

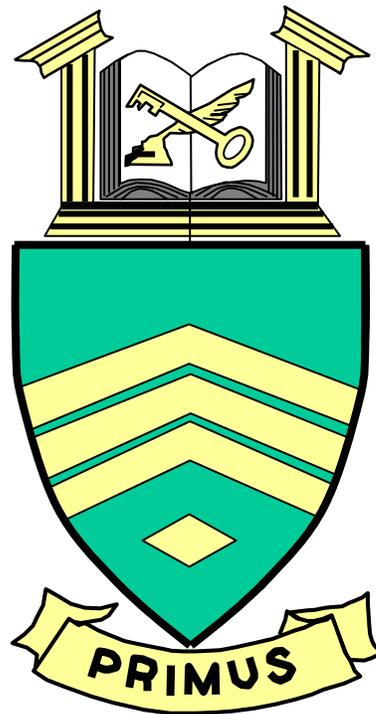
U.S. ARMY SERGEANTS MAJOR ