to distribute. Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference of intent to distribute are: possession of a quantity of substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the substance may tend to negate an inference of intent to distribute.

(7) Certain amount. When a specific amount of a controlled substance is believed to have been possessed, distributed, introduced, or manufactured by an accused, the specific amount should ordinarily be alleged in the specification. It is not necessary to allege a specific amount, however, and a specification is sufficient if it alleges that an accused possessed, distributed, introduced, or manufactured "some," "traces of," or "an unknown quantity of" a controlled substance.

(8) Missile launch facility. A "missile launch facility" includes the place from which missiles are fired and launch control facilities from which the launch of a missile is initiated or controlled after launch.

(9) Customs territory of the United States. "Customs territory of the United States" includes only the States, the District of Columbia, and Puerto Rico.

d. Lesser included offenses.

(1) Wrongful possession of controlled substance. Article 80 -- attempts

(2) Wrongful use of controlled substance.

(a) Article 112a -- wrongful possession of controlled substance

(b) Article 80 -- attempts

(3) Wrongful distribution of controlled substance. Article 80 -- attempts

(4) Wrongful manufacture of controlled substance.

(a) Article 112a -- wrongful possession of controlled substance

(b) Article 80 -- attempts

(5) Wrongful introduction of controlled substance.

(a) Article 112a -- wrongful possession of controlled substance

(b) Article 80 -- attempts

(6) Wrongful possession, manufacture, or introduction of a controlled substance with intent to distribute.

(a) Article 112a -- wrongful possession, manufacture, or introduction of controlled substance

(b) Article 80 -- attempts

(7) Wrongful importation or exportation of a controlled substance. Article 80 -- attempts

e. Maximum punishments.

(1) Wrongful use, possession, manufacture, or introduction of controlled substance.

(a) Amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamine, opium, phencyclidine, secobarbital, and schedule I, II, and 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 paragraph 37 is committed: while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; while receiving special pay under 37 U.S.C. § 310; or in time of war, the maximum period of confinement authorized for such offense shall be increased by 5 years.

f. Sample specifications.

(1) Wrongful possession, manufacture, or distribution of controlled substance.

In that (personal jurisdiction data) did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about , 19 , 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 , 19 , wrongfully use [a schedule ( ) controlled substance] [while on duty as a sentinel or lookout] [while (on board a vessel/aircraft) (in or at a missile launch facility) used by the armed forces or under the control of the armed forces, to wit:] [while receiving special pay under 37 U.S.C. § 310] [during time of war].

(3) Wrongful introduction of controlled substance.

In that (personal jurisdiction data) did, (at/on board--location) on or about , 19 , wrongfully introduce (grams) (ounces) (pounds) ( ) of [a schedule ( ) controlled substance] onto a vessel, aircraft, vehicle, or installation used by the armed forces or under control of the armed forces, to wit: [with the intent to distribute the said controlled substance] [while on duty as a sentinel or lookout] [while receiving special pay under 37 U.S.C. § 310] [during a time of war].

(4) Wrongful importation or exportation of controlled substance.

In that (personal jurisdiction data) did, (at/on board -- location) on or about , 19 , wrongfully (import) (export) (grams) (ounces) (pounds) ( ) of [a schedule ( ) controlled substance] (into the customs territory of) (from) the United States [while on board a vessel/aircraft used by the armed forces or under the control of the armed forces, to wit:] [during time of war].

38. Article 113 -- Misbehavior of sentinel or lookout

a. Text.

"Any sentinel or look-out who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct."

b. Elements.

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

(2) That the accused was found drunk while on post, was found sleeping while on post, or left post before being regularly relieved.

[NOTE: If the offense was committed in time of war or while the accused was receiving special pay under 37 U.S.C. § 310, add the following element]

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

c. Explanation.

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

(2) Post. "Post" is the area where the sentinel or lookout is required to be for the performance of duties. It is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary for the proper performance of the duties for which the sentinel or lookout was posted. The offense of leaving post is not committed when a sentinel or lookout goes an immaterial distance from the post, unless it is such a distance that the ability to fully perform the duty for which posted is impaired.

(3) On post. A sentinel or lookout becomes "on post" after having been given a lawful order to go "on post" as a sentinel or lookout and being formally or informally posted. The fact that a sentinel or lookout is not posted in the regular way is not a defense. It is sufficient, for example, if the sentinel or lookout has taken the post in accordance with proper instruction, whether or not formally given. A sentinel or lookout is on post within the meaning of the article not only when at a post physically defined, as is ordinarily the case in garrison or aboard ship, but also, for example, when stationed in observation against the approach of an enemy, or detailed to use any equipment designed to locate friend, foe, or possible danger, or at a designated place to maintain internal discipline, or to guard stores, or to guard prisoners while in confinement or at work.

(4) Sentinel or lookout. A sentinel or a lookout is a person whose duties include the requirement to maintain constant alertness, be vigilant, and remain awake, in order to observe for the possible approach of the enemy, or to guard persons, property, or a place and to sound the alert, if necessary.

(5) Drunk. For an explanation of "drunk," see paragraph 35c(3).

(6) Sleeping. As used in this article, "sleeping" is that condition of insentience which is sufficient sensibly to impair the full exercise of the mental and physical faculties of a sentinel or lookout. It is not necessary to show that the accused was in a wholly comatose condition. The fact that the accused's sleeping resulted from a physical incapacity caused by disease or accident is an affirmative defense. See R.C.M. 916(i).

d. Lesser included offenses.

(1) Drunk on post.

(a) Article 112 -- drunk on duty

(b) Article 92 -- dereliction of duty

(c) Article 134 -- drunk on station

(d) Article 134 -- drunk in uniform in a public place

(2) Sleeping on post.

(a) Article 92 -- dereliction of duty

(b) Article 134 -- loitering or wrongfully sitting down on post

(3) Leaving post.

(a) Article 92 -- dereliction of duty

(b) Article 86 -- going from appointed place of duty

e. Maximum punishment.

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

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

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

f. Sample specification.

In that (personal jurisdiction data), on or about (a time of war) (at/on board--location), (while receiving special pay under 37 U.S.C. § 310), being (posted) (on post) as a (sentinel) (lookout) at (warehouse no. 7) (post no. 11) (for radar observation) ( ) [was found (drunk) (sleeping) upon his/her post] [did leave his/her post before he/she was regularly relieved].

39. Article 114 -- Dueling

a. Text.

"Any person subject to this chapter who fights or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct."

b. Elements.

(1) Dueling.

(a) That the accused fought another person with deadly weapons;

(b) That the combat was for private reasons; and

(c) That the combat was by prior agreement.

(2) Promoting a duel.

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

(b) That the accused did so in a certain manner.

(3) Conniving at fighting a duel.

(a) That certain persons intended to and were about to engage in a duel;

(b) That the accused had knowledge of the planned duel; and

(c) That the accused connived at the fighting of the duel in a certain manner.

(4) Failure to report a duel.

(a) That a challenge to fight a duel had been sent or was about to be sent;

(b) That the accused had knowledge of this challenge; and

(c) That the accused failed to report this fact promptly to proper authority.

c. Explanation.

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

(2) Promoting a duel. Urging or taunting another to challenge or to accept a challenge to duel, acting as a second or as carrier of a challenge or acceptance, or otherwise furthering or contributing to the fighting of a duel are examples of promoting a duel.

(3) Conniving at fighting a duel. Anyone who has knowledge that steps are being taken or have been taken toward arranging or fighting a duel and who fails to take reasonable preventive action thereby connives at the fighting of a duel.

d. Lesser included offense.

Article 80 -- attempts

e. Maximum punishment. For all Article 114 offenses: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specifications.

(1) Dueling.

In that (personal jurisdiction data) (and), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , fight a duel (with), using as weapons therefor (pistols) (swords) ( ).

(2) Promoting a duel.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter) jurisdiction data, if required), on or about 19 , promote a duel between and by (telling said he/she would be a coward if he/she failed to challenge said to a duel) (knowingly carrying from said to said a challenge to fight a duel).

(3) Conniving at fighting a duel.

In that (personal jurisdiction data), having knowledge that and were about to engage in a duel, did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , connive at the fighting of said duel by (failing to take reasonable preventive action) ( ).

(4) Failure to report a duel.

In that (personal jurisdiction data), having knowledge that a challenge to fight a duel (had been sent) (was about to be sent) by to , did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , fail to report that fact promptly to the proper authority.

40. Article 115 -- Malingering

a. Text.

"Any person subject to this chapter who for the purpose of avoiding work, duty, or service --

(1) feigns illness, physical disablement, mental lapse or derangement; or

(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused was assigned to, or was aware of prospective assignment to, or availability for, the performance of work, duty, or service;

(2) That the accused feigned illness, physical disablement, mental lapse or derangement, or intentionally inflicted injury upon himself or herself; and

(3) That the accused's purpose or intent in doing so was to avoid the work, duty, or service.

[NOTE: If the offense was committed in time of war or in a hostile fire pay zone, add the following element]

(4) That the offense was committed (in time of war) (in a hostile fire pay zone).

c. Explanation.

(1) Nature of offense. The essence of this offense is the design to avoid performance of any work, duty, or service which may properly or normally be expected of one in the military service. Whether to avoid all duty, or only a particular job, it is the purpose to shirk which characterizes this offense. Hence, the nature or permanency of a self-inflicted injury is not material on the question of guilt, nor is the seriousness of a physical or mental disability which is a sham. Evidence of the extent of the self-inflicted injury or feigned disability may, however, be relevant as a factor indicating the presence or absence of the purpose.

(2) How injury inflicted. The injury may be inflicted by nonviolent as well as by violent means and may be accomplished by any act or omission which produces, prolongs, or aggravates any sickness or disability. Thus, voluntary starvation which results in debility is a self-inflicted injury and when done for the purpose of avoiding work, duty, or service constitutes a violation of this article.

d. Lesser included offenses.

(1) Article 134 --self-injury without intent to avoid service

(2) Article 80 -- attempts

e. Maximum punishment.

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

(2) Feigning illness, physical disablement, mental lapse, or derangement in a hostile fire pay zone or in time of war. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(3) Intentional self-inflicted injury. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(4) Intentional self-inflicted injury in a hostile fire pay zone or in time of war. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location) (in a hostile fire pay zone) (subject-matter jurisdiction data, if required) (on or about 19) (from about 19 to about 19), (a time of war) for the purpose of avoiding (his/her duty as officer of the day) (his/her duty as aircraft mechanic) (work in the mess hall) (service as an enlisted person) ( ) [feign (a headache) (a sore back) (illness) (mental lapse) (mental derangement) ( )] [intentionally injure himself/herself by].

41. Article 116 -- Riot or breach of peace

a. Text.

"Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct."

b. Elements.

(1) Riot.

(a) That the accused was a member of an assembly of three or more persons;

(b) That the accused and at least two other members of this group mutually intended to assist one another against anyone who might oppose them in doing an act for some private purpose;

(c) That the group or some of its members, in furtherance of such purpose, unlawfully committed a tumultuous disturbance of the peace in a violent or turbulent manner; and

(d) That these acts terrorized the public in general in that they caused or were intended to cause public alarm or terror.

(2) Breach of the peace.

(a) That the accused caused or participated in a certain act of a violent or turbulent nature; and

(b) That the peace was thereby unlawfully disturbed.

c. Explanation.

(1) Riot. "Riot" is a tumultuous disturbance of the peace by three or more persons assembled together in furtherance of a common purpose to execute some enterprise of a private nature by concerted action against

anyone who might oppose them, committed in such a violent and turbulent manner as to cause or be calculated to cause public terror. The gravamen of the offense of riot is terrorization of the public. It is immaterial whether the act intended was lawful. Furthermore, it is not necessary that the common purpose be determined before the assembly. It is sufficient if the assembly begins to execute in a tumultuous manner a common purpose formed after it assembled.

(2) Breach of the peace. A "breach of the peace" is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. The acts or conduct contemplated by this article are those which disturb the public tranquillity or impinge upon the peace and good order to which the community is entitled. Engaging in an affray and unlawful discharge of firearms in a public street are examples of conduct which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace by the speaker. A speaker may also be guilty of causing a breach of the peace if the speaker uses language which can reasonably be expected to produce a violent or turbulent response and a breach of the peace results. The fact that the words are true or used under provocation is not a defense, nor is tumultuous conduct excusable because incited by others.

(3) Community and public. "Community" and "public" include a military organization, post, camp, ship, aircraft, or station.

d. Lesser included offenses.

(1) Riot.

(a) Article 116 -- breach of the peace

(b) Article 134 -- disorderly conduct

(c) Article 80 -- attempts

(2) Breach of the peace.

(a) Article 134 -- disorderly conduct

(b) Article 80 -- attempts

e. Maximum punishment.

(1) Riot. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) Breach of the peace. Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

f. Sample specifications.

(1) Riot.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , (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 19 , (cause) (participate in) a breach of the peace by [wrongfully engaging in a fist fight in the dayroom with] [using the following provoking language (toward), to wit: " ," or words to that effect] [wrongfully shouting and singing in a public place, to wit:] [ ].

42. Article 117 -- Provoking speeches or gestures

a. Text.

"Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused wrongfully used words or gestures toward a certain person;

(2) That the words or gestures used were provoking or reproachful; and

(3) That the person toward whom the words or gestures were used was a person subject to the code;

c. Explanation.

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

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

d. Lesser included offenses.

(1) Article 134 -- indecent language

(2) Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully use (provoking) (reproachful) (words, to wit: " ." or words to that effect) (and) (gestures, to wit:) towards (Sergeant , U.S. Air Force) ( ).

43. Article 118 -- Murder

a. Text.

"Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he --

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct."

b. Elements.

(1) Premeditated murder.

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had a premeditated design to kill.

(2) Intent to kill or inflict great bodily harm.

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused had the intent to kill or inflict great bodily harm upon a person.

(3) Act inherently dangerous to others.

(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 others and showed a wanton disregard for human life;

(d) That the accused knew that death or great bodily harm was a probable consequence of the act; and

(e) That the killing was unlawful.

(4) During certain offenses.

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That, at the time of the killing, the accused was engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.

c. Explanation.

(1) In general. Killing a human being is unlawful when done without justification or excuse. See R.C.M. 916. Whether an unlawful killing constitutes murder or a lesser offense depends upon the circumstances. The offense is committed at the place of the act or omission although the victim may have died elsewhere. Whether death occurs at the time of the accused's act or omission, or at some time thereafter, it must have followed from an injury received by the victim which resulted from the act or omission.

(2) Premeditated murder.

(a) Premeditation. A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances.

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

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

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

(a) Intent. An unlawful killing without premeditation is also murder when the accused had either an intent to kill or inflict great bodily harm. It may be inferred that a person intends the natural and probable consequences of an act purposely done. Hence, if a person does an intentional act likely to result in death or great bodily injury, it may be inferred that death or great bodily injury was intended. The intent need not be directed toward the person killed, or exist for any particular time before commission of the act, or have previously existed at all. It is sufficient that it existed at the time of the act or omission (except if death is inflicted in the heat of sudden passion caused by adequate provocation -- see paragraph 44). For example, a person committing housebreaking who strikes and kills the householder attempting to prevent flight can be guilty of murder even if the householder was not seen until the moment before striking the fatal blow.

(b) Great bodily harm. "Great bodily harm" means serious injury; it does not include minor injuries such as a black eye or a bloody nose, but it does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries. It is synonomous 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 others -- 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 others in jest or flying an aircraft very low over a crowd to make it scatter.

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

(5) During certain offenses.

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

(b) Separate offenses. The perpetration or attempted perpetration of the burglary, sodomy, rape, robbery, or aggravated arson may be charged separately from the homicide.

d. Lesser included offenses.

(1) Premeditated murder and murder during certain offenses. Article 118(2) and (3) -- murder

(2) All murders under Article 118.

(a) Article 119 -- voluntary or involuntary manslaughter.

(b) Article 128 -- assault; assault consummated by a battery; aggravated assault

(c) Article 134 -- assault with intent to commit murder

(d) Article 134 -- assault with intent to commit voluntary manslaughter

(e) Article 134 -- negligent homicide

(3) Murder as defined in Article 118(1), (2), and (4).

Article 80 -- attempts

e. Maximum punishment.

(1) Article 118(1) or (4) -- death. Mandatory minimum -- imprisonment for life.

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , [with premeditation] [while (perpetrating) (attempting to perpetrate)] murder by means of (shooting him/her with a rifle) ( ).

44. Article 119 -- Manslaughter

a. Text.

"(a) Any person subject to this chapter who, with an intent to kill or inflict great bodily harm, unlawfully kills a human being in the heat of sudden passion caused by adequate provocation is guilty of voluntary manslaughter and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who, without an intent to kill or inflict great bodily harm, unlawfully kills a human being --

(1) by culpable negligence; or

(2) while perpetrating or attempting to perpetrate an offense, other than those named in clause (4) of section 918 of this title (article 118), directly affecting the person;

is guilty of involuntary 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.

(2) Involuntary manslaughter.

(a) That a certain named or described person is dead;

(b) That the death resulted from the act or omission of the accused;

(c) That the killing was unlawful; and

(d) That this act or omission of the accused constituted culpable negligence, or occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, sodomy, rape, robbery, or aggravated arson.

c. Explanation.

(1) Voluntary manslaughter.

(a) Nature of offense. An unlawful killing, although done with an intent to kill or inflict great bodily harm, is not murder but voluntary manslaughter if committed in the heat of sudden passion caused by adequate provocation. Heat of passion may result from fear or rage. A person may be provoked to such an extent that in the heat of sudden passion caused by the provocation, although not in necessary defense of life or to prevent bodily harm, a fatal blow may be struck before self-control has returned. Although adequate provocation does not excuse the homicide, it does preclude conviction of murder.

(b) Nature of provocation. The provocation must be adequate to excite uncontrollable passion in a reasonable person, and the act of killing must be committed under and because of the passion. However, the provocation must not be sought or induced as an excuse for killing or doing harm. If, judged by the standard of a reasonable person, sufficient cooling time elapses between the provocation and the killing, the offense is murder, even if the accused's passion persists. Examples of acts which may, depending on the circumstances, constitute adequate provocation

are the unlawful infliction of great bodily harm, unlawful imprisonment, and the sight by one spouse of an act of adultery committed by the other spouse. Insulting or abusive words or gestures, a slight blow with the hand or fist, and trespass or other injury to property are not, standing alone, adequate provocation.

(2) Involuntary manslaughter.

(a) Culpable negligence.

(i) Nature of culpable negligence. Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. Thus, the basis of a charge of involuntary manslaughter may be a negligent act or omission which, when viewed in the light of human experience, might foreseeably result in the death of another, even though death would not necessarily be a natural and probable consequence of the act or omission. Acts which may amount to culpable negligence include negligently conducting target practice so that the bullets go in the direction of an inhabited house within range; pointing a pistol in jest at another and pulling the trigger, believing, but without taking reasonable precautions to ascertain, that it would not be dangerous; and carelessly leaving poisons or dangerous drugs where they may endanger life.

(ii) Legal duty required. When there is no legal duty to act there can be no neglect. Thus, when a stranger makes no effort to save a drowning person, or a person allows a beggar to freeze or starve to death, no crime is committed.

(b) Offense directly affecting the person. An "offense directly affecting the person" means one affecting some particular person as distinguished from an offense affecting society in general. Among offenses directly affecting the person are the various types of assault, battery, false imprisonment, voluntary engagement in an affray, and maiming.

d. Lesser included offenses.

(1) Voluntary manslaughter.

(a) Article 119 -- involuntary manslaughter

(b) Article 128 -- assault; assault consummated by a battery; aggravated assault

(c) Article 134 -- assault with intent to commit voluntary manslaughter

(d) Article 134 -- negligent homicide

(e) Article 80 -- attempts

(2) Involuntary manslaughter.

(a) Article 128 -- assault; assault consummated by a battery

(b) Article 134 -- negligent homicide

e. Maximum punishment.

(1) Voluntary manslaughter. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(2) Involuntary manslaughter. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. Sample specifications.

(1) Voluntary manslaughter.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , willfully and unlawfully kill by him/her (in) (on) the with a .

(2) Involuntary manslaughter.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , [by culpable negligence] [while (perpetrating) (attempting to perpetrate) an offense directly affecting the person of , to wit: (maiming) (a battery) ( )] unlawfully kill by him/her (in) (on) the with a .

45. Article 120 -- Rape and carnal knowledge

a. Text.

"(a) Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

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

b. Elements.

(1) Rape.

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

(b) That the female was not the accused's wife; and

(c) That the act of sexual intercourse was done by force and without her consent.

(2) Carnal knowledge.

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

(b) That the female was not the accused's wife; and

(c) That at the time of the sexual intercourse the female was under 16 years of age.

c. Explanation.

(1) Rape.

(a) Nature of offense. Rape is sexual intercourse by a person with a female not his wife, by force and without her consent. It may be committed on a female of any age. Any penetration, however slight, is sufficient to complete the offense.

(b) Force and lack of consent. Force and lack of consent are necessary to the offense. Thus, if the female consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a woman in possession of her mental and physical faculties fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the female is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a woman gave her consent, or whether she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the woman is of unsound mind or unconscious to an extent rendering her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that she is incapable of understanding the nature of the act is not consent.

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

(2) Carnal knowledge. "Carnal knowledge" is sexual intercourse under circumstances not amounting to rape, with a female who is not the accused's wife and who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense. It is not defense that the accused is ignorant or misinformed as to the true age of the female, or that she was of prior unchaste character; it is the fact of the girl's age and not his knowledge or belief which fixes his criminal responsibility. Evidence of these matters should, however, be considered in determining an appropriate sentence.

d. Lesser included offenses.

(1) Rape.

(a) Article 128 -- assault; assault consummated by a battery

(b) Article 134 -- assault with intent to commit rape

(c) Article 134 -- indecent assault

(d) Article 80 -- attempts

(2) Carnal knowledge.

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

(b) Article 80 -- attempts

e. Maximum punishment.

(1) Rape. Death or such other punishment as a court-martial may direct.

(2) Carnal knowledge. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

f. Sample specifications.

(1) Rape.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , rape .

(2) Carnal knowledge.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , commit the offense of carnal knowledge with .

46. Article 121 -- Larceny and wrongful appropriation

a. Text.

"(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind --

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of 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.

(2) Wrongful appropriation.

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent temporarily to deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.

c. Explanation.

(1) Larceny.

(a) In general. A wrongful taking with intent permanently to deprive includes the common law offense of larceny; a wrongful obtaining with intent permanently to defraud includes the offense formerly known as obtaining by false pretense; and a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement. Any of the various types of larceny under Article 121 may be charged and proved under a specification alleging that the accused "did steal" the property in question.

(b) Taking, obtaining, or withholding. There must be a taking, obtaining, or withholding of the property by the thief. For instance, there is no taking if the property is connected to a building by a chain and the property has not been disconnected from the building; property is not "obtained" by merely acquiring title thereto without exercising some possessory control over it. As a general rule, however, any movement of the property or any exercise of dominion over it is sufficient if accompanied by the requisite intent. Thus, if an accused enticed another's horse into the accused's stable without touching the animal, or procured a railroad company to deliver another's trunk by changing the check on it, or obtained the delivery of another's goods to a person or place designated by the accused, or had the funds of another transferred to the accused's bank account, the accused is guilty of larceny if the other

elements of the offense have been proved. A person may "obtain" the property of another by acquiring possession without title, and one who already has possession of the property of another may "obtain" it by later acquiring title to it. A "withholding" may arise as a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due, even if the owner has made no demand for the property, or it may arise as a result of devoting property to a use not authorized by its owner. Generally, this is so whether the person withholding the property acquired it lawfully or unlawfully. See subparagraph c(1)(f) below. However, acts which constitute the offense of unlawfully receiving, buying, or concealing stolen property or of being an accessory after the fact are not included within the meaning of "withholds." Therefore, neither a receiver of stolen property nor an accessory after the fact can be convicted of larceny on that basis alone. The taking, obtaining, or witholding 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 that person presently intends to perform a certain act in the future is a false representation of an existing fact -- the intention -- and thus a false pretense. Although the pretense need not be the sole cause inducing the owner to part with the property, it must be an effective and intentional cause of the obtaining. A false representation made after the property was obtained will not result in a violation of Article 121. A larceny is committed when a person obtains the property of another by false pretense and with intent to steal, even though the owner neither intended nor was requested to part with title to the property. Thus, a person who gets another's watch by pretending that it will be borrowed briefly and then returned, but two really intends to sell it, is guilty of larceny.

(f) Intent.

(i) In general. The offense of larceny requires that the taking, obtaining, or withholding by the thief be accompanied by an intent permanently to deprive or defraud another of the use and benefit of property or permanently to appropriate the property to the thief's own use or the use of any person other than the owner. These intents are collectively called an intent to steal. Although a person gets property by a taking or obtaining which was not wrongful or which was without a concurrent intent to steal, a larceny is nevertheless committed if an intent to steal is formed after the taking or obtaining and the property is wrongfully withheld with that intent. For example, if a person rents another's vehicle, later decides to keep it permanently, and then either fails to return it at the appointed time or uses it for a purpose not authorized by the terms of the rental, larceny has been committed, even though at the time the vehicle was rented, the person intended to return it after using it according to the agreement.

(ii) Inference of intent. An intent to steal may be proved by circumstantial evidence. Thus, if a person secretly takes property, hides it, and denies knowing anything about it, an intent to steal may be inferred; if the property was taken openly and returned, this would tend to negate such an intent. Proof of sale of the property may show an intent to steal, and, therefore, evidence of such a sale may be introduced to support a charge of larceny. An intent to steal may be inferred from a wrongful and intentional dealing with the property of another in a manner likely to cause that person to suffer a permanent loss thereof.

(iii) Special situations.

(A) Motive does not negate intent. The accused's purpose in taking an item ordinarily is irrelevant to the accused's guilt as long as the accused had the intent required under subparagraph c(1)(f)(i) above. For example, if the

accused wrongfully took property as a "joke" or "to teach the owner a lesson" this would not be a defense, although if the accused intended to return the property, the accused would be guilty of wrongful appropriation, not larceny. When a person takes property intending only to return it to its lawful owner, as when stolen, property is taken from a thief in order to return it to its owner, larceny or wrongful appropriation is not committed.

(B) Intent to pay for a replace property not a defense. An intent to pay for or replace the stolen property is not a defense, even if that intent existed at the time of the theft. If, however, the accused takes money or a negotiable instrument having no special value above its face value, with the intent to return an equivalent amount of money, the offense of larceny is not committed although wrongful appropriation may be.

(C) Return of property not a defense. Once a larceny is committed, a return of the property or payment for it is no defense. See subparagraph c(2) below when the taking, obtaining, or withholding is with the intent to return.

(g) Value.

(i) In general. Value is a question of fact to be determined on the basis of all of the evidence admitted.

(ii) Government property. When the stolen property is an item issued or procured from Government sources, the price listed in an official publication for that property at the time of the theft is admissible as evidence of its value. See Mil. R. Evid. 803(17). However, the stolen item must be shown to have been, at the time of the theft, in the condition upon which the value indicated in the official price list is based. The price listed in the official publication is not conclusive as to the value of the item, and other evidence may be admitted on the question of its condition and value.

(iii) Other property. As a general rule, the value of other stolen property is its legitimate market value at the time and place of the theft. If this property, because of its character or the place where it was stolen, had no legitimate market value at the time and place of the theft or if that value cannot readily be ascertained, its value may be determined by its legitimate market value in the United States at the time of the theft, or by its replacement cost at that time, whichever is less. Market value may be established by proof of the recent purchase price paid for the article in the legitimate market involved or by testimony or other admissible evidence from any person who is familiar through training or experience with the market value in question. The owner of the property may testify as to its market value if familiar with its quality and condition. The fact that the owner is not an expert on 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 $100.00, the court-martial may find a value of more than $100.00. Writings representing value may be considered to have the value -- even though contingent -- which they represented at the time of the theft.

(iv) Limited interest in property. If an owner of property or someone acting in the owner's behalf steals it from a person who has a superior, but limited, interest in the property, such as a lien, the value for punishment purposes shall be that of the limited interest.

(h) Miscellaneous considerations.

(i) Lost property. A taking or withholding of lost property by the finder is larceny if accompanied by an intent to steal and if a clue to the identity of the general or special owner, or through which such identity may be traced, is furnished by the character, location, or marking of the property, or by other circumstances.

(ii) Multiple article larceny. When a larceny of several articles is committed at substantially the same time and place, it is a single larceny even though the articles belong to different persons. Thus, if a thief steals a suitcase containing the property of several persons or goes into a room and takes property belonging to various persons, there is but one larceny, which should be alleged in but one specification.

(iii) Special kinds of property which may also be the subject of larceny. Included in property which may be the subject of larceny is property which is taken, obtained, or withheld by severing it from real estate and writings which represent value such as commercial paper.

(iv) Services. Theft of services may not be charged under this paragraph, but see paragraph 78.

(v) Mail. As to larceny of mail, see also paragraph 93.

(2) Wrongful appropriation.

(a) In general. Wrongful appropriation requires an intent to temporarily -- as opposed to permanently -- deprive the owner of the use and benefit of, or appropriate to the use of another, the property wrongfully taken, withheld, or obtained. In all other respects wrongful appropriation and larceny are identical.

(b) Examples. Wrongful appropriation includes: taking another's automobile without permission or lawful authority with intent to drive it a short distance and then return it or cause it to be returned to the owner; obtaining a service weapon by falsely pretending to be about to go on guard duty with intent to use it on a hunting trip and later return it; and while driving a government vehicle on a mission to deliver supplies, withholding the vehicle from government service by deviating from the assigned route without authority, to visit a friend in a nearby town and later restore the vehicle to its lawful use. An inadvertent exercise of control over the property of another will not result in wrongful appropriation. For example, a person who fails to return a borrowed boat at the time agreed upon because the boat inadvertently went aground is not guilty of this offense.

d. Lesser included offenses.

(1) Larceny.

(a) Article 121 -- wrongful appropriation

(b) Article 80 -- attempts

(2) Wrongful appropriation. Article 80 -- attempts

e. Maximum punishment.

(1) Larceny.

(a) Of a value of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) Of a value of more than $100.00 or any motor vehicle, aircraft, vessel, firearm, or explosive. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) Wrongful appropriation.

(a) Of a value of $100.00 or less. Confinement for 3 months, and forfeiture of two-thirds pay per month for 3 months.

(b) Of a value of more than $100.00. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(c) Of any motor vehicle, aircraft, vessel, firearm, or explosive. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. Sample specifications.

(1) Larceny.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , steal , 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 19 , wrongfully appropriate , or a value of (about) $, the property of .

47. Article 122 -- Robbery

a. Text.

"Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is quilty of robbery and shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;

(2) That the taking was against the will of that person;

(3) That the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the property of a relative, family member, or anyone accompanying the person at the time of the robbery;

(4) That the property belonged to a person named or described;

(5) That the property was of a certain or of some value; and

(6) That the taking of the property by the accused was with the intent permanently to deprive the person robbed of the use and benefit of the property.

[Note: if the robbery was committed with a firearm, add the following element]

(7) That the means of force or violence or of putting the person in fear was a firearm.

c. Explanation.

(1) Taking in the presence of the victim. It is not necessary that the property taken be located within any certain distance of the victim. If persons enter a house and force the owner by threats to disclose the hiding place of valuables in an adjoining room, and, leaving the owner tied, go into that room and steal the valuables, they have committed robbery.

(2) Force or violence. For a robbery to be committed by force or violence, there must be actual force or violence to the person, preceding or accompanying the taking against the person's will, and it is immaterial that there is no fear engendered in the victim. Any amount of force is enough to constitute robbery if the force overcomes the actual resistance of the person robbed, puts the person in such a position that no resistance is made, or suffices to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. The offense is not robbery if an article is merely snatched from the hand of another or a pocket is picked by stealth, no other force is used, and the owner is not put in fear. But if resistance is overcome in snatching the article, there is sufficient violence, as when an earring is torn from a person's ear. There is sufficient violence when a person's attention is diverted by being jostled by a confederate of a pickpocket, who is thus enabled to steal the person's watch, even though the person had no knowledge of the act; or when a person is knocked insensible and that person's pockets rifled; or when a guard steals property from the person of a prisoner in the guard's charge after handcuffing the prisoner on the pretext of preventing escape.

(3) Fear. For a robbery to be committed by putting the victim in fear, there need be no actual force or violence, but there must be a demonstration of force or menace by which the victim is placed in such fear that the victim is warranted in making no resistance. The fear must be a reasonable apprehension of present or future injury, and the taking must occur while the apprehension exists. The injury apprehended may be death or bodily injury to the person or to a relative or family member, or to anyone in the person's company at the time, or it may be the

destruction of the person's habitation or other property or that of a relative or family member of anyone in the person's company at the time of sufficient gravity to warrant giving up the property demanded by the assailant.

(4) Larceny by taking. Robbery includes "taking with intent to steal"; hence, a larceny by taking is an integral part of a charge of robbery and must be proved at the trial. See paragraph 46c(1).

(5) Multiple-victim robberies. Robberies of different persons at the same time and place are separate offenses and each such robbery should be alleged in a separate specification.

d. Lesser included offenses.

(1) Article 121 -- larceny

(2) Article 121 -- wrongful appropriation

(3) Article 128 -- assault; assault consummated by a battery

(4) Article 128 -- assault with a dangerous weapon

(5) Article 128 -- assault intentionally inflicting grievous bodily harm

(6) Article 134 -- assault with intent to rob

(7) Article 80 -- attempts

[Note: More than one lesser included offense may be found in an appropriate case because robbery is a compound offense. For example, a person may be found not guilty of robbery but guilty of wrongful appropriation and assault.]

e. Maximum punishment.

(1) When committed with a firearm. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(2) Other cases. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , by means of (force) (violence) (force and violence) (and) (putting him/her in fear) (with a firearm) steal from the (person) (presence) of , against his/her will, (a watch) ( ) of a value of (about) $, the property of .

48. Article 123 -- Forgery

a. Text.

"Any person subject to this chapter who, with intent to defraud --

(1) falsely makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or

(2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered;

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

b. Elements.

(1) Forgery -- making or altering.

(a) That the accused falsely made or altered a certain signature or writing;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice; and

(c) That the false making or altering was with the intent to defraud.

(2) Forgery -- uttering.

(a) That a certain signature or writing was falsely made or altered;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice;

(c) That the accused uttered, offered, issued, or transferred the signature or writing;

(d) That at such time the accused knew that the signature or writing had been falsely made or altered; and

(e) That the uttering, offering, issuing or transferring was with 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. See, however, paragraph 49. Likewise, if a person makes a false signature of another to an instrument, but adds the word "by" with that person's own signature thus indicating authority to sign,

the offense is not forgery even if no such authority exists. False recitals of fact in a genuine document, as an aircraft flight report which is "padded" by the one preparing it, do not make the writing a forgery. But see paragraph 31 concerning false official statements.

(3) Signatures. Signing the name of another to an instrument having apparent legal efficacy without authority and with intent to defraud is forgery as the signature is falsely made. The distinction is that in this case the falsely made signature purports to be the act of one other than the actual signer. Likewise, a forgery may be committed by a person signing that person's own name to an instrument. For example, when a check payable to the order of a certain person comes into the hands of another of the same name, forgery is committed if, knowing the check to be another's, that person indorses it with that person's own name intending to defraud. Forgery may also be committed by signing a fictitious name, as when Roe makes a check payable to Roe and signs it with a fictitious name -- Doe -- as drawer.

(4) Nature of writing. The writing must be one which would, if genuine, apparently impose a legal liability on another, as a check or promissory note, or change that person's legal rights or liabilities to that person's prejudice, as a receipt. Some other instruments which may be the subject of forgery are orders for the delivery of money or goods, railroad tickets, and military orders directing travel. A writing falsely "made" includes an instrument that may be partially or entirely printed, engraved, written with a pencil, or made by photography or other device. A writing may be falsely "made" by materially altering an existing writing, by filling in a paper signed in blank, or by signing an instrument already written. With respect to the apparent legal efficacy of the writing falsely made or altered, the writing must appear either on its face or from extrinsic facts to impose a legal liability on another, or to change a legal right or liability 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 paragraph 49c(14). The intent to defraud need not be directed toward anyone in particular nor be for the advantage of the offender. It is immaterial that nobody was actually defrauded, or that no further step was made toward carrying out the intent to defraud other than the false making or altering of a writing.

(6) Alteration. The alteration must effect a material change in the legal tenor of the writing. Thus, an alteration which apparently increases, diminishes, or discharges any obligation is material. Examples of material alterations in the case of a promissory note are changing the date, amount, or place of payment. If a genuine writing has been delivered to the accused and while in the accused's possession is later found to be altered it may be inferred that the writing was altered by the accused.

(7) Uttering. See paragraph 49c(4).

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specifications.

(1) Forgery -- making or altering.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , 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].

(2) Forgery -- uttering

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , 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].

49. Article 123a -- Making, drawing, or uttering check, draft, or order without sufficient funds

a. Text.

"Any person subject to this chapter who --

(1) for the procurement of any article or thing of value, with intent to defraud; or

(2) for the payment of any past due obligation, or for any other purpose, with intent to deceive;

makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment, shall be punished as a court-martial may direct. The making, drawing, uttering, or delivering by a maker or drawer of a check draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or

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* [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.]

* [Note: see the note following (1), above]

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, 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 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.

(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 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 contact 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 of 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 make 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 the 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 provisions of this article with respect to establishing prima facie evidence of knowledge and intent by proof of notice and nonpayment within 5 days is a statutory rule of evidence. The failure of an accused who is a maker or drawer to pay the holder the amount due within 5 days after receiving either oral or written notice from the holder of a check, draft, or order, or from any other person having knowledge that such check, draft, or order was returned unpaid because of insufficient funds, is prima facie evidence (a) that the accused had the intent to defraud or deceive as alleged; and (b) that the accused knew at the time the accused made, drew, uttered, or delivered the check, draft, or order that the accused did not have or would not have sufficient funds in, or credit with, the bank or other depository for the payment of such check, draft, or order upon its presentment for payment. Prima facie evidence is that evidence from which the accused's intent to defraud or deceive and the accused's knowledge of insufficient funds in or credit with the bank or other depository may be inferred, depending on all the circumstances. The failure to give notice referred to in the article, or payment by the accused, maker, or drawer to the holder of the amount due within 5 days after such notice has been given, precludes the prosecution from using the statutory rule of evidence but does not preclude conviction of this offense if all the elements are otherwise proved.

(18) Affirmative defense. Honest mistake is an affirmative defense to offenses under this article. See R.C.M. 916(j).

d. Lesser included offenses.

(1) Article 134 -- making, drawing, uttering or delivering a check, draft, or order, and thereafter wrongfully and dishonorably failing to maintain sufficient funds

(2) Article 80 -- attempts

e. Maximum punishment.

(1) For the procurement of any article or thing of value, with intent to defraud, in the face amount of:

(a) $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) More than $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) For the payment of any past due obligation, or for any other purpose, with intent to deceive. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. Sample specifications.

(1) For the procurement of any article or thing of value, with intent to defraud.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , 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 19 , with intent to deceive and (for the payment of a past due obligation, to wit:) (for the purpose of) wrongfully and unlawfully [(make) (draw)] [(utter) (deliver) to ,] a certain (check) (draft) (money order) for the payment of money upon (Bank) (depository), in words and figures as follows, to wit: , then knowing that (he/she) ( ), the (maker) (drawer) thereof, did not or would not have sufficient funds in or credit with such (bank) (depository) for the payment of the said (check) (draft) (order) in full upon its presentment.

50. Article 124 -- Maiming

a. Text.

"Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which --

(1) seriously disfigures his person by any mutilation thereof;

(2) destroys or disables any member of 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 of 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 he 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 there is infliction of an injury of the type specified in this article. Infliction of the type of injuries specified in this article upon the person of another may support an inference of the intent to injure, disfigure, or disable.

(4) Defenses. If the injury is done under circumstances which would justify or excuse homicide, the offense of maiming is not committed. See R.C.M. 916.

d. Lesser included offenses.

(1) Article 128 -- assault; assault consummated by a battery

(2) Article 128 -- assault with a dangerous weapon

(3) Article 128 -- assault intentionally inflicting grievous bodily harm

(4) Article 80 -- attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , maim by (crushing his/her foot with a sledge hammer) ( ).

51. Article 125 -- Sodomy

a. Text.

"(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

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

b. Elements.

(a) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

[Note: add either or both of the following elements, if applicable]

(b) That the act was done with a child under the age of 16

(c) That the act was done by force and without the consent of the other person.

c. Explanation. It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person or of an animal; or to place that person's sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.

d. Lesser included offenses.

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

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

(b) Article 134 -- indecent acts with a child under 16

(c) Article 80 -- attempts

(2) Forcible sodomy.

(a) Article 125 -- sodomy (and offenses included therein; see subparagraph (3) below)

(b) Article 134 -- assault with intent to commit sodomy

(c) Article 134 -- indecent assault

(d) Article 80 -- attempts

(3) Sodomy.

(a) Article 134 -- indecent acts with another

(b) Article 80 -- attempts

e. Maximum punishment.

(1) By force and without consent. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(2) With a child under the age of 16 years. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) Other cases. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , commit sodomy with (a child under the age of 16 years) (by force and without the consent of the said).

52. Article 126 -- Arson

a. Text.

"(a) Any person subject to this chapter who willfully and maliciously burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of aggravated arson and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who willfully and maliciously burns or sets fire to the property of another, except as provided in subsection (a), is guilty of simple arson and shall be punished as a court-martial may direct."

b. Elements.

(1) Aggravated arson.

(a) Inhabited dwelling.

(i) That the accused burned or set on fire an inhabited dwelling;

(ii) That this dwelling belonged to a certain person and was of a certain value; and

(iii) That the act was willful and malicious.

(b) Structure.

(i) That the accused burned or set on fire a certain structure;

(ii) That the act was willful and malicious;

(iii) That there was a human being in the structure at the time;

(iv) That the accused knew that there was human being in the structure at the time; and

(v) That this structure belonged to a certain person and was of a certain value.

(2) Simple arson.

(a) That the accused burned or set fire to certain property of another;

(b) That the property was of a certain value; and

(c) That the act was willful and malicious.

c. Explanation.

(1) In general. In aggravated arson, danger to human life is the essential element; in simple arson, it is injury to the property of another. In either case, it is immaterial that no one is, in fact, injured. It must be shown that the accused set the fire willfully and maliciously, that is, not merely by negligence or accident.

(2) Aggravated arson.

(a) Inhabited dwelling. An inhabited dwelling includes the outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not an inhabited dwelling unless occupied as such, nor is a house that has never been occupied or which has been temporarily abandoned. A person may be guilty of aggravated arson of that 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 inferred that the offender had this knowledge when the nature of the structure -- as a department store or theater during hours of

business, or other circumstances -- are shown to have been such that a reasonable person would have known that a human being was inside at the time.

(c) Damage to property. It is not necessary that the dwelling or structure be consumed or materially injured; it is enough if fire is actually communicated to any part thereof. Any actual burning or charring is sufficient, but a mere scorching or discoloration by heat is not.

(d) Value and ownership of property. For the offense of aggravated arson, the value and ownership of the dwelling or other structure are immaterial, but should ordinarily be alleged and proved to permit the finding in an appropriate case of the included offense of simple arson.

(3) Simple arson. "Simple arson" is the willful and malicious burning or setting fire to the property of another under circumstances not amounting to aggravated arson. The offense includes burning or setting fire to real or personal property of someone other than the offender. See also paragraph 67 (Burning with intent to defraud).

d. Lesser included offenses.

(1) Aggravated arson.

(a) Article 126 -- simple arson

(b) Article 80 -- attempts

e. Maximum punishment.

(1) Aggravated arson. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(2) Simple arson, where the property is --

(a) Of a value of $100.00 or less. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(b) Of a value of more than $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Aggravated arson.

(a) Inhabited dwelling.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , willfully and maliciously (burn) (set on fire) an inhabited dwelling, to wit: (the residence of) (, the property of) of a value of (about) $.

(b) Structure.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , willfully and maliciously (burn) (set on fire), knowing that a human being was therein at the time, (the Post Theater) (, the property of), of a value of (about) $.

(2) Simple arson.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , willfully and maliciously (burn) (set fire to) (an automobile) ( ), the property of , of a value of (about) $.

53. Article 127 -- Extortion

a. Text.

"Any person subject to this chapter who communicates threats to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused communicated a certain threat to another; and

(2) That the accused intended to unlawfully obtain something of value, or any acquittance, advantage, or immunity.

c. Explanation.

(1) In general. Extortion is complete upon communication of the threat with the requisite intent. The actual or probable success of the extortion need not be proved.

(2) Threat. A threat may be communicated by any means but must be received by the intended victim. The threat may be: a threat to do any unlawful injury to the person or property of the person threatened or to any member of that person's family or any other person held dear to that person; a threat to accuse the person threatened, or any member of that person's family or any other person held dear to that person, of any crime; a threat to expose or impute any deformity or disgrace to the person threatened or to any member of that person's family or any other person held dear to that person; a threat to expose any secret affecting the person threatened or any member of that person's family or any other person held dear to that person; or a threat to do any other harm.

(3) Acquittance. An "acquittance" is a release or discharge from an obligation.

(4) Advantage or immunity. Unless it is clear from the circumstances, the advantage or immunity sought should be described in the specification. An intent to make a person do an act against that person's will is not, by itself, sufficient to constitute extortion.

d. Lesser included offenses.

(1) Article 134 -- communicating a threat

(2) Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , with intent unlawfully to obtain (something of value) (an acquittance) (an advantage, to wit) (an immunity, to wit), communicate to a threat to (here describe the threat).

54. Article 128 -- Assault

a. Text.

"(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who --

(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon; is guilty of aggravated assault and shall be punished as a court-martial may direct."

b. Elements.

(1) Simple assault.

(a) That the accused attempted or offered to do bodily harm to a certain person; and

(b) That the attempt or offer was done with unlawful force or violence.

(2) Assault consummated by a battery.

(a) That the accused did bodily harm to a certain person; and

(b) That the bodily harm was done with unlawful force or violence.

(3) Assaults permitting increased punishment based on status of victim.

(a) Assault upon a commissioned, warrant, noncommissioned, or petty officer.

(i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;

(ii) That the attempt, offer, or bodily harm was done with unlawful force or violence;

(iii) That the person was a commissioned, warrant, noncommissioned, or petty officer; and

(iv) That the accused then knew that the person was a commissioned, warrant, noncommissioned, or petty officer.

(b) Assault upon a sentinel or lookout in the execution of duty, or upon a person in the execution of law enforcement duties.

(i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;

(ii) That the attempt, offer, or bodily harm was done with unlawful force or violence;

(iii) That the person was a sentinel or lookout in the execution of duty or was a person who then had and was in the execution of security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties; and

(iv) That the accused then knew that the person was a sentinel or lookout in the execution of duty or was a person who then had and was in the execution of security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties.

(c) Assault consummated by a battery upon a child under 16 years.

(i) That the accused did bodily harm to a certain person;

(ii) That the bodily harm was done with unlawful force or violence; and

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

(4) Aggravated assault.

(a) Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.

(i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;

(ii) That the accused did so with a certain weapon, means, or force;

(iii) That the attempt, offer, or bodily harm was done with unlawful force or violence; and

(iv) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

[Note: when a loaded firearm was used, add the following element]

(v) That the weapon was a loaded firearm.

(b) Assault in which grievous bodily harm is intentionally inflicted.

(i) That the accused assaulted a certain person;

(ii) That grievous bodily harm was thereby inflicted upon such person;

(iii) That the grievous bodily harm was done with unlawful force or violence; and

(iv) That the accused, at the time, had the specific intent to inflict grievous bodily harm.

[Note: when a loaded firearm was used, add the following element]

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

c. Explanation.

(1) Simple assault.

(a) Definition of assault. An "assault" is an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. It must be done without legal justification or excuse and without the lawful consent of the person affected. "Bodily harm" means any offensive touching of another, however, slight.

(b) Difference between "attempt" and "offer" type assaults.

(i) Attempt type assault. An "attempt" type assault requires a specific intent to inflict bodily harm, and an over 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 first 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 struct, Doe has committed both an offer and an attempt type assault.

(D) If Doe swings at Roe's head simply to frighten Roe, not intending to hit Roe, and Roe does not see the blow and is not placed in fear, then no assault of any type has been committed.

(c) Situations not amounting to assault.

(i) Mere preparation. Preparation not amounting to an overt act, such as picking up a stone without any attempt or offer to throw it, does not constitute an assault.

(ii) Threatening words. The use of threatening words alone does not constitute an assault. However, if the threatening words are accompanied by a menacing act or gesture, there may be an assault, since the combination constitutes a demonstration of violence.

(iii) Circumstances negating intent to harm. If the circumstances known to the person menaced clearly negate an intent to do bodily harm there is no assault. Thus, if a person accompanies an apparent attempt to strike another by an unequivocal announcement in some form of an intention not to strike there is no assault. For example, if Doe raises a stick and shakes it at Roe within striking distance saying, "If you weren't an old man, I would knock you down," Doe has committed no assault. However, an offer to inflict bodily injury upon another instantly if that person does not comply with a demand which the assailant has no lawful right to make is an assault. Thus, if Doe points a pistol at Roe and says, "If you don't hand over your watch, I will shoot you," Doe has committed an assault upon Roe. See also paragraph 47 (robbery) of this part.

(d) Situations not constituting defenses to assault.

(i) Assault attempt fails. It is not a defense to a charge of assault that for some reason unknow to the assailant, an assault attempt was bound to fail. Thus, if a person loads a rifle with what is believed to be a good cartridge and, pointing it at another, pulls the trigger, that person may be guilty of assault although the cartridge was defective and did not fire. Likewise, if a person in a house shoots through the roof at a place where a policeman is believed to be, that person may be guilty of assault even though the policeman is at another place on the roof.

(ii) Retreating victim. An assault is complete if there is a demonstration of violence and an apparent ability to inflict bodily injury causing the person at whom it was directed to reasonably apprehend that unless the person retreats bodily harm will be inflicted. This is true even though the victim retreated and was never within actual striking distance of the assailant. There must, however, be an apparent present ability to inflict the injury. Thus, to aim a pistol at a person at such a distance that it clearly could not injure would not be an assault.

(2) Battery.

(a) In general. A "battery" is an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm.

(b) Application of force. The force applied in a battery may have been directly or indirectly applied. Thus, a battery can be committed by inflicting bodily injury on a person through striking the horse on which the person is mounted causing the horse to throw the person, as well as by striking the person directly.

(c) Examples of battery. It may be a battery to spit on another, push a third person against another, set a dog at another which bites the person, cut another's clothes while the person is wearing them though without touching or

intending to touch the person, shoot a person, cause a person to take poison, or drive an automobile into a person. A person who, although excused in using force, uses more force than is required, commits a battery. Throwing an object into a crowd may be a battery on anyone whom the object hits.

(d) Situations not constituting battery. If bodily harm is inflicted unintentionally and without culpable negligence, there is no battery. It is also not a battery to touch another to attract the other's attention or to prevent injury.

(3) Assaults permitting increased punishment based on status of victim.

(a) Assault upon a commissioned, warrant, noncommissioned, or petty officer. The maximum punishment is increased when assault is committed upon a commissioned officer of the armed forces of the United States, or of a friendly foreign power, or upon a warrant, noncommissioned, or petty officer of the armed forces of the United States. Knowledge of the status of the victim is an essential element of the offense and may be proved by circumstantial evidence. It is not necessary that the victim be superior in rank or command to the accused, that the victim be in the same armed force, or that the victim be in the execution of office at the time of the assault.

(b) Assault upon a sentinel or lookout in the execution of duty, or upon a person in the execution of law enforcement duties. The maximum punishment is increased when assault is committed upon a sentinel or lookout in the execution of duty or upon a person who was then performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties. Knowledge of the status of the victim is an essential element of this offense and may be proved by circumstantial evidence. See paragraph 38c(4) for the definition of "sentinel or lookout."

(c) Assault consummated by a battery upon a child under 16 years of age. The maximum punishment is increased when assault consummated by a battery is committed upon a child under 16 years of age. Knowledge that the person assaulted was under 16 years of age is not an element of this offense.

(4) Aggravated assault.

(a) Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.

(i) Dangerous weapon. A weapon is dangerous when used in a manner likely to produce death or grievous bodily harm.

(ii) Other means or force. The phrase "other means or force" may include any means or instrumentality not normally considered a weapon. When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be inferred that the means or force is "likely" to produce that result. The use to which a certain kind of instrument is ordinarily put is irrelevant to the question of its method of employment in a particular case. Thus, a bottle, beer glass, a rock, a bunk adaptor, a piece of pipe, a piece of wood, boiling water, drugs, or a rifle butt may be used in a manner likely to inflict death or grievous bodily harm. On the other hand, an unloaded pistol, when presented as a firearm and not as a bludgeon, is not a dangerous weapon or a means or force likely to produce grievous bodily harm, whether or not the assailant knew it was unloaded.

(iii) Grievous bodily harm. "Grievous bodily harm" means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

(iv) Death or injury not required. It is not necessary that death or grievous bodily harm be actually inflicted to prove assault with a dangerous weapon or means likely to produce grievous bodily harm.

(b) Assault in which grievous bodily harm is intentionally inflicted.

(i) In general. It must be proved that the accused specifically intended to and did inflict grievous bodily harm. Culpable negligence will not suffice.

(ii) Proving intent. Specific intent may be proved by circumstantial evidence. When grievous bodily harm has been inflicted by means of intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended. On the other hand, that inference might not be drawn if a person struck another with a fist in a sidewalk fight even if the victim fell so that the victim's head hit the curbstone and a skull fracture resulted. It is possible, however, to commit this kind of aggravated assault with the fists, as when the victim is held by one of several assailants while the others beat the victim with their fists and break a nose, jaw, or rib.

(iii) Grievous bodily harm. See subparagraph (4)(a)(iii).

d. Lesser included offenses.

(1) Simple assault. None

(2) Assault consummated by a battery. Article 128 -- simple assault

(3) Assault upon a commissioned, warrant, noncommissioned, or petty officer. Article 128 -- simple assault; assault consummated by a battery

(4) Assault upon a sentinel or lookout in the execution of duty, or upon a person in the execution of police duties. Article 128 -- simple assault; assault consummated by a battery

(5) Assault consummated by a battery upon a child under 16 years. Article 128 -- simple assault; assault consummated by a battery

(6) Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm. Article 128 -- simple assault; assault consummated by a battery

(7) Assault in which grievous bodily harm is intentionally inflicted. Article 128 -- assault with a dangerous weapon; simple assault; assault consummated by a battery

e. Maximum punishment.

(1) Simple assault. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(2) Assault consummated by a battery. Bad conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) Assault upon a commissioned officer of the armed forces of the United States or of a friendly foreign power, not in the execution of office. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(4) Assault upon a warrant officer, not in the execution of office. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(5) Assault upon a noncommissioned or petty officer, not in the execution of office. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(6) Assault upon a sentinel or lookout in the execution of duty, or upon any person who, in the execution of office, is performing security police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(7) Assault consummated by a battery upon a child under 16 years. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(8) Assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.

(a) When committed with a loaded firearm. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 8 years.

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

(9) Assault in which grievous bodily harm is intentionally inflicted.

(a) When the injury is inflicted with a loaded firearm. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(b) Other cases. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Simple assault.

In that (personal jurisdiction data), did, (at/on board--location), (subject-matter jurisdiction data, if required), on or about 19 , 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 19 , 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 19 , 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 19 , assault , who then was and was then known by the accused to be a (warrant) (noncommissioned) (petty) officer of the United States (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard), by .

(5) Assault upon a sentinel or lookout.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , 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 19 , assault , who then was and was then known by the accused to be a person then having and in the execution of (Air Force security police) (military police) (shore patrol) (master at arms) [(military) (civilian) law enforcement] duties, by .

(7) Assault consummated by a battery upon a child under 16 years.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , unlawfully (strike) ( ) a child under the age of 16 years, (in) (on) the with .

(8) Assault, aggravated -- with a dangerous weapon, means, or force.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , commit an assault upon by (shooting) (pointing) (striking) (cutting) ( ) (at him/her) (him/her) (in) (on) (the) with [a dangerous weapon] [a (means) (force) likely to produce death or grievous bodily harm], to wit: a (loaded firearm) (pickax) (bayonet) (club) ( ).

(9) Assault, aggravated -- inflicting grievous bodily harm.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , commit an assault upon by (shooting) (striking) (cutting) ( ) (him/her) (in) (on) the with a (loaded firearm) (club) (rock) (brick) ( ) and did thereby intentionally inflict grievous bodily harm upon him/her, to wit: a (broken leg) (deep cut) (fractured skull) ( ).

55. Article 129 -- Burglary

a. Text.

"Any person subject to this chapter who, with intent to commit on offense punishable under sections 918-928 of this title (articles 118-128), breaks and enters, in the neghttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused unlawfully broke and entered the dwelling house of another;

(2) That both the breaking and entering were done in the nighttime; and

(3) That the breaking and entering were done with the intent to commit an offense punishable under Articles 118 through 128, except Article 123a.

c. Explanation.

(1) In general. "Burglary" is the breaking and entering in the nighttime of the dwelling house of another, with intent to commit an offense punishable under Articles 118 through 128, except 123a. In addition, an intent to commit an offense which, although not covered by Articles 118 through 128, necessarily includes an offense within one of these articles, satisfies the intent element of this article. This includes, for example, assaults punishable under Article 134 which necessarily include simple assault under Article 128.

(2) Breaking. There must be a breaking, actual or constructive. Merely to enter through a hole left in the wall or roof or through an open window or door will not constitute a breaking; but if a person moves any obstruction to entry of the house without which movement the person could not have entered, the person has committed a "breaking." Opening a closed door or window or other similar fixture, opening wider a door or window already partly open but insufficient for the entry, or cutting out the glass of a window or the netting of a screen is a sufficient breaking. The breaking of an inner door by one who has entered the house without breaking, or by a person lawfully within the house who has no authority to enter the particular room, is a sufficient breaking, but unless such a breaking is followed by an entry into the particular room with the requisite intent, burglary is not committed. There is a constructive breaking when the entry is gained by a trick, such as concealing oneself in a box; under false pretense, such as impersonating a gas or telephone inspector; by intimidating the occupants through violence or threats into opening the door: through collusion with a confederate, an occupant of the house; or by descending a chimney, even if only a partial descent is made and no room is entered.

(3) Entry. An entry must be effected before the offense is complete, but the entry of any part of the body, even a finger, is sufficient. Insertion into the house of a tool or other instrument is also a sufficient entry, unless the insertion is solely to facilitate the breaking or entry.

(4) Nighttime. Both the breaking and entry must be in the nighttime. "Nighttime" is the period between sunset and sunrise when there is not sufficient daylight to discern a person's face.

(5) Dwelling house of another. To constitute burglary the house must be the dwelling house of another. "Dwelling house" includes outbuildings within the common inclosure, farmyard, or cluster of buildings used as a residence. Such an area is the "curtilage." A store is not a dwelling house unless part of, or also used as, a dwelling house, as when the occupant uses another part of the same building as a dwelling, or when the store is habitually slept in by family members or employees. The house must be used as a dwelling at the time of the breaking and entering. It is not necessary that anyone actually be in it at the time of the breaking and entering, but if the house has never been occupied at all or has been left without any intention of returning, it is not a dwelling house. Separate dwellings within the same building, such as a barracks room, apartment, or a room in a hotel, are subjects of burglary by other residents or guests, and in general by the owner of the building. A tent is not a subject of burglary.

(6) Intent to commit offense. Both the breaking and entry must be done with the intent to commit in the house an offense punishable under Articles 118 through 128, except 123a. If, after the breaking and entering, the accused commits one or more of these offenses, it may be inferred that the accused intended to commit the offense or offenses at the time of the breaking and entering. If the evidence warrants, the intended offense may be separately charged. It is immaterial whether the offense intended is committed or even attempted. If the offense is intended, it is no defense that its commission was impossible.

(7) Separate offense. If the evidence warrants, the intended offense in the burglary specification may be separately charged.

d. Lesser included offenses.

(1) Article 130 -- housebreaking

(2) Article 134 -- unlawful entry

(3) Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, at , (subject-matter jurisdiction data, if required), on or about 19 , in the nighttime, unlawfully break and enter the (dwelling house) (within the curtilage) of , with intent to commit (murder) (larceny) ( ) therein.

56. Article 130 -- Housebreaking

a. Text.

"Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused unlawfully entered a certain building or structure of a certain other person; and

(2) That the unlawful entry was made with the intent to commit a criminal offense therein.

c. Explanation.

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49 FR 17152

April 23, 1984

Presidential Documents

Reporter
49 FR 17152

Federal Register > 1984 > April > April 23, 1984 > Presidential Documents > FEDERAL REGISTER

Notice

Part 4 of 4. You are viewing a very large document that has been divided into parts.

Title: Title 3--
The President
Manual for Courts-Martial, United States, 1984

Agency

FEDERAL REGISTER

Identifier: Executive Order 12473 of April 13, 1984

Text

(1) Scope of offense. The offense of housebreaking is broader than burglary in that the place entered is not required to be a dwelling house; it is not necessary that the place be occupied; it is not essential that there be a breaking; the entry may be either in the night or in the daytime; and the intent need not be to commit one of the offenses made punishable under Articles 118 through 128.

(2) Intent. The intent to commit some criminal offense is an essential element of housebreaking and must be alleged and proved to support a conviction of this offense. If, after the entry the accused committed a criminal offense inside the building or structure, it may be inferred that the accused intended to commit that offense at the time of the entry.

(3) Criminal offense. Any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense, is a "criminal offense."

(4) Building, structure. "Building" includes a room, shop, store, office, or apartment in a building. "Structure" refers only to those structures which are in the nature of a building or dwelling. Examples of these structures are a stateroom, hold, or other compartment of a vessel, an inhabitable trailer, an inclosed truck or freight car, a tent, and a houseboat. It is not necessary that the building or structure be in use at the time of the entry.

(5) Entry. See paragraph 55c(3).

(6) Separate offense. If the evidence warrants, the intended offense in the housebreaking specification may be separately charged.

d. Lesser included offenses.

(1) Article 134 -- unlawful entry

(2) Article 80 -- attempts

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

f. Sample specification.

In that , (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , unlawfully enter a (dwelling) (room) (bank) (store) (warehouse) (shop) (tent) (stateroom) ( ), the property of , with intent to commit a criminal offense, to wit: , therein.

57. Article 131 -- Perjury

a. Text.

"Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly --

(1) upon a lawful oath or in any form allowed by law to be substituted for an oath, gives any false testimony material to the issue or matter of inquiry; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, subscribes any false statement material to the issue or matter of inquiry;

is quilty 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 the 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) Tha the accused did not then believe the statement to be true.

c. Explanation.

(1) In general. "Judicial proceeding" includes a trial by court-martial and "course of justice" includes an investigation conducted under Article 32. If the accused is charged with having committed perjury before a court-martial, it must be shown that the court-martial was duly constituted.

(2) Giving false testimony.

(a) Nature. The testimony must be false and must be willfully and corruptly given; that is, it must be proved that the accused gave the false testimony willfully and did not believe it to be true. A witness may commit perjury by testifying to the truth of a matter when in fact the witness knows nothing about it at all or is not sure about it, whether the thing is true or false in fact. A witness may also commit perjury in testifying falsely as to a belief, remembrance, or impression, or as to a judgment or opinion. It is no defense that the witness voluntarily appeared, that the witness was incompetent as a witness, or that the testimony was given in response to questions that the witness could have declined to answer.

(b) Material matter. The false testimony must be with respect to a material matter, but that matter need not be the main issue in the case. Thus, perjury may be committed by giving false testimony with respect to the credibility of a

material witness or in an affidavit in support of a request for a continuance, as well as by giving false testimony with respect to a fact from which a legitimate inference may be drawn as to the existence or nonexistence of a fact in issue. Whether the allegedly false testimony was with respect to a material matter is a question of law to be determined as an interlocutory question.

(c) Proof. The falsity of the allegedly perjured statement cannot be proved by circumstantial evidence alone, except with respect to matters which by their nature are not susceptible of direct proof. The falsity of the statement cannot be proved by the testimony of a single witness unless that testimony directly contradicts the statement and is corroborated by other evidence, either direct or circumstantial, tending to prove the falsity of the statement. However, documentary evidence directly disproving the truth of the statement charged to have been perjured need not be corroborated if: the document is an official record shown to have been well known to the accused at the time the oath was taken; or the documentary evidence originated from the accused -- or had in any manner been recognized by the accused as containing the truth -- before the allegedly perjured statement was made.

(d) Oath. The oath must be one recognized or authorized by law and must be duly administered by one authorized to administer it. When a form of oath has been prescribed, a literal following of that form is not essential; it is sufficient if the oath administered conforms in substance to the prescribed form. "Oath" includes an affirmation when the latter is authorized in lieu of an oath.

(e) Belief of accused. The fact that the accused did not believe the statement to be true may be proved by testimony of one witness without corroboration or by circumstantial evidence.

(3) Subscribing false statement. See subparagraphs (1) and (2), above, as applicable. Section 1746 of title 28, United States Code, provides for subscribing to the truth of a document by signing it expressly subject to the penalty for perjury. The signing must take place in a judicial proceeding or course of justice -- for example, if a witness signs under penalty of perjury summarized testimony given at an Article 32 investigation. It is not required that the document be sworn before a third party. Section 1746 does not change the requirement that a deposition be given under oath or alter the situation where an oath is required to be taken before a specific person.

d. Lesser included offenses.

(1) Article 134 -- false swearing

(2) Article 80 -- attempts

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

f. Sample specifications.

(1) Giving false testimony.

In that (personal jurisdiction data), having taken a lawful (oath) (affirmation) in a (trial by court-martial of) (trial by a court of competent jurisdiction, to wit: of) (deposition for use in a trial by of) ( ) that he/she would (testify) (depose) truly, did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , 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 19 , 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 subscribe a false statement material to the (issue) (matter of inquiry), to wit: , which statement was false in that , and which statement he/she did not then believe to be true.

58. Article 132 -- Frauds against the United States

a. Text.

"Any person subject to this chapter --

(1) who, knowing it to be false or fraudulent --

(A) makes any claim against the United States or any officer thereof; or

(b) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof;

(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof --

(A) makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;

(B) makes any oath to any fact or to any writing or other paper knowing the oath to be false; or

(C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited;

(3) who, having charge, possession, custody, or control of any money, or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive it, any amount thereof less than that for which he receives a certificate or receipt; or

(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States;

shall, upon conviction, be punished as a court-martial may direct."

b. Elements.

(1) Making a false or fraudulent claim.

(a) That the accused made a certain claim against the United States or an officer thereof;

(b) That the claim was false or fraudulent in certain particulars; and

(c) That the accused then knew that the claim was false or fraudulent in these particulars.

(2) Presenting for approval or payment a false or fraudulent claim.

(a) That the accused presented for approval or payment to a certain person in the civil or military service of the United States having authority to approve or pay it a certain claim against the United States or an officer thereof;

(b) That the claim was false or fraudulent in certain particulars; and

(c) That the accused then knew that the claim was false or fraudulent in these particulars.

(3) Making or using a false writing or other paper in connection with claims.

(a) That the accused made or used a certain writing or other paper;

(b) That certain material statements in the writing or other paper were false or fraudulent;

(c) That the accused then knew the statements were false or fraudulent; and

(d) That the act of the accused was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

(4) False oath in connection with claims.

(a) That the accused made an oath to a certain fact or to a certain writing or other paper;

(b) That the oath was false in certain particulars;

(c) That the accused then knew it was false; and

(d) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

(5) Forgery of signature in connection with claims.

(a) That the accused forged or counterfeited the signature of a certain person on a certain writing or other paper; and

(b) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

(6) Using forged signature in connection with claims.

(a) That the accused used the forged or counterfeited signature of a certain person;

(b) That the accused then knew that the signature was forged or counterfeited; and

(c) That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

(7) Delivering less than amount called for by receipt.

(a) That the accused had charge, possession, custody, or control of certain money or property of the United States furnished or intended for the armed forces thereof;

(b) That the accused obtained a certificate or receipt for a certain amount or quantity of that money or property;

(c) That for the certificate or receipt the accused knowingly delivered to a certain person having authority to receive it an amount or quantity of money or property less than the amount or quantity thereof specified in the certificate or receipt; and

(d) That the undelivered money or property was of a certain value.

(8) Making or delivering receipt without having full knowledge that it is true.

(a) That the accused was authorized to make or deliver a paper certifying the receipt from a certain person of certain property of the United States furnished or intended for the armed forces thereof;

(b) That the accused made or delivered to that person a certificate or receipt;

(c) That the accused made or delivered the certificate without having full knowledge of the truth of a certain material statement or statements therein;

(d) That the act was done with intent to defraud the United States; and

(e) That the property certified as being received was of a certain value.

c. Explanation.

(1) Making a false or fraudulent claim.

(a) Claim. A "claim" is a demand for a transfer of ownership of money or property and does not include requisitions for the mere use of property. This article applies only to claims against the United States or any officer thereof as such, and not to claims against an officer of the United States in that officer's private capacity.

(b) Making a claim. Making a claim is a distinct act from presenting it. A claim may be made in one place and presented in another. The mere writing of a paper in the form of a claim, without any further act to cause the paper to become a demand against the United States or an officer thereof, does not constitute making a claim. However, any act placing the claim in official channels constitutes making a claim, even if that act does not amount to presenting a claim. It is not necessary that the claim be allowed or paid or that it be made by the person to be benefited by the allowance or payment. See also subparagraph (2), below.

(c) Knowledge. The claim must be made with knowledge of its fictitious or dishonest character. This article does not proscribe claims, however groundless they may be, that the maker believes to be valid, or claims that are merely made negligently or without ordinary prudence.

(2) Presenting for approval or payment a false or fraudulent claim.

(a) False and fraudulent. False and fraudulent claims include not only those containing some material false statement, but also claims which the claimant knows to have been paid or for some other reason the claimant knows the claimant is not authorized to present or upon which the claimant knows the claimant has no right to collect.

(b) Presenting a claim. The claim must be presented, directly or indirectly, to some person having authority to pay it. The person to whom the claim is presented may be identified by position or authority to approve the claim, and need not be identified by name in the specification. A false claim may be tacitly presented, as when a person who knows that there is no entitlement to certain pay accepts it nevertheless without disclosing a disqualification, even though the person may not have made any representation of entitlement to the pay. For example, a person cashing a pay check which includes an amount for a dependency allowance, knowing at the time that the entitlement no longer exists because of a change in that dependency status, has tacitly presented a false claim. See also subparagraph (1), above.

(3) Making or using a false writing or other paper in connection with claims. The false or fraudulent statement must be material, that is, it must have a tendency to mislead governmental officials in their consideration or investigation of the claim. The offense of making a writing or other paper known to contain a false or fraudulent statement for the purpose of obtaining the approval, allowance, or payment of a claim is complete when the writing or paper is made for that purpose, whether or not any use of the paper has been attempted and whether or not the claim has been presented. See also the explanation in subparagraph (1) and (2), above.

(4) False oath in connection with claims. See subparagraphs (1) and (2), above.

(5) Forgery of signature in connection with claims. Any fraudulent making of the signature of another is forging or counterfeiting, whether or not an attempt is made to imitate the handwriting. See paragraph 48(c) and subparagraphs (1) and (2), above.

(6) Delivering less than amount called for by receipt. It is immaterial by what means -- whether deceit, collusion, or otherwise -- the accused effected the transaction, or what was the accused's purpose.

(7) Making or delivering receipt without having full knowledge that it is true. When an officer or other person subject to military law is authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, and a receipt or other paper is presented for signature stating that a certain amount of supplies has been furnished by a certain contractor, it is that person's duty before signing the paper to know that the full amount of supplies therein stated to have been furnished has in fact been furnished, and that the statements contained in the paper are true. If the person signs the paper with intent to defraud the United States and without that knowledge, that person is guilty of a violation of this section of the article. If the person signs the paper with knowledge that the full amount was not received, it may be inferred that the person intended to defraud the United States.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment.

(1) Article 132(1) and (2). Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) Article 132 (3) and (4).

(a) When amount is $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) When amount is over $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Making false claim.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , [by preparing (a voucher) ( ) for presentment 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 19 , 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 19 , (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 19 , 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 19 , (forge) (counterfeit) (forge and counterfeit) the signature of upon a in words and figures as follows:

(6) Using forged signature.

In that , for the purpose of obtaining the (approval) (allowance) (payment) (approval, allowance, and payment) of a claim against the United States, did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , use the signature of on a certain (writing) (paper), to wit: , then knowing such signature to be (forged) (counterfeited) (forged and counterfeited).

(7) Paying amount less than called for by receipt.

In that (personal jurisdiction data), having (charge) (possession) (custody) (control) of (money) ( ) of the United States, (furnished) (intended) (furnished and intended) for the armed forces thereof, did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , 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 19 , without having full

knowledge of the truth of the statement therein contained and with intent to defraud the United States, (make) (deliver) (make and deliver) to , such a writing, in words and figures as follows: , the property therein certified as received being of a value of (about) $.

59. Article 133 -- Conduct unbecoming an officer and gentleman

a. Text.

"Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

b. Elements.

(1) That the accused did or omitted to do certain acts; and

(2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

c. Explanation.

(1) Gentleman. As used in this article, "gentleman" includes both male and female commissioned officers, cadets, and midshipmen.

(2) Nature of offense. Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising. This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman. Thus, a commissioned officer who steals property violates both this article and Article 121. Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.

(3) Examples of offenses. Instances of violation of this article include knowingly making a false official statement; dishonorable failure to pay a debt; cheating on an exam; opening and reading a letter of another without authority; using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons; being drunk and disorderly in a public place; public association with known prostitutes; committing

or attempting to commit a crime involving moral turpitude; and failing without good cause to support the officer's family.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Dismissal, forfeiture of all pay and allowances, and confinement for a period not in excess of that authorized for the most analogous offense for which a punishment is prescribed in this Manual, or, if none is prescribed, for 1 year.

f. Sample specifications.

(1) Copying or using examination paper.

In that (personal jurisdiction data), did, (at/on board--location), on or about 19 , while undergoing a written examination on the subject of , wrongfully and dishonorably (receive) (request) unauthorized aid by [(using) (copying) the examination paper of] [ ].

(2) Drunk or disorderly.

In that (personal jurisdiction data), was, (at/on board--location), on or about 19 , in a public place, to wit: , (drunk) (disorderly) (drunk and disorderly) while in uniform, to the disgrace of the armed forces.

60. Article 134 -- General article

a. Text.

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

b. Elements. The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital, the proof must establish every element of the crime or offense as required by the applicable law. If the conduct is punished as a disorder or neglect to the prejudice of good order and discipline in the armed forces, or of a nature to being discredit upon the armed forces, then the following proof is required:

(1) That the accused did or failed to do certain acts; and

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

c. Explanation.

(1) In general. Article 134 makes punishable acts in three categories of offenses not specifically covered in any other article of the code. These are referred to as "clauses 1, 2, and 3" of Article 134. Clause 1 offenses involve disorders and neglects to the prejudice of good order and discipline in the armed forces. Clause 2 offenses involve conduct of a nature to bring discredit upon the armed forces. Clause 3 offenses involve noncapital crimes or offenses which violate Federal law including law made applicable through the Federal Assimilative Crimes Act, see subsection (4) below. If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article. See subparagraph (5)(a) below. However, see paragraph 59c 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 paragraph 16c.

(3) Conduct of a nature to bring discredit upon the armed forces (clause 2). "Discredit" means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Acts in violation of a local civil law or a foreign law may be punished if they are of a nature to bring discredit upon the armed forces. However, see R.C.M. 203 concerning subject-matter jurisdiction.

(4) Crimes and offenses not capital (clause 3).

(a) In general. State and foreign laws are not included within the crimes and offenses not capital referred to in this clause of Article 134 and violations thereof may not be prosecuted as such except when State law becomes Federal law of local application under section 13 of title 18 of the United States Code (Federal Assimilative Crimes Act -- see subparagraph (4)(c) below). For the purpose of court-martial jurisdiction, the laws which may be applied under clause 3 of Article 134 are divided into two groups: crimes and offenses of unlimited application (crimes

which are punishable regardless where they may be committed), and crimes and offenses of local application (crimes which are punishable only if committed in areas of federal jurisdiction).

(b) Crimes and offenses of unlimited application. Certain noncapital crimes and offenses prohibited by the United States Code are made applicable under clause 3 of Article 134 to all persons subject to the code regardless where the wrongful act or omission occurred. Examples include: counterfeiting (18 U.S.C. § 471), and various frauds against the Government not covered by Article 132.

(c) Crimes and offenses of local application.

(i) In general. A person subject to the code may not be punished under clause 3 of Article 134 for an offense that occurred in a place where the law in question did not apply. For example, a person may not be punished under clause 3 of Article 134 when the act occurred in a foreign country merely because that act would have been an offense under the United States Code had the act occurred in the United States. Regardless where committed, such an act might be punishable under clauses 1 or 2 of Article 134. There are two types of congressional enactments of local application: specific federal statutes (defining particular crimes), and a general federal statute, the Federal Assimilative Crimes Act (which adopts certain state criminal laws).

(ii) Federal Assimilative Crimes Act (18 U.S.C. § 13). The Federal Assimilative Crimes Act is an adoption by Congress of state criminal laws for areas of exclusive or concurrent federal jurisdiction, provided federal criminal law, including the UCMJ, has not defined an applicable offense for the misconduct committed. The Act applies to state laws validly existing at the time of the offense without regard to when these laws were enacted, whether before or after passage of the Act, and whether before or after the acquisition of the land where the offense was committed. For example, if a person committed an act on a military installation in the United States at a certain location over which the United States had either exclusive or concurrent jurisdiction, and it was not an offense specifically defined by federal law (including the UCMJ), that person could be punished for that act by a court-martial if it was a violation of a noncapital offense under the law of the State where the military installation was located. This is possible because the Act adopts the criminal law of the state wherein the military installation is located and applies it as though it were federal law. The text of the Act is as follows:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(5) Limitations on Article 134.

(a) Preemption doctrine. The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132. For example, larceny is covered in Article 121, and if an element of that offense is lacking -- for example, intent -- there can be no larceny or larceny-type offense, either under Article 121 or, because of

preemption, under Article 134. Article 134 cannot be used to create a new kind of larceny offense, one without the required intent, where Congress has already set the minimum requirements for such an offense in Article 121.

(b) Capital offense. A capital offense may not be tried under Article 134.

(6) Drafting specifications for Article 134 offenses.

(a) In general. A specification alleging a violation of Article 134 need not expressly allege that the conduct was "a disorder or neglect," that it was "of a nature to bring discredit upon the armed forces," or that it constituted "a crime or offense not capital." The same conduct may constitute a disorder or neglect to the prejudice of good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces.

(b) Specifications under clause 3. When alleging a clause 3 violation, each element of the federal or assimilated statute must be alleged expressly or by necessary implication. In addition, the federal or assimilated statute should be identified.

(c) Specifications for clause 1 or 2 offenses not listed. If conduct by an accused does not fall under any of the listed offenses for violations of Article 134 in this Manual (paragraphs 61 through 113 of this Part) a specification not listed in this Manual may be used to allege the offense.

61. Article 134 (Abusing public animal)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused wrongfully abused a certain public animal; and

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

c. Explanation. A public animal is any animal owned or used by the United States; any animal owned or used by a local or State government in the United States, its territories or possessions; or any wild animal located on any public lands in the United States, its territories or possessions. This would include, for example, drug detector dogs used by the government.

d. Lesser included offense. Article 80 -- attempts

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

f. sample specification.

In that (personal jurisdiction data), did (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully (kick a public drug detector dog in the nose) ( ).

62. Article 134 (Adultery)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused wrongfully had sexual intercourse with a certain person;

(2) That, at the time, the accused or the other person was married to someone else; and

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

c. Explanation. Adultery is not a lesser included offense of rape.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that (personal jurisdiction data), (a married man/a married woman), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully have sexual intercourse with , a (married (woman/man) not (his wife) (her husband).

63. Article 134 (Assault -- indecent)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;

(2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and

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

c. Explanation. See paragraph 54c for a discussion of assault. Specific intent is an element of this offense. For a definition of "indecent", see paragraph 90c.

d. Lesser included offenses.

(1) Article 128 -- assault consummated by a battery; assault

(2) Article 134 -- indecent acts

(3) Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did (at/on board--location), (subject-matter jurisdiction data, if required), on or about 19 , commit an indecent assault upon a person not his/her wife/husband by , with intent to gratify his/her (lust) (sexual desires).

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

a. Text. See paragraph 60.

b. Elements.

(1) That the accused assaulted a certain person;

(2) That, at the time of the assault, the accused intended to kill (as required for murder or voluntary manslaughter) or intended to commit rape, robbery, sodomy, arson, burglary, or housebreaking; and

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

c. Explanation.

(1) In general. An assault with intent to commit any of the offenses mentioned above is not necessarily the equivalent of an attempt to commit the intended offense, for an assault can be committed with intent to commit an offense without achieving that proximity to consummation of an intended offense which is essential to an attempt. See paragraph 4.

(2) Assault with intent to murder. Assault with intent to commit murder is assault with specific intent to kill. Actual infliction of injury is not necessary. To constitute an assault with intent to murder with a firearm, it is not necessary that the weapon be discharged. When the intent to kill exists, the fact that for some unknown reason the actual consummation of the murder by the means employed is 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.

(3) Assault with intent to commit voluntary manslaughter. Assault with intent to commit voluntary manslaughter is an assault committed with a specific intent to kill under such circumstances that, if death resulted therefrom, the offense of voluntary manslaughter would have been committed. There can be no assault with intent to commit involuntary manslaughter, for it is not a crime capable of being intentionally committed.

(4) Assault with intent to commit rape. In assault with intent to commit rape, the accused must have intended to overcome any resistance by force, and to complete the offense. Any lesser intent will not suffice. No actual touching is necessary, but indecent advances and importunities, however earnest, not accompanied by such an intent, do not constitute this offense, nor do mere preparations to rape not amounting to an assault. Once an assault with intent to commit rape is made, it is no defense that the accused voluntarily desisted.

(5) Assault with intent to rob. For assault with intent to rob, the fact that the accused intended to take money and that the person the accused intended to rob had none is not a defense.

(6) Assault with intent to commit sodomy. Assault with intent to commit sodomy is an assault against a human being and must be committed with a specific intent to commit sodomy. Any lesser intent, or different intent, will not suffice.

d. Lesser included offenses.

(1) Assault with intent to murder.

(A) Article 128 -- assault; assault consummated by a battery; assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm

(B) Article 134 -- assault with intent to commit voluntary manslaughter; willful or careless discharge of a firearm

(2) Assault with intent to commit voluntary manslaughter.

(A) Article 128 -- assault, assault consummated by a battery; assault with a dangerous weapon; assault intentionally inflicting grievous bodily harm

(B) Article 134 -- willful or careless discharge of a firearm

(3) Assault with intent to commit rape or sodomy.

(A) Article 128 -- assault; assault consummated by a battery; assault with a dangerous weapon

(B) Article 134 -- indecent assault

(4) Assault with intent to commit burglary.

(A) Article 128 -- assault; assault consummated by a battery; assault with a dangerous weapon

(B) Article 134 -- assault with intent to commit housebreaking

(5) Assault with intent to commit robbery, arson, or housebreaking. Article 128 -- assault; assault consummated by a battery; assault with a dangerous weapon

e. Maximum punishment.

(1) Assault with intent to commit murder or rape. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(2) Assault with intent to commit voluntary manslaughter, robbery, sodomy, arson, or burglary. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) Assault with intent to commit housebreaking. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , with intent to commit (murder) (voluntary manslaughter) (rape) (robbery) (sodomy) (arson) (burglary) (housebreaking), commit an assault upon by .

65. Article 134 (Bigamy)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused had a living lawful spouse;

(2) That while having such spouse the accused wrongfully married another person; and

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

c. Explanation. Bigamy is contracting another marriage by one who already has a living lawful spouse. If a prior marriage was void, it will have created no status of "lawful spouse." However, if it was only voidable and has not been voided by a competent court, this is no defense. A belief that a prior marriage has been terminated by divorce, death of the other spouse, or otherwise, constitutes a defense only if the belief was reasonable. See R.C.M. 916(1)(1).

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, at , (subject-matter jurisdiction data, if required), on or about 19 , wrongfully marry , having at the time of his/her said marriage to a lawful wife/husband then living, to wit: .

66. Article 134 (Bribery and graft)

a. Text. See paragraph 60.

b. Elements.

(1) Asking, accepting, or receiving.

(a) That the accused wrongfully asked, accepted, or received a thing of value from a certain person or organization;

(b) That the accused then occupied a certain official position or had certain official duties;

(c) That the accused asked, accepted, or received this thing of value (with the intent to have the accused's decision or action influenced with respect to a certain matter) * (as compensation for or in recognition of services rendered, to be rendered, or both, by the accused in relation to a certain matter) **;

(d) That this certain matter was an official matter in which the United States was and is interested; and

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

[* NOTE: This element is required for bribery.]

[** NOTE: This element is required for graft.]

(2) Promising, offering, or giving.

(a) That the accused wrongfully promised, offered, or gave a thing of value to a certain person;

(b) That this person then occupied a certain official position or had certain official duties;

(c) That this thing of value was promised, offered, or given (with the intent to influence the decision or action of this person) * (as compensation for or in recognition of services rendered, to be rendered, or both, by this person in relation to a certain matter) **;

(d) That this matter was an official matter in which the United States was and is interested; and

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

[* NOTE: This element is required for bribery.]

[** NOTE: This element is required for graft.]

c. Explanation. Bribery requires an intent to influence or be influenced in an official matter; graft does not. Graft involves compensation for services performed in an official matter when no compensation is due.

d. Lesser included offenses.

(1) Bribery. Article 134 -- graft

(2) Bribery and graft. Article 80 -- attempts

e. Maximum punishment.

(1) Bribery. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

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

f. Sample specifications.

(1) Asking, accepting, or receiving.

In that (personal jurisdiction data), being at the time (a contracting officer for) (the personnel officer of) ( ), did (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully (ask) (accept) (receive) from , (a contracting company) engaged in ( ), (the sum of $) [, of a value of (about) $] ( ), [with intent to have his/her (decision) (action) influenced with respect to *] [as compensation for) (in recognition of) service (rendered) (to be rendered) (rendered and to be rendered) by him/her the said in relation to **] an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from) (the transfer of to duty with) ( ).

[* NOTE: This language should be used to allege bribery.]

[** NOTE: This language should be used to allege graft.]

(2) Promising, offering, or giving.

In that (personal jurisdiction data), did (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully (promise) (offer) (give) to , (his/her commanding officer) (the claims officer of) ( ), (the sum of $) [, of a value of (about) $] ( ), [with intent to influence the (decision) (action) of the said with respect to *] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by the said in relation to **] an official matter in which the United States was and is interested, to wit: (the granting of leave to) (the processing of a claim against the United States in favor of) ( ).

[* NOTE: This language should be used to allege bribery.]

[** NOTE: This language should be used to allege graft.]

67. Article 134 (Burning with intent to defraud)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused willfully and maliciously burned or set fire to certain property owned by a certain person or organization;

(2) That such burning or setting on fire was with the intent to defraud a certain person or organization; and

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

c. Explanation. See paragraph 49c(14) for a discussion of "intent to defraud."

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , willfully and maliciously (burn) (set fire to) (a dwelling) (a barn) (an automobile), the property of , with intent to defraud (the insurer thereof, to wit:) ( ).

68. Article 134 (Check, worthless, making and uttering -- by dishonorably failing to maintain funds)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused made and uttered a certain check;

(2) That the check was made and uttered for the purchase of a certain thing, in payment of a debt, or for a certain purpose;

(3) That the accused subsequently failed to place or maintain sufficient funds in or credit with the drawee bank for payment of the check in full upon its presentment for payment;

(4) That this failure was dishonorable; and

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

c. Explanation. This offense differs from an Article 123a offense (paragraph 49) in that there need be no intent to defraud or deceive at the time of making, drawing, uttering, or delivery, and that the accused need not know at that time that the accused did not or would not have sufficient funds for payment. The gist of the offense lies in the conduct of the accused after uttering the instrument. Mere negligence in maintaining one's bank balance is insufficient for this offense, for the accused's conduct must reflect bad faith or gross indifference in this regard. As

in the offense of dishonorable failure to pay debts (see paragraph 71), dishonorable conduct of the accused is necessary, and the other principles discussed in paragraph 71 also apply here.

d. Lesser included offenses. None.

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

d. Sample specification.

In that (personal jurisdiction data), did, (at/on board--location) (subject-matter jurisdiction data, if required), on or about 19 , make and utter to a certain check, in words and figures as follows, to wit: , (for the purchase of) (in payment of a debt) (for the purpose of), and did thereafter dishonorably fail to (place) (maintain) sufficient funds in the Bank for payment of such check in full upon its presentment for payment.

69. Article 134 (Cohabitation, wrongful)

a. Text. See paragraph 60.

b. Elements.

(1) That, during a certain period of time, the accused and another person openly and publicly lived together as husband and wife, holding themselves out as such;

(2) That the other person was not the spouse of the accused;

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

c. Explanation. This offense differs from adultery (see paragraph 62) in that it is not necessary to prove that one of the partners was married or that sexual intercourse took place. Public knowledge of the wrongfulness of the relationship is not required, but the partners must behave in a manner, as exhibited by conduct or language, that leads others to believe that a marital relationship exists.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), from about 19 , to about 19 , wrongfully cohabit with , (a woman not his wife) (a man not her husband).

70. Article 134 (Correctional custody -- offenses against)

a. Text. See paragraph 60.

b. Elements.

(1) Escape from correctional custody.

(a) That the accused was placed in correctional custody by a person authorized to do so;

(b) That, while in such correctional custody, the accused was under physical restraint;

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

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

(2) Breach of correctional custody.

(a) That the accused was placed in correctional custody by a person authorized to do so;

(b) That, while in correctional custody, a certain restraint was imposed upon the accused;

(c) That the accused went beyond the limits of the restraint imposed before having been released from the correctional custody or relieved of the restraint by proper authority; and

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

c. Explanation.

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

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

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

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment.

(1) Escape from correctional custody. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) Breach of correctional custody. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. Sample specifications.

(1) Escape from correctional custody.

In that (personal jurisdiction data), while undergoing the punishment of correctional custody imposed by a person authorized to do so, did, (at/on board -- location), on or about 19 , 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 19 , breach the restraint imposed thereunder by .

71. Article 134 (Debt, dishonorably failing to pay)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused was indebted to a certain person or entity in a certain sum;

(2) That this debt became due and payable on or about a certain date;

(3) That while the debt was still due and payable the accused dishonorably failed to pay this debt; and

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

c. Explanation. More than negligence is nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations. For a debt to form the basis of this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to the accused's belief, at the time alleged. The offense should not be charged if there was a genuine dispute between the parties as to the facts or law relating to the debt which would affect the obligation of the accused to pay. The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment. The length of the period of nonpayment and any denial of indebtedness which the accused may have made may tend to prove that the accused's conduct was dishonorable, but the court-martial may convict only if it finds from all of the evidence that the conduct was in fact dishonorable.

d. Lesser included offenses. None

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

f. Sample specification.

In that (personal jurisdiction data), being indebted to in the sum of $ for , which amount became due and payable (on) (about) (on or about) 19 , did (at/on board -- location) (subject-matter jurisdiction data, if required), from 19 , to 19 , dishonorably fail to pay said debt.

72. Article 134 (Disloyal statements)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused made a certain statement;

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

(3) That the statement was disloyal to the United States;

(4) That the statement was made with the intent to promote disloyalty or disaffection toward the United States by any member of the armed forces or to interfere with or impair the loyalty to the United States or good order and discipline of any member of the armed forces; and

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

c. Explanation. Certain disloyal statements by military personnel may not constitute an offense under 18 U.S.C. §§ 2385, 2387, and 2388, but may, under the circumstances, be punishable under this article. Examples include praising the enemy, attacking the war aims of the United States, or denouncing our form of government with the intent to promote disloyalty or disaffection among members of the armed services. A declaration of personal belief can amount to a disloyal statement if it disavows allegiance owed to the United States by the declarant. The disloyalty involved for this offense must be to the United States as a political entity and not merely to a department or other agency that is a part of its administration.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location), on or about 19 , with intent to [promote (disloyalty) (disaffection) (disloyalty and disaffection)] [(interfere with) (impair) the (loyalty) (good order and discipline)] (of any member of the armed forces of the United States, communicate to , the following statement, to wit: " ," or words to that effect, which statement was disloyal to the United States.

73. Article 134 (Disorderly conduct, drunkenness)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused was drunk, disorderly, or drunk and disorderly on board ship or in some other place; and

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

c. Explanation.

(1) Drunkenness. See paragraph 35c(3) for a discussion of intoxication.

(2) Disorderly. Disorderly conduct is conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character.

(3) Service discrediting. Unlike most offenses under Article 134, "conduct of a nature to bring discredit upon the armed forces" must be included in the specification and proved in order to authorize the higher maximum punishment when the offense is service discrediting.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment.

(1) Disorderly conduct.

(a) Under such circumstances as to bring discredit upon the military service. Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

(b) Other cases. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(2) Drunkenness.

(a) Aboard ship or under such circumstances as to bring discredit upon the military service. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

(b) Other cases. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

(3) Drunk and disorderly.

(a) Aboard ship. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(b) Under such circumstances as to bring discredit upon the military service. Confinement for 6 months and forfeiture of two-thirds pay per month for 6 months.

(c) Other cases. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

f. Sample specification.

In that (personal jurisdiction data), was (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , (drunk) (disorderly) (drunk and disorderly) [which conduct was of a nature to bring discredit upon the armed forces].

74. Article 134 (Drinking liquor with prisoner)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused was a sentinel or in another assignment in charge of a prisoner;

(2) That, while in such capacity, the accused unlawfully drank intoxicating liquor with a prisoner;

(3) That the prisoner was under the charge of the accused;

(4) That the accused knew that the prisoner was a prisoner under the accused's charge; and

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

c. Explanation.

(1) Prisoner. A "prisoner" is a person who is in confinement or custody imposed under R.C.M. 302, 304, or 305, or under sentence of a court-martial who has not been set free by proper authority.

(2) Liquor. For the purposes of this offense, "liquor" includes any alcoholic beverage.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), a (sentinel) ( ) in charge of prisoners, did, (at/on board -- location), on or about 19 , unlawfully drink intoxicating liquor with , a prisoner under his/her charge.

75. Article 134 (Drunk prisoner)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused was a prisoner;

(2) That while in such status the accused was found drunk; and

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

c. Explanation.

(1) Prisoner. See paragraph 74c(1).

(2) Drunk. See paragraph 35c(3) for a discussion of intoxication.

d. Lesser included offenses. None.

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

f. Sample specification.

In that (personal jurisdiction data), a prisoner, was (at/on board -- location), on or about 19 , found drunk.

76. Article 134 (Drunkenness -- incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused had certain duties to perform;

(2) That the accused was incapacitated for the proper performance of such duties;

(3) That such incapacitation was the result of previous wrongful indulgence in intoxicating liquor or any drug; and

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

c. Explanation.

(1) Liquor. See paragraph 74c(2).

(2) Incapacitated. Incapacitated means unfit or unable to perform properly. A person is "unfit" to perform duties if at the time the duties are to commence, the person is drunk, even though physically able to perform the duties. Illness resulting from previous overindulgence is an example of being "unable" to perform duties. For a discussion of "drunk" see paragraph 35c(3).

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

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), was, (at/on board -- location), on or about 19 , as a result of wrongful previous overindulgence in intoxicating liquor or drugs, incapacitated for the proper performance of his/her duties.

77. Article 134 (False or unauthorized pass offenses)

a. Text. See paragraph 60.

b. Elements.

(1) Wrongful making, altering, counterfeiting, or tampering with a military or official pass, permit, discharge certificate, or identification card.

(a) That the accused wrongfully and falsely made, altered, counterfeited, or tempered with a certain military or official pass; permit, discharge certificate, or identification card; and

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

(2) Wrongful sale, gift, loan, or disposition of a military or official pass, permit, discharge certificate, or identification card.

(a) That the accused wrongfully sold, gave, loaned, or disposed of a certain military or official pass, permit, discharge certificate, or identification card;

(b) That the pass, permit, discharge certificate, or identification card was false or unauthorized;

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

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

(3) Wrongful use or possession of a false or unauthorized military or official pass, permit, discharge certificate, or identification card.

(a) That the accused wrongfully used or possessed a certain military or official pass, permit, discharge certificate, or identification card;

(b) That the pass, permit, discharge certificate, or identification card was false or unauthorized;

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

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

[Note: when there is intent to defraud or deceive, add the following element after (c) above: That the accused used or possessed the pass, permit, discharge certificate, or identification card with an intent to defraud or deceive.]

c. Explanation.

(1) In general. "Military or official pass, permit, discharge certificate, or identification card" includes, as well as the more usual forms of these documents, all documents issued by any governmental agency for the purpose of identification and copies thereof.

(2) Intent to defraud or deceive. See paragraph 49c(14) and (15).

d. Lesser included offenses.

(1) Wrongful use or possession of false or unauthorized military or official pass, permit, discharge certificate, or identification card, with the intent to defraud or deceive. Article 134 -- same offenses, except without the intent to defraud or deceive

(2) All false or unauthorized pass offenses. Article 80 -- attempts

e. Maximum punishment.

(1) Possessing or using with intent to defraud or deceive, or making, altering, counterfeiting, tampering with, or selling. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

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

f. Sample specifications.

(1) Wrongful making, altering, counterfeiting, or tempering 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 19 , 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 19 , 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 19 , 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).

78. Article 134 (False pretenses, obtaining services under)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused wrongfully obtained certain services;

(2) That the obtaining was done by using false pretenses;

(3) That the accused then knew of the falsity of the pretenses;

(4) That the obtaining was with intent to defraud;

(5) That the services were of a certain value; and

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

c. Explanation. This offense is similar to the offenses of larceny and wrongful appropriation by false pretenses, except that the object of the obtaining is services (for example, telephone service) rather than money, personal property, or articles of value of any kind as under Article 121. See paragraph 46c. See paragraph 49c(14) for a definition of "intent to defraud."

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Obtaining services under false pretenses.

(1) Of a value of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) Of a value of more that $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject--matter jurisdiction data, if required), on or about 19 , with intent to defraud, falsely pretend to that , then knowing that the pretenses were false, and by means thereof did wrongfully obtain from services, of a value of (about) $, to wit: .

79. Article 134 (False swearing)

a. Text. See paragraph 60.

b. Elements.

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

(2) That the oath or equivalent was administered to the accused in a matter in which such oath or equivalent was required or authorized by law;

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

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

(5) That the statement was false;

(6) That the accused did not then believe the statement to be true; and

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

c. Explanation.

(1) Nature of offense. False swearing is the making under a lawful oath or equivalent of any false statement, oral or written, not believing the statement to be true. It does not include such statements made in a judicial proceeding or course of justice, as these are under Article 131, perjury (see paragraph 57). Unlike a false official statement under Article 107 (see paragraph 31) there is no requirement that the statement be made with an intent to deceive or that the statement be official. See paragraphs 57c(1), c(2)(c), and c(2)(e) concerning "judicial proceeding or course of justice," proof of the falsity, and the belief of the accused, respectively.

(2) Oath. See Article 136 and R.C.M. 807 as to the authority to administer oaths, and see Section IX of Part III (Military Rules of Evidence) concerning proof of the signatures of persons authorized to administer oaths. An oath includes an affirmation when authorized in lieu of an oath.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , (in an affidavit) (in), wrongfully and unlawfully (make) (subscribe) under lawful (oath) (affirmation) a false statement in substance as follows: , which statement he/she did not then believe to be true.

80. Article 134 (Firearm, discharging -- through negligence)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused discharged a firearm;

(2) That such discharge was caused by the negligence of the accused; and

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

c. Explanation. For a discussion of negligence, see paragraph 85c(2).

d. Lesser included offenses. None

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , through negligence, discharge a (service rifle) ( ) in the (squadron) (tent) (barracks) ( ) of .

81. Article 134 (Firearm, discharging -- willfully, under such circumstances as to endanger human life)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused discharged a firearm;

(2) That the discharge was willful and wrongful;

(3) That the discharge was under circumstances such as to endanger human life; and

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

c. Explanation. "Under circumstances such as to endanger human life" refers to a reasonable potentiality for harm to human beings in general. The test is not whether the life was in fact endangered but whether, considering the circumstances surrounding the wrongful discharge of the weapon, the act was unsafe to human life in general.

d. Lesser included offenses.

(1) Article 134 -- firearm, discharging -- through negligence

(2) Article 80 -- attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully and willfully discharge a firearm, to wit: , (in the mess hall of) ( ), under circumstances such as to endanger human life.

82. Article 134 (Fleeing scene of accident)

a. Text. See paragraph 60.

b. Elements.

(1) Driver.

(a) That the accused was the driver of a vehicle;

(b) That while the accused was driving the vehicle was involved in an accident;

(c) That the accused knew that the vehicle had been in an accident;

(d) That the accused left the scene of the accident without [providing assistance to the victim who had been struck (and injured) by the said vehicle] (or) [providing identification];

(e) That such leaving was wrongful; and

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

(2) Senior passenger.

(a) That the accused was a passenger in a vehicle which was involved in an accident;

(b) That the accused knew that said vehicle had been in an accident;

(c) That the accused was the superior commissioned or noncommissioned officer of the driver, or commander of the vehicle, and wrongfully and unlawfully ordered, caused, or permitted the driver to leave the scene of the accident without [providing assistance to the victim who had been struck (and injured) by the said vehicle] (or) [providing identification]; and

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

c. Explanation.

(1) Nature of offense. This offense covers "hit and run" situations where there is damage to property other than the driver's vehicle or injury to someone other than the driver or a passenger in the driver's vehicle. It also covers accidents caused by the accused, even if the accused's vehicle does not contact other people, vehicles, or property.

(2) Knowledge. Actual knowledge that an accident has occurred is an essential element of this offense. Actual knowledge may be proved by circumstantial evidence.

(3) Passenger. A passenger other than a senior passenger may also be liable under this paragraph. See paragraph 1 of this Part.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), (the driver of) (a passenger in *) (the senior officer/noncommissioned officer in) (in) a vehicle at the time of an accident in which said vehicle was involved, and having knowledge of said accident, did, at (subject-matter jurisdiction data, if required), on or about 19 (wrongfully leave) (by , assist the driver of the said vehicle in wrongfully leaving *) (wrongfully order, cause, or permit the driver to leave) the scene of the accident without [providing assistance to , who had been struck (and injured) by the said vehicle] [making his/her (the driver's) identity known].

[* Note: this language should be used when the accused was a passenger and is charged as a principal. See paragraph 1 of this part.]

83. Article 134 (Fraternization)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused was a commissioned or warrant officer;

(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

(3) That the accused then knew the person(s) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

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

c. Explanation.

(1) In general. The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

(2) Regulations. Regulations, directives, and orders may also govern conduct between officer and enlisted personnel on both a service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under Article 92. See paragraph 16.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Dismissal, forfeiture of all pay and allowances, and confinement for 2 years.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location), on or about , knowingly fraternize with , an enlisted person, on terms of military equality, to wit: , in violation of the custom of (the Naval Service of the United States) (the United States Army) (the United States Air Force) (the United States Coast Guard) that officers shall not fraternize with enlisted persons on terms of military equality.

84. Article 134 (Gambling with subordinate)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused gambled with a certain servicemember;

(2) That the accused was then a noncommissioned or petty officer;

(3) That the servicemember was not then a noncommissioned or petty officer and was subordinate to the accused

(4) That the accused knew that the servicemember was not then a noncommissioned or petty officer and was subordinate to the accused; and

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

c. Explanation. This offense can only be committed by a noncommissioned or petty officer gambling with an enlisted person of less than noncommissioned or petty officer rank. Gambling by an officer with an enlisted person may be a violation of Article 133. See also paragraph 83.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , gamble with , then knowing that the said was not a noncommissioned or petty officer and was subordinate to the said .

85. Article 134 (Homicide, negligent)

a. Text. See paragraph 60.

b. Elements.

(1) That a certain person is dead;

(2) That this death resulted from the act or failure to act of the accused;

(3) That the killing by the accused was unlawful;

(4) That the act or failure to act of the accused which caused the death amounted to simple negligence; and

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

c. Explanation.

(1) Nature of offense. Negligent homicide is any unlawful homicide which is the result of simple negligence. An intent to kill or injure is not required.

(2) Simple negligence. Simple negligence is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably careful person would have exercised under the same or similar circumstances. Simple negligence is a lesser degree of carelessness than culpable negligence. See paragraph 44c(2)(a).

d. Lesser included offenses. None

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , unlawfully kill , [by negligently the said (in) (on) the with a] [by driving a (motor vehicle) ( ) against the said in a negligent manner] [ ].

86. Article 134 (Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official)

a. Text. See paragraph 60.

b. Elements.

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

(2) That the impersonation was wrongful and willful; and

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

[NOTE 1: If intent to defraud is in issue, and the following additional element after (2), above: That the accused did so with the intent to defraud a certain person or organization in a certain manner;].

[NOTE 2: If the accused is charged with impersonating an official of a certain government without an intent to defraud, use the following additional element after (2) above: That the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have;].

c. Explanation.

(1) Nature of offense. Impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, although this is an aggravating factor.

(2) Willfulness. "Willful" means with the knowledge that one is falsely holding one's self out as such.

(3) Intent to defraud. See paragraph 49c(14).

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official.

(1) With intent to defraud. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully and willfully impersonate [a (commissioned officer) (warrant officer) (noncommissioned officer) (petty officer) (agent of superior authority) of the (Army) (Navy) (Marine Corps) (Air Force) (Coast Guard)] [an official of the Government of] by [publicly wearing the uniform and insignia of rank of a (lieutenant of the) ( )] [showing the credentials of] [ ] (with intent to defraud by *) [and (exercised) (asserted) the authority of by **].

[* See subsection b note 1.]

[** See subsection b note 2.]

87. Article 134 (Indecent acts or liberties with a child)

a. Text. See paragraph 60.

b. Elements.

(1) Physical contact.

(a) That the accused committed a certain act upon or with the body of a certain person;

(b) That the person was under 16 years of age and not the spouse of the accused;

(c) That the act of the accused was indecent;

(d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

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

(2) No physical contact.

(a) That the accused committed a certain act;

(b) That the act amounted to the taking of indecent liberties with a certain person;

(c) That the accused committed the act in the presence of this person;

(d) That this person was under 16 years of age and not the spouse of the accused;

(e) That the accused committed the act with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

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

c. Explanation.

(1) Consent. Lack of consent by the child to the act or conduct is not essential to this offense; consent is not a defense.

(2) Indecent liberties. When a person is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but physical contact is not required. Thus, one who with the requisite intent exposes one's private parts to a child under 16 years of age may be found guilty of this offense. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child.

(3) Indecent. See paragraphs 89c and 90c.

d. Lesser included offenses.

(1) Article 134 -- indecent acts with another

(2) Article 128 -- assault; assault consummated by a battery

(3) Article 80 -- attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , [take (indecent) liberties with] [commit an indecent act (upon) (with) the body of] , a (female) (male) under 16 years of age, not the (wife) (husband) of the said , by [fondling (her) (him) and placing his/her

hands upon (her) (his) leg and private parts] [ ], with intent to (arouse) (appeal to) (gratify) the (lust) (passion) (sexual desires) of the said (and).

88. Article 134 (Indecent exposure)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;

(2) That the exposure was willful and wrongful; and

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

c. Explanation. "Willful" means an intentional exposure to public view. Negligent indecent exposure is not punishable as a violation of the code. See paragraph 90c concerning "indecent."

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , while (at a barracks window) ( ) willfully and wrongfully expose in an indecent manner to public view his/her .

89. Article 134 (Indecent language)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused orally or in writing communicated to another person certain language;

(2) That such language was indecent; and

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

[NOTE: In appropriate cases add the following element after element (1): That the person to whom the language was communicated was a child under the age of 16;].

c. Explanation. "Indecent" language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. The language must violate community standards. See paragraph 87 if the communication was made in the physical presence of a child.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Indecent or insulting language.

(1) Communicated to any child under the age of 16 years. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

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

f. Sample specification.

In that (personal jurisdiction data), did (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , (orally) (in writing) communicate to , (a child under the age of 16 years), certain indecent language, to wit: .

90. Article 134 (Indecent acts with another)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused committed a certain wrongful act with a certain person;

(2) That the act was indecent; and

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

c. Explanation. "Indecent" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully commit an indecent act with by .

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

a. Text. See paragraph 60.

b. Elements.

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

(2) That such act by the accused was wrongful and intentional; and

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

c. Explanation. "In use by" means any vessel operated by or under the control of the armed forces. This offense may be committed at sea, at anchor, or in port.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, on board , at (location), on or about 19 , wrongfully and intentionally jump from , a vessel in used by the armed forces, into the (sea) (lake) (river).

92. Article 134 (Kidnapping)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused seized, confined, inveigled, decoyed, or carried away a certain person;

(2) That the accused then held such person against that person's will;

(3) That the accused did so willfully and wrongfully; and

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

c. Explanation.

(1) Inveigle, decoy. "Inveigle" means to lure, lead astray, or entice by false representations or other deceitful means. For example, a person who entices another to ride in a car with a false promise to take the person to a certain destination has inveigled the passenger into the car. "Decoy" means to entice or lure by means of some fraud, trick, or temptation. For example, one who lures a child into a trap with candy has decoyed the child.

(2) Held. "Held" means detained. The holding must be more than a momentary or incidental detention. For example, a robber who holds the victim at gunpoint while the victim hands over a wallet, or a rapist who throws his victim to the ground, does not, by such acts, commit kidnapping. On the other hand if, before or after such robbery or rape, the victim is involuntarily transported some substantial distance, as from a housing area to a remote area of the base or post, this may be kidnapping, in addition to robbery or rape.

(3) Against the will. "Against that person's will" means that the victim was held involuntarily. The involuntary nature of the detention may result from force, mental or physical coercion, or from other means, including false representations. If the victim is incapable of having a recognizable will, as in the case of a very young child or a mentally incompetent person, the holding must be against the will of the victim's parents or legal guardian. Evidence of the availability or nonavailability to the victim of means of exit or escape is relevant to the voluntariness of the detention, as is evidence of threats or force, or lack thereof, by the accused to detain the victim.

(4) Willfully. The accused must have specifically intended to hold the victim against the victim's will to be guilty of kidnapping. An accidental detention will not suffice. The holding need not have been for financial or personal gain or for any other particular purpose. It may be an aggravating circumstance that the kidnapping was for ransom, however. See R.C.M. 1001(b)(4).

(5) Wrongfully. "Wrongfully" means without justification or excuse. For example, a law enforcement official may justifiably apprehend and detain, by force if necessary (see R.C.M. 302(d)(3)), a person reasonably believed to have committed an offense. An official who unlawfully uses that official's authority to apprehend someone is not guilty of kidnapping, but may be guilty of unlawful detention. See paragraph 21. It is not wrongful under this paragraph and therefore not kidnapping for a parent or legal guardian to seize and hold that parent's or legal guardian's minor child.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life.

f. Sample specification.

In that , (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , willfully and wrongfully (seize) (confine) (inveigle) (decoy) (carry away) and hold [a minor whose parent or legal guardian the accused was not] [a person not a minor] against his/her will.

93. Article 134 (Mail: taking, opening, secreting, destroying, or stealing)

a. Text. See paragraph 60.

b. Elements.

(1) Taking.

(a) That the accused took certain mail matter;

(b) That such taking was wrongful;

(c) That the mail matter was taken by the accused before it was delivered to or received by the addressee;

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

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

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

(a) That the accused opened, secreted, destroyed, or stole certain mail matter;

(b) That such opening, secreting, destroying, or stealing was wrongful;

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

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

c. Explanation. These offenses are intended to protect the mail and mail system. "Mail matter" means any matter deposited in a postal system of any government or any authorized depository thereof or in official mail channels of the United States or an agency thereof including the armed forces. The value of the mail matter is not an element. See paragraph 46c(1) concerning "steal."

d. Lesser included offenses.

(1) Article 121 -- larceny; wrongful appropriation

(2) Article 80 -- attempts

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

f. Sample specifications.

(1) Taking.

In that (personal jurisdiction data), did, (at/ on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , 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 19 , [wrongfully (open) (secret) (destroy)] [steal] certain mail matter, to wit: (a) [letter(s)] [postal card(s)] [package(s)] addressed to , which said [letter(s)] [ ] (was) (were) then [in the (Post Office) (orderly room of) (unit mail box of) (custody of) ( )] [had previously been committed to , (a representative of ,) (an official agency for the transmission of communications)] before said [letter(s)] [ ] (was) (were) (delivered) (actually received) (to) (by) the [addressee].

94. Article 134 (Mails: depositing or causing to be deposited obscene matters in)

a. Text. See paragraph 60

b. Elements.

(1) That the accused deposited or caused to be deposited in the mails certain matter for mailing and delivery;

(2) That the act was done wrongfully and knowingly;

(3) That the matter was obscene; and

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

c. Explanation. Whether something is obscene is a question of fact. "Obscene" is synonymous with "indecent" as the latter is defined in paragraph 89c. The matter must violate community standards of decency or obscenity and must go beyond customary limits of expression. "Knowingly" means the accused deposited the material with knowledge of its nature.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully and knowingly (deposit) (cause to be deposited) in the (United States) ( ) mails, for mailing and delivery a (letter) (picture)

( ) (containing) (portraying) (suggesting) ( ) certain obscene matters, to wit: .

95. Article 134 (Misprision of serious offense)

a. Text. See paragraph 60.

b. Elements.

(1) That a certain serious offense was committed by a certain person;

(2) That the accused knew that the said person had committed the serious offense;

(3) That, thereafter, the accused concealed the serious offense and failed to make it known to civilian or military authorities as soon as possible;

(4) That the concealing was wrongful; and

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

c. Explanation.

(1) In general. Misprision of a serious offense is the offense of concealing a serious offense committed by another but without such previous concert with or subseuent assistance to the principal as would make the accused an accessory. See paragraph 3. An intent to benefit the principal is not necessary to this offense.

(2) Serious offense. For purposes of this paragraph, a "serious offense" is any offense punishable under the authority of the code by death or by confinement for a term exceeding 1 year.

(3) Positive act of concealment. A mere failure or refusal to disclose the serious offense without some positive act of concealment does not make the guilty of this offense. Making a false entry in an account book for the purpose of concealing a theft committed by another is an example of a positive act of concealment.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), having knowledge that had actually committed a serious offense to wit: (the murder of) ( ), did, (at/on board -- location) (subject-matter jurisdiction data, if required) from about 19 , to about , 19 , wrongfully conceal such serious offense by and fail to make the same known to the civil or military authorities as soon as possible.

96. Article 134 (Obstructing justice)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;

(3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and

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

c. Explanation. This offense may be based on conduct that occurred before preferral of charges. Actual obstruction of justice is not an element of this offense. For purposes of this paragraph "criminal proceedings" includes nonjudicial punishment proceedings under Part V of this Manual. Examples of obstruction of justice include wrongfully influencing, intimidating, impeding, or injuring a witness, a person acting on charges under this chapter, an investigating officer under R.C.M. 406, or a party; and by means of bribery, intimidation, misrepresentation, or force or threat of force delaying or preventing communication of information relating to a violation of any criminal statute of the United States to a person authorized by a department, agency, or armed force of the United States to conduct or engage in investigations or prosecutions of such offenses; or endeavoring to do so. See also paragraph 22 and Article 37.

d. Lesser included offenses. None.

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , (wrongfully endeavor to) [impede (a trial by court-martial) (an investigation) ( )] [influence the actions of , (a trial counsel of the court-martial) (a defense counsel of the court-martial) (an officer responsible for making a recommendation concerning disposition of charges) ( )] [(influence) (alter) the testimony of as a witness before (a court-martial) (an investigating officer) ( )] in the case of , by [(promising) (offering) (giving) to the said , (the sum of $) (, of a value of about $)] [communicating to the said a threat to] [ ], (if) (unless) he/she, the said , would [(recommend dismissal of the charges against said) [(wrongfully refuse to testify) (testify falsely concerning) ( )] [(at such trial) (before such investigating officer)] [ ].

97. Article 134 (Pandering and prostitution)

a. Text. See paragraph 60.

b. Elements.

(1) Prostitution.

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

(b) That the accused did so for the purpose of receiving money or other compensation;

(c) That this act was wrongful; and

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

(2) Pandering by compelling, inducing, enticing, or procuring act of prostitution.

(a) That the accused compelled, induced, enticed, or procured a certain person to engage in an act of sexual intercourse for hire and reward with a person to be directed to said person by the accused;

(b) That this compelling, inducing, enticing, or procuring was wrongful; and

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

(3) Pandering by arranging or receiving consideration for arranging for sexual intercourse or sodomy.

(a) That the accused arranged for, or received valuable consideration for arranging for, a certain person to engage in sexual intercourse or sodomy with another person;

(b) That the arranging (and receipt of consideration) was wrongful; and

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

c. Explanation. Prostitution may be committed by males or females. Sodomy for money or compensation is not included in subparagraph b(1). Sodomy may be charged under paragraph 51. Evidence that sodomy was for money or compensation may be a matter in aggravation. See R.C.M. 1001(b)(4).

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment.

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

(2) Pandering. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Prostitution.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully engage in (an act) (acts) of sexual intercourse with , a person not his/ her spouse, for the purpose of receiving (money) ( ).

(2) Compelling, inducing, enticing, or procuring act of prostitution.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully (compel) (induce) (entice) (procure) to engage in (an act) (acts) of (sexual intercourse for hire and reward) with persons to be directed to him/her by the said .

(3) Arranging, or receiving consideration for arranging for sexual intercourse or sodomy.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully [arrange for] [receive valuable consideration, to wit: on account of arranging for] to engage in (an act) (acts) of (sexual intercourse) (sodomy) with .

98. Article 134 (Perjury: subornation of)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused induced and procured a certain person to take an oath or its equivalent and to falsely testify, depose, or state upon such oath or its equivalent concerning a certain matter;

(2) That the oath or its equivalent was administered to said person in a matter in which an oath or its equivalent was required or authorized by law;

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

(4) That upon the oath or its equivalent said person willfully made or subscribed a certain statement;

(5) That the statement was material;

(6) That the statement was false;

(7) That the accused and the said person did not then believe that the statement was true; and

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

c. Explanation. See paragraph 57c for applicable principles. "Induce and procure" means to influence, persuade, or cause.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , procure to commit perjury by inducing him/her, the said , to take a lawful (oath) (affirmation) in a (trial by court-martial of) (trial by a court of competent jurisdiction, to wit: of) (deposition for use in a trial by of) ( ) that he/she, the said , would (testify) (depose) ( ) truly, and to (testify) (depose) ( ) willfully, corruptly, and contrary to such (oath) (affirmation) in substance that , which (testimony) (deposition) ( ) was upon a material matter and which the accused and the said did not then believe to be true.

99. Article 134 (Public record: altering, concealing, removing, mutilating, obliterating, or destroying)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused altered, concealed, removed, mutilated, obliterated, destroyed, or took with the intent to alter, conceal, remove, mutilate, obliterate, or destroy, a certain public record;

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

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

c. Explanation. "Public records" include records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which matters there was a duty to report. "Public records" includes classified matters.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , willfully and unlawfully [(alter) (conceal) (remove) (mutilate) (obliterate) (destroy)] [take with intent to (alter) (conceal) (remove) (mutilate) (obliterate) (destroy)] a public record, to wit: .

100. Article 134 (Quarantine: medical, breaking)

a. Text. See paragraph 60.

b. Elements.

(1) That a certain person ordered the accused into medical quarantine;

(2) That that person was authorized to order the accused into medical quarantine;

(3) That the accused knew of this medical quarantine and the limits thereof;

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

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

c. Explanation. None.

d. Lesser included offenses.

(1) Article 134 -- breaking restriction

(2) Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), having been placed in medical quarantine by a person authorized to order the accused into medical quarantine, did, (at/on board -- location) (subject-matter jurisdiction data, of required), on or about 19 , break said medical quarantine.

101. Article 134 (Requesting commission of an offense)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused communicated certain language;

(2) That the language advised, directed, requested, or suggested to certain person(s) to commit an offense under the code;

(3) That the communication was wrongful; and

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

c. Explanation. This offense differs from solicitation to commit an offense (see paragraphs 6 and 105) in that for this offense the accused need not have specifically intended that the offense advised, directed, requested, or suggested be committed. Advice or a direction, request, or suggestion is wrongful if it is made in a manner or under

circumstances which the accused could reasonably expect the persons to whom it was made to take seriously and act upon.

d. Lesser included offenses. None.

e. Maximum punishment. Confinement for 4 months and forfeiture of two-thirds pay per month for 4 months.

f. Sample specification.

In that did (personal jurisdiction data), (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully communicate certain language, to wit: , to , which language (advised) (directed) (requested) (suggested to) the said , to commit , an offense under the code.

102. Article 134 (Restriction, breaking)

a. Text. See paragraph 60.

b. Elements.

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

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

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

(4) That the accused went beyond the limits of the restriction before being released therefrom by proper authority; and

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

c. Explanation. Restriction is the moral restraint of a person imposed by an order directing a person to remain within certain specified limits. "Restriction" includes restriction under R.C.M. 304(a)(2), restriction resulting from imposition of either nonjudicial punishment (see Part V) or the sentence of a court-martial (see R.C.M. 1003(b)(6)), and administrative restriction in the interest of training, operations, security, or safety.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Confinement for 1 month and forfeiture of two-thirds pay per month for 1 month.

f. Sample specification.

In that (personal jurisdiction data), having been restricted to the limits of , by a person authorized to do so, did, (at/on board -- location), on or about 19 , break said restriction.

103. Article 134 (Seizure: destruction, removal, or disposal of property to prevent)

a. Text. See paragraph 60.

b. Elements.

(1) That one or more persons authorized to make searches and seizures were seizing, about to seize, or endeavoring to seize certain property;

(2) That the accused destroyed, removed, or otherwise disposed of that property with intent to prevent the seizure thereof;

(3) That the accused then knew that person(s) authorized to make searches were seizing, about to seize, or endeavoring to seize the property; and

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

c. Explanation. See Mil. R. Evid. 316(e) concerning military personnel who may make seizures. It is not a defense that a search or seizure was technically defective.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject matter jurisdiction data, if required), on or about 19 , 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).

104. Article 134 (Sentinel or lookout: offenses against or by)

a. Text. See paragraph 60.

b. Elements.

(1) Disrespect to a sentinel or lookout.

(a) That a certain person was a sentinel or lookout;

(b) That the accused knew that said person was a sentinel or lookout;

(c) That the accused used certain disrespectful language or behaved in a certain disrespectful manner;

(d) That such language or behavior was wrongful;

(e) That such language or behavior was directed toward and within the sight or hearing of the sentinel or lookout;

(f) That said person was at the time in the execution of duties as a sentinel or lookout; and

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

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

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

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

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

[Note: if the offense was committed in time of war or while the accused was receiving special pay under 37 U.S.C. § 310, add the following element after element (a): That the accused was so posted (in time of war) (while receiving special pay under 37 U.S.C. § 310);]

c. Explanation.

(1) Disrespect. For a discussion of "disrespect," see paragraph 13c(3).

(2) Loitering or wrongfully sitting on post.

(a) In general. The discussion set forth in paragraph 38c applies to loitering or sitting down while posted as a sentinel or lookout as well.

(b) Loiter. "Loiter" means to stand around, to move about slowly, to linger, or to lay behind when that conduct is in violation of known instructions or accompanied by a failure to give complete attention to duty.

d. Lesser included offenses.

(1) Disrespect to a sentinel or lookout. Article 80 -- attempts

(2) Loitering or wrongfully sitting on post by a sentinel or lookout. Article 80 -- attempts

e. Maximum punishment.

(1) Disrespect to a sentinel or lookout. Confinement for 3 months and forfeiture of two-thirds pay per month for 3 months.

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

(a) In time of war or while receiving special pay under 37 U.S.C. § 310. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(b) Other cases. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. Sample specifications.

(1) Disrespect to a sentinel or lookout.

In that (personal jurisdiction data), did, (at/on board -- location), on or about 19 , then knowing that was a sentinel or lookout, [wrongfully use the following disrespectful language " ," or words to that effect, to] [wrongfully behave in a disrespectful manner toward , by] a (sentinel) (lookout) in the execution of his/her duty.

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

In that (personal jurisdiction data), while posted as a (sentinel) (lookout), did, (at/on board -- location) (while receiving special pay under 37 U.S.C. § 310) on or about 19 , (a time of war) (loiter) (wrongfully sit down) on his/her post.

105. Article 134 (Soliciting another to commit an offense)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused solicited or advised a certain person or persons to commit a certain offense under the code other than one of the four offenses named in Article 82;

(2) That the accused did so with the intent that the offense actually be committed; and

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

c. Explanation. See paragraph 6c. If the offense solicited was actually committed, see also paragraph 1.

d. Lesser included offenses.

(1) Article 134 -- Requesting another to commit an offense, wrongful communication of language

(2) Article 80 -- attempts

e. Maximum punishment. Any person subject to the code who is found guilty of soliciting or advising another person to commit an offense which, if committed by one subject to the code, would be punishable under the code, shall be subject to the maximum punishment authorized for the offense solicited or advised, except that in no case shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 5 years.

f. Sample specification.

In that (personal jurisdiction data), did (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully (solicit) (advise) (to disobey a general regulation, to wit:) (to steal , or a value of (about) $, the property of) (to), by .

106. Article 134 (Stolen property: knowingly receiving, buying, concealing)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused wrongfully received, bought, or concealed certain property of some value;

(2) That the property belonged to another person;

(3) That the property had been stolen;

(4) That the accused then knew that the property had been stolen; and

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

c. Explanation.

(1) In general. The actual thief is not criminally liable for receiving the property stolen; however a principal to the larceny (see paragraph 1), when not the actual thief, may be found guilty of knowingly receiving the stolen property but may not be found guilty of both the larceny and receiving the property.

(2) Knowledge. Actual knowledge that the property was stolen is required. Knowledge may be proved by circumstantial evidence.

(3) Wrongfulness. Receiving stolen property is wrongful if it is without justification or excuse. For example, it would not be wrongful for a person to receive stolen property for the purpose of returning it to its rightful owner, or for a law enforcement officer to seize it as evidence.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Stolen property, knowingly receiving, buying, or concealing.

(1) Of a value of $100.00 or less. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) Of a value of more than $100.00. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully (receive) (buy) (conceal) , of a value of (about) $, the property of , which property, as he/she, the said , then knew, had been stolen.

107. Article 134 (Straggling)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused, while accompanying the accused's organization on a march, maneuvers, or similar exercise, straggled;

(2) That the straggling was wrongful; and

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

c. Explanation. "Straggle" means to wander away, to stray, to become separated from, or to lag or linger behind.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, at , on or about 19 , while accompanying his/her organization on (a march) (maneuvers) ( ), wrongfully straggle.

108. Article 134 (Testify: wrongful refusal)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused was in the presence of a court-martial, board of officer(s), military commission, court of inquiry, an officer conducting an investigation under Article 32, or an office taking a deposition, of or for the United States, at which a certain person was presiding;

(2) That the said person presiding directed the accused to qualify as a witness or, having so qualified, to answer a certain question;

(3) That the accused refused to qualify as a witness or answer said question;

(4) That the refusal was wrongful; and

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

c. Explanation. To "qualify as a witness" means that the witness declares that the witness will testify truthfully. See R.C.M. 807; Mil. R. Evid. 603. A good faith but legally mistaken belief in the right to remain silent does not constitute a defense to a charge of wrongful refusal to testify. See also Mil. R. Evid. 301 and Section V.

d. Lesser included offenses. None

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

f. Sample specification.

In that (personal jurisdiction data), being in the presence of (a) (an) [(general) (special) (summary) court-martial] [board of officer(s)] [military commission] [court of inquiry] [officer conducting an investigation under Article 32, Uniform Code of Military Justice] [officer taking a deposition] [ ] (of) (for) the United States, of which was (military judge) (president), ( ), (and having been directed by the said to qualify as a witness) (and having qualified as a witness and having been directed by the said to answer the following question(s) put to him/her as witness, " "), did, (at/on board -- location), on or about 19 , wrongfully refuse (to qualify as a witness) [to answer said question(s)].

109. Article 134 (Threat or hoax: bomb)

a. Text. See paragraph 60.

b. Elements.

(1) Bomb threat.

(a) That the accused communicated certain language;

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

(c) That the harm threatened was to be done by means of an explosive;

(d) That the communication was wrongful; and

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

(2) Bomb hoax.

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

(b) That the language or information concerned an attempt being made or to be made by means of an explosive to unlawfully kill, injure, or intimidate a person or to unlawfully damage or destroy certain property;

(c) That the information communicated by the accused was false and that the accused then knew it was false;

(d) That the communication of the information by the accused was malicious; and

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

c. Explanation.

(1) Threat. A "threat" is an expressed present determination or intent to kill, injure, or intimidate a person or to damage or destroy certain property presently or in the future. Proof that the accused actually intended to kill, injure, intimidate, damage, or destroy is not required. See also paragraph 110.

(2) Malicious. A communication is "malicious" if the accused believed that the information would probably interfere with the peaceful use of the building, vehicle, aircraft, or other property concerned, or would cause fear or concern to one or more persons.

(3) Explosive. See R.C.M. 103(11).

d. Lesser Included offenses.

(1) Bomb threat.

(a) Article 134 -- communicating a threat

(b) Article 80 -- attempts

(2) Bomb hoax. Article 80 -- attempts

e. Maximum punishment. Bomb threat and bomb hoax: Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. Sample specifications.

(1) Bomb threat.

In that (personal jurisdiction data) did, (at/on board -- location) (subject-matter jurisdiction data, if required) on or about 19 , wrongfully communicate certain language, to wit: , which language constituted a threat to harm a person or property by means of an explosive.

(2) Bomb hoax.

In that (personal jurisdiction data) did, (at/on board -- location) (subject-matter jurisdiction data, if required) on or about 19 , maliciously (communicate) (convey) certain information concerning an attempt being made or to be made to unlawfully [(kill) (injure) (intimidate)] [(damage) (destroy)] by means of an explosive, to wit: , which information was false and which then knew to be false.

110. Article 134 (Threat, communicating)

a. Text. See paragraph 60.

b. Elements.

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

(2) That the communication was made known to that person or to a third person;

(3) That the communication was wrongful; and

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

c. Explanation. To establish the threat it is not necessary that the accused actually intended to do the injury threatened. However, a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another. See also paragraph 109 concerning bomb threat.

d. Lesser included offenses.

(1) Article 117 -- provoking speeches or gestures

(2) Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , wrongfully communicate to a threat to (injure by) (accuse of having committed the offense of) ( ).

111. Article 134 (Unlawful entry)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused entered the real property of another or certain personal property of another which amounts to a structure usually used for habitation or storage;

(2) That such entry was unlawful; and

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

c. Explanation. See paragraph 55 for a discussion of "entry." An entry is "unlawful" if made without the consent of any person authorized to consent to entry or without other lawful authority. No specific intent or breaking is required for this offense. See paragraph 55 for a discussion of housebreaking. The property protected against unlawful entry includes real property and the sort of personal property which amounts to a structure usually used for habitation or storage. It would usually not include an aircraft, automobile, tracked vehicle, or a person's locker, even though used for storage purposes. However, depending on the circumstances, an intrusion into such property may be prejudicial to good order and discipline.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , unlawfully enter the (dwelling house) (garage) (warehouse) (tent) (vegetable garden) (orchard) (stateroom) ( ) of .

112. Article 134 (Weapon: concealed, carrying)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused carried a certain weapon concealed on or about the accused's person;

(2) That the carrying was unlawful;

(3) That the weapon was a dangerous weapon; and

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

c. Explanation.

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

(2) Dangerous weapon. For purposes of this paragraph, a weapon is dangerous if it was specifically designed for the purpose of doing grievous bodily harm, or it was used or intended to be used by the accused to do grievous bodily harm.

(3) On or about. "On or about" means the weapon was carried on the accused's person or was within the immediate reach of the accused.

d. Lesser included offense. Article 80 -- attempts

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location) (subject-matter jurisdiction data, if required), on or about 19 , unlawfully carry on or about his/her person a concealed weapon, to wit: a .

113. Article 134 (Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button)

a. Text. See paragraph 60.

b. Elements

(1) That the accused wore a certain insignia, decoration, badge, ribbon, device, or lapel button upon the accused's uniform or civilian clothing;

(2) That accused was not authorized to wear the item;

(3) That the wearing was wrongful; and

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

c. Explanation. None.

d. Lesser included offense. Article 80 -- attempts

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

f. Sample specification.

In that (personal jurisdiction data), did, (at/on board -- location), on or about 19 , wrongfully and without authority wear upon his/her (uniform) (civilian clothing) [the insignia of 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] [ ].

Part V

NONJUDICIAL PUNISHMENT PROCEDURE

1. General

a. Authority. Nonjudicial punishment in the United States Armed Forces is authorized by Article 15.

b. Nature. Nonjudicial punishment is a disciplinary measure more serious than the administrative corrective measures discussed in paragraph lg, but less serious than trial by court-martial.

c. Purpose. Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in servicemembers without the stigma of a court-martial conviction.

d. Policy.

(1) Commander's responsibility. Commanders are responsible for good order and discipline in their commands. Generally, discipline can be maintained through effective leadership including, when necessary, administrative corrective measures. Nonjudicial punishment is ordinarily appropriate when administrative corrective measures are inadequate due to the nature of the minor offense or the record of the servicemember, unless it is clear that only trial by court-martial will meet the needs of justice and discipline. Nonjudicial punishment shall be considered on an individual basis. Commanders considering nonjudicial punishment should consider the nature of the offense, the record of the servicemember, the needs for good order and discipline, and the effect of nonjudicial punishment on the servicemember and the servicemember's record.

(2) Commander's discretion. A commander who is considering a case for disposition under Article 15 will exercise personal discretion in evaluation each case, both as to whether nonjudicial punishment is appropriate, and, if so, as to the nature and amount of punishment appropriate. No superior may direct that a subordinate authority impose nonjudicial punishment in a particular case. Non superior may issue regulations, orders, or "guides" which suggest to subordinate authorities that certain categories of minor offenses be disposed of by nonjudicial punishment instead of by court-martial or administrative corrective measures, or that predetermined kinds or amounts of punishments be imposed for certain classifications of offenses that the subordinate considers appropriate for disposition by nonjudicial punishment.

(3) Commander's suspension authority. Commanders should consider suspending all or part of any punishment selected under Article 15, particularly in the case of first offenders or when significant extenuating or mitigating matters are present. Suspension provides an incentive to the offender and gives an opportunity to the commander to evaluate the offender during the period of suspension.

e. Minor offenses. Nonjudicial punishment may be imposed for acts or omissions that are minor offenses under the punitive articles (see Part IV). Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender's age, rank, duty assignment, record, and experience; and the maximum sentence imposable for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial. The decision whether an offense is "minor" is a matter of discretion for the commander imposing nonjudicial punishment, but nonjudicial punishment for an offense other than a minor offense (even though thought by the commander to be minor) is not a bar to trial by court-martial for the same offense. See R.C.M. 907(b)(2)(D)(iv). However, the accused may show at trial that nonjudicial punishment was imposed, and if the accused does so, this fact must be considered in determining an appropriate sentence. See Article 15(f); R.C.M. 1001(c)(1)(B).

f. Limitations on nonjudicial punishment.

(1) Double punishment prohibited. When nonjudicial punishment has been imposed for an offense, punishment may not again be imposed for the same offense under Article 15. But see paragraph 1e concerning trial by court-martial.

(2) Increase in punishment prohibited. Once nonjudicial punishment has been imposed, it may not be increased, upon appeal or otherwise.

(3) Multiple punishment prohibited. When a commander determines that nonjudicial punishment is appropriate for a particular servicemember, all known offenses determined to be appropriate for disposition by nonjudicial punishment and ready to be considered at that time, including all such offenses arising from a single incident or course of conduct, shall ordinarily be considered together, and not made the basis for multiple punishments.

(4) Statute of limitations. Except as provided in Article 43(d), nonjudicial punishment may not be imposed for offenses which were committed more than 2 years before the date of imposition. See Article 43(c).

(5) Civilian courts. Nonjudicial punishment may not be imposed for an offense tried by a court which derives its authority from the United States. Nonjudicial punishment may not be imposed for an offense tried by a State or foreign court unless authorized by regulations of the Secretary concerned.

g. Relationship of nonjudicial punishment to administrative corrective measures. Article 15 and Part V of this Manual do not apply to, include, or limit use of administrative corrective measures that promote efficiency and good order and discipline such as counseling, admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, rebukes, extra military instruction, and administrative withholding of privileges. See also R.C.M. 306. Administrative corrective measures are not punishment, and they may be used for acts or omissions which are not offenses under the code and for acts or omissions which are offenses under the code.

h. Effect of errors. Failure to comply with any of the procedural provisions of Part V of this Manual shall not invalidate a punishment imposed under Article 15, unless the error materially prejudiced a substantial right of the servicemember on whom the punishment was imposed.

2. Who may impose nonjudicial punishment

a. Commander. Unless otherwise provided by regulations of the Secretary concerned, a commander may impose nonjudicial punishment upon any military personnel for that command. "Commander" means a commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area, which under pertinent official directives is recognized as a "command." Subject to paragraph 1d(2) and any regulations of the Secretary concerned, the authority of a commander to impose nonjudicial punishment as to certain types of offenses, certain categories of persons, or in specific cases, or to impose certain types of punishment, may be limited or withheld by a superior commander or by the Secretary concerned.

b. Officer in charge. If authorized by regulations of the Secretary concerned, an officer in charge may impose nonjudicial punishment upon enlisted persons assigned to that unit.

c. Principal assistant. If authorized by regulations of the Secretary concerned, a commander exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate that commander's powers under Article 15 to a principal assistant. The Secretary concerned may define "principal assistant."

3. Right to demand trial

Except in the case of a person attached to or embarked in a vessel, punishment may not be imposed under Article 15 upon any member of the armed forces who has, before the imposition of nonjudicial punishment, demanded trial by court-martial in lieu of nonjudicial punishment. This right may also be granted to a person attached to or embarked in a vessel if so authorized by regulations of the Secretary concerned. A person is "attached to" or "embarked in" a vessel if, at the time nonjudicial punishment is imposed, that person is assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body.

4. Procedure

a. Notice. If, after a preliminary inquiry (see R.C.M. 303), the commander determines that disposition by nonjudicial punishment proceedings is appropriate (see R.C.M. 306; paragraph 1 of this Part), the commander shall cause the servicemember to be notified. The notice shall include:

(1) a statement that the commander is considering the imposition of nonjudicial punishment;

(2) a statement describing the alleged offenses -- including the article of the code -- which the member is alleged to have committed;

(3) a brief summary of the information upon which the allegations are based or a statement that the member may, upon request, examine available statements and evidence;

(4) a statement of the rights that will be accorded to the servicemember under subparagraphs 4c(1) and (2) of this Part;

(5) unless the right to demand trial is not applicable (see paragraph 3 of this Part), a statement that the member may demand trial by court-martial in lieu of nonjudicial punishment, a statement of the maximum punishment which the commander may impose by nonjudicial punishment; a statement that, if trial by court-martial is demanded, charges could be referred for trial by summary, special, or general court-martial; that the member may not be tried by summary court-martial over the member's objection; and that at a special or general court-martial the member has the right to be represented by counsel.

b. Decision by servicemember.

(1) Demand for trial by court-martial. If the servicemember demands trial by court-martial (when this right is applicable), the nonjudicial proceedings shall be terminated. It is within the discretion of the commander whether to forward or refer charges for trial by court-martial (see R.C.M. 306; 307; 401-407) in such a case, but in no event may nonjudicial punishment be imposed for the offenses affected unless the demand is voluntarily withdrawn.

(2) No demand for trial by court-martial. If the servicemember does not demand trial by court-martial within a reasonable time after notice under subparagraph 4a of this Part, or if the right to demand trial by court-martial is not applicable, the commander may proceed under subparagraph 4c of this Part.

c. Nonjudicial punishment accepted.

(1) Personal appearance requested; procedure. Before nonjudicial punishment may be imposed, the servicemember shall be entitled to appear personally before the commander -- or the commander's delegee (see paragraph 2c of this Part) -- who offered nonjudicial punishment, except when appearance is prevented by the unavailability of the commander or by extraordinary circumstances, in which case the servicemember shall be entitled to appear before a person designated by the commander who shall prepare a written summary of any proceedings before that person and forward it and any written matter submitted by the servicemember to the commander. If the servicemember requests personal appearance, the servicemember shall be entitled to:

(A) Be informed in accordance with Article 31(b);

(B) Be accompanied by a spokesperson provided or arranged for by the member unless the punishment to be imposed will not exceed extra duty for 14 days, restricton for 14 days, and an oral reprimand. Such a spokesperson need not be qualified under R.C.M. 502(d); such spokesperson is not entitled to travel or similar expenses, and the proceedings need not be delayed to permit the presence of a spokesperson; the spokesperson may speak for the servicemember, but may not question witnesses except as the commander may allow as a matter of discretion;

(C) Be informed orally or in writing of the information against the servicemember and relating to the offenses alleged;

(D) Be allowed to examine documents or physical objects against the member which the commander has examined in connection with the case and on which the commander intends to rely in deciding whether and how much nonjudicial punishment to impose;

(E) Present matters in defense, extenuation, and mitigation orally, or in writing, or both;

(F) Have present witnesses, including those adverse to the servicemember, upon request if their statements will be relevant and they are reasonably available. For purposes of this subparagraph, a witness is not reasonably available if the witness requires reimbursement by the United States for any cost incurred in appearing, cannot appear without unduly delaying the proceedings, or, if a military witness, cannot be excused from other important duties;

(G) Have the proceeding open to the public unless the commander determines that the proceeding should be closed for good cause, such as military exigencies or security interests, or unless the punishment to be imposed will not exceed extra duty for 14 days, restriction for 14 days, and an oral reprimand; however, nothing in this subparagraph requires special arrangements to be made to facilitate access to the proceeding.

(2) Personal appearance waived; procedure. If the servicemember waives the right to appear personally under subparagraph 4c(1) of this Part, the servicemember may submit written matters for consideration by the commander before the commander's decision under subparagraph 4c(4) of this Part. The servicemember shall be informed of the right to remain silent and that matters submitted may be used against the member in a trial by court-martial.

(3) Evidence. The Military Rules of Evidence (Part III), other than with respect to privileges, do not apply at nonjudicial punishment proceedings. Any relevant matter may be considered, after compliance with subparagraphs 4c(1)(C) and (D) of this Part.

(4) Commander's decision. After considering all relevant matters presented, if the commander --

(A) Does not conclude that the servicemember committed the offenses alleged, the commander shall so inform the member and terminate the proceedings;

(B) Concludes that the servicemember committed one or more of the offenses alleged, the commander shall:

(i) so inform the servicemember;

(ii) inform the servicemember of the punishment imposed; and

(iii) inform the servicemember of the right to appeal (see paragraph 7 of this Part).

d. Nonjudicial punishment based on record of court of inquiry or other investigative body. Nonjudicial punishment may be based on the record of a court of inquiry or other investigative body, in which proceeding the member was accorded the rights of a party. No additional proceeding under subparagraph 4c(1) of this Part is required. The servicemember shall be informed in writing that nonjudicial punishment is being considered based on the record of

the proceedings in question, and given the opportunity, if applicable, to refuse nonjudicial punishment. If the servicemember does not demand trial by court-martial or has no option, the servicemember may submit, in writing, any matter in defense, extenuation, or mitigation, to the officer considering imposing nonjudicial punishment, for consideration by that officer to determine whether the member committed the offenses in question, and, if so, to determine an appropriate punishment.

5. Punishments

a. General limitations. The Secretary concerned may limit the power granted by Article 15 with respect to the kind and amount of the punishment authorized. Subject to paragraphs 1 and 4 of this Part and to regulations of the Secretary concerned, the kinds and amounts of punishment authorized by Article 15(b) may be imposed upon servicemembers as provided in this paragraph.

b. Authorized maximum punishments. In addition to or in lieu of admonition or reprimand, the following disciplinary punishments may, subject to the limitations of subparagraph 5d of this Part, be imposed by the following commanders upon servicemembers:

(1) Upon commissioned officers and warrant officers --

(A) by any commanding officer -- restriction to specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rang in command --

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of 1 month's pay per month for 2 months;

(iii) restriction to specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(2) Upon other military personnel of the command

(A) by any commander --

(i) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than 3 consecutive days;

(ii) correctional custody for not more than 7 consecutive days;

(iii) forfeiture of not more than 7 days' pay;

(iv) reduction to the next inferior grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;

(v) extra duties, including fatigue or other duties, for not more than 14 consecutive days;

(vi) restriction to specified limits, with or without suspension from duty, for not more than 14 consecutive days.

(B) if imposed by a commanding officer of the grade of major or lieutenant commander or above --

(i) if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than 3 consecutive days;

(ii) correctional custody for not more than 30 consecutive days;

(iii) forfeiture of not more than one-half of 1 month's pay per month for 2 months;

(iv) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but enlisted members in pay grades above E-4 may not be reduced more than one pay grade, except that during time of war or national emergency this category of persons may be reduced two grades if the Secretary concerned determines that circumstances require the removal of this limitation;

(v) extra duties, including fatigue or other duties, for not more than 45 consecutive days;

(vi) restriction to specified limits, with or without suspension from duty, for not more than 60 consecutive days;

c. Nature of punishments.

(1) Admonition and reprimand. Admonition and reprimand are two forms of censure intended to express adverse reflection upon or criticism of a person's conduct. A reprimand is a more severe form of censure than an admonition. When imposed as nonjudicial punishment, the admonition or reprimand is considered to be punitive, unlike the nonpunitive admonition and reprimand provided for in paragraph if of this part. In the case of commissioned officers and warrant officers, admonitions and reprimands given as nonjudicial punishment must be administered in writing. In other cases, unless otherwise prescribed by the Secretary concerned, they may be administered either orally or in writing.

(2) Restriction. Restriction is the least severe form of deprivation of liberty. Restriction involves moral rather than physical restraint. The severity of this type of restraint depends on its duration and the geographical limits specified when the punishment is imposed. A person undergoing restriction may be required to report to a designated place at specified times if reasonably necessary to ensure that the punishment is being properly executed. Unless otherwise specified by the commander imposing this form of punishment, a person in restriction may be required to perform any military duty.

(3) Arrest in quarters. As in the case of restriction, the restraint involved in arrest in quarters is enforced by a moral obligation rather than by physical means. This punishment may be imposed only on officers. An officer undergoing this punishment may be required to perform those duties prescribed by the Secretary concerned. However, an officer so punished is required to remain within that officer's quarters during the period of punishment unless the

limits of arrest are otherwise extended by appropriate authority. The quarters of an officer may consist of a military residence, whether a tent, stateroom, or other quarters assigned, or a private residence when government quarters have not been provided.

(4) Correctional custody. Correctional custody is the physical restraint of a person during duty or nonduty hours, or both, imposed as a punishment under Article 15, and may include extra duties, fatigue duties, or hard labor as an incident of correctional custody. A person may be required to serve correctional custody in a confinement facility, but, if practicable, not in immediate association with persons awaiting trial or held in confinement pursuant to trial by court-martial. A person undergoing correctional custody may be required to perform those regular military duties, extra duties, fatigue duties, and hard labor which may be assigned by the authority charged with the administration of the punishment. The conditions under which correctional custody is served shall be prescribed by the Secretary concerned. In addition, the Secretary concerned may limit the categories of enlisted members upon whom correctional custody may be imposed. The authority competent to order the release of a person from correctional custody shall be as designated by the Secretary concerned.

(5) Confinement on bread and water or diminished rations. Confinement on bread and water or diminished rations involves confinement in places where the person so confined may communicate only with authorized personnel. The ration to be furnished a person undergoing a punishment of confinement on bread and water or diminished rations is that specified by the authority charged with the administration of the punishment, but the ration may not consist solely of bread and water unless this punishment has been specifically imposed. When punishment of confinement on bread and water or diminished rations is imposed, a signed certificate of a medical officer containing an opinion that no serious injury to the health of the person to be confined will be caused by that punishment, must be obtained before the punishment is executed. The categories of enlisted personnel upon whom this type of punishment may be imposed may be limited by the Secretary concerned.

(6) Extra duties. Extra duties involve the performance of duties in addition to those normally assigned to the person undergoing the punishment. Extra duties may include fatigue duties. Military duties of any kind may be assigned as extra duty. However, no extra duty may be imposed which constitutes a known safety or health hazard to the member or which constitutes cruel or unusual punishment or which is not sanctioned by customs of the service concerned. Extra duties assigned as punishment of noncommissioned officers, petty officers, or any other enlisted persons of equivalent grades or positions designated by the Secretary concerned, should not be of a kind which demeans their grades or positions.

(7) Reduction in grade. Reduction in grade is one of the most severe forms of nonjudicial punishment and it should be used with discretion. As used in Article 15, the phrase "if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction" does not refer to the authority to promote the person concerned but to the general authority to promote to the grade held by the person to be punished.

(8) Forfeiture of pay. Forfeiture means a permanent loss of entitlement to the pay forfeited. "Pay," as used with respect to forfeiture of pay under Article 15, refers only to the basic pay of the person plus any sea or foreign duty

pay. "Basic pay" includes no element of pay other than the basic pay fixed by statute for the grade and length of service of the person concerned and does not include special pay for a special qualification, incentive pay for the performance of hazardous duties, proficiency pay, subsistence and quarters allowances, and similar types of compensation. If the punishment includes both reduction, whether or not suspended, and forfeiture of pay, the forfeiture must be based on the grade to which reduced. The amount to be forfeited will be expressed in whole dollar amounts only and not in a number of day's pay or fractions of monthly pay. If the forfeiture is to be applied for more than 1 month, the amount to be forfeited per month and the number of months should be stated. Forfeiture of pay may not extend to any pay accrued before the date of its imposition.

d. Limitations on combinations of punishment.

(1) Arrest in quarters may not be imposed in combination with restriction;

(2) Confinement on bread and water or diminished rations may not be imposed in combination with correctional custody, extra duties, or restriction;

(3) Correctional custody may not be imposed in combination with restriction or extra duties;

(4) Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties.

(5) Subject to the limits in subparagraphs d(1) through (4) all authorized punishments may be imposed in a single case in the maximum amounts.

e. Effective date and execution of punishments. Reduction and forfeiture of pay, if unsuspended, take effect on the date the commander imposes the punishments. Other punishments, if unsuspended, will take effect and be carried into execution as prescribed by the Secretary concerned.

6. Suspension, mitigation, remission, and setting aside

a. Suspension. The commander who imposes nonjudicial punishment, or a successor in command over the person punished, may, at any time, suspend any part or amount of the unexecuted punishment imposed and may suspend a reduction in grade or a forfeiture, whether or not executed, subject to the following rules:

(1) An executed punishment of reduction or forfeiture of pay may be suspended only within a period of 4 months after the date of execution.

(2) Suspension of a punishment may not be for a period longer than 6 months from the date of the suspension, and the expiration of the current enlistment or term of service of the servicemember involved automatically terminates the period of suspension.

(3) Unless the suspension is sooner vacated, suspended portions of the punishment are remitted, without further action, upon the termination of the period of suspension.

(4) A suspension may be vacated by any commander competent to impose upon the offender concerned punishment of the kind and amount involved in the vacation of suspension. Vacation of suspension may only be based on an offense under the code committed during the period of suspension. Before a suspension may be vacated, the servicemember ordinarily shall be notified and given an opportunity to respond. Although a hearing is not required to vacate a suspension, if the punishment suspended is of the kind set forth in Article 15(e)(1)-(7) the servicemember should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate suspension of the punishment to present any matters in defense, extenuation or mitigation of the offense on which the vacation action is to be based. Vacation of a suspended nonjudicial punishment is not itself nonjudicial punishment, and additional action to impose nonjudicial punishment for the offense upon which the vacation action is based is not precluded thereby.

b. Mitigation. Mitigation is a reduction in either the quantity or quality of a punishment, its general nature remaining the same. Mitigation is appropriate when the offender's later good conduct merits a reduction in the punishment, or when it is determined that the punishment imposed was disproportionate. The commander who imposes nonjudicial punishment or a successor in command may, at any time, mitigate any part or amount of the unexecuted portion of the punishment imposed. The commander may also mitigate reduction in grade, whether executed or unexecuted, to forfeiture of pay, but the amount of the forfeiture may not be greater than the amount that could have been imposed by the officer who initially imposed the nonjudicial punishment. Reduction in grade may be mitigated to forfeiture of pay only within 4 months after the date of execution.

When mitigating --

(1) Arrest in quarters to restriction;

(2) Confinement on bread and water or diminished rations to correctional custody;

(3) Correctional custody or confinement on bread and water or diminished rations to extra duties or restriction, or both; or

(4) Extra duties to restriction, the mitigated punishment may not be for a greater period than the punishment mitigated. As restriction is the least severe form of deprivation of liberty, it may not be mitigated to a lesser period of another form of deprivation of liberty, as that would mean an increase in the quality of the punishment.

c. Remission. Remission is an action whereby any portion of the unexecuted punishment is cancelled. Remission is appropriate under the same circumstances as mitigation. The commander who imposes nonjudicial punishment or a successor in command may, at any time, remit any part or amount of the unexecuted portion of the punishment imposed. The expiration of the current enlistment or term of service of the servicemember automatically remits any unexecuted punishment imposed under Article 15.

d. Setting aside. Setting aside is an action whereby the punishment or any part or amount thereof, whether executed or unexecuted, is set aside and any property, privileges, or rights affected by the portion of the punishment set aside are restored. The commander who imposes nonjudicial punishment or a successor in

command may set aside punishment. The power to set aside punishments and restore rights, privileges, and property affected by the executed portion of a punishment should ordinarily be exercised only when the authority considering the case believes that, under all the circumstances of the case, the punishment has resulted in a clear injustice. Also, the power to set aside an executed punishment should ordinarily be exercised only within a reasonable time after the punishment has been executed. In this connection, 4 months is a reasonable time in the absence of unusual circumstances.

7. Appeals

a. In general. Any servicemember punished under Article 15 who considers the punishment to be unjust or disproportionate to the offense may appeal through the proper channels to the next superior authority.

b. Who may act on appeal. A "superior authority," as prescribed by the Secretary concerned, may act on an appeal. When punishment has been imposed under delegation of a commander's authority to administer nonjudicial punishment (see paragraph 2c of this Part), the appeal may not be directed to the commander who delegated the authority.

c. Format of appeal. Appeals shall be in writing and may include the appellant's reasons for regarding the punishment as unjust or disproportionate.

d. Time limit. An appeal shall be submitted within 5 days of imposition of punishment, or the right to appeal shall be waived in the absence of good cause shown. A servicemember who has appealed may be required to undergo any punishment imposed while the appeal is pending, except that if action is not taken on the appeal within 5 days after the appeal was submitted, and if the servicemember so requests, any unexecuted punishment involving restraint or extra duty shall be stayed until action on the appeal is taken.

e. Legal review. Before acting on an appeal from any punishment of the kind set forth in Article 15(e)(1)-(7), the authority who is to act on the appeal shall refer the case to a judge advocate or to a lawyer of the Department of Transportation for consideration and advice, and may so refer the case upon appeal from any punishment imposed under Article 15. When the case is referred, the judge advocate or lawyer is not limited to an examination of any written matter comprising the record of proceedings and may make any inquiries and examine any additional matter deemed necessary.

f. Action by superior authority.

(1) In general. In acting on an appeal, the superior authority may exercise the same power with respect to the punishment imposed as may be exercised under Article 15(d) and paragraph 6 of this part by the officer who imposed the punishment. The superior authority may take such action even if no appeal has been filed.

(2) Matters considered. When reviewing the action of an officer who imposed nonjudicial punishment, the superior authority may consider the record of the proceedings, any matters submitted by the servicemember, any matters considered during the legal review, if any, and any other appropriate matters.

(3) Additional proceedings. If the superior authority sets aside a nonjudicial punishment due to a procedural error, that authority may authorize additional proceedings under Article 15, to be conducted by the officer who imposed the nonjudicial punishment, or a successor in command, for the same offenses involved in the original proceedings. Any punishment imposed as a result of these additional proceedings may be no more severe than that originally imposed.

(4) Notification. Upon completion of action by the superior authority, the servicemember upon whom punishment was imposed shall be promptly notified of the result.

(5) Delegation to principal assistant. If authorized by regulations of the Secretary concerned, a superior authority who is a commander exercising general court-martial jurisdiction, or is an officer of general or flag rank in command, may delegate the power under Article 15(e) and this paragraph to a principal assistant.

8. Records of nonjudicial punishment

The content, format, use, and disposition of records of nonjudicial punishment may be prescribed by regulations of the Secretary concerned.

[FR Doc. 84-10522

Filed 4-16-84; 1:53 pm]

Billing code 3195-01-C

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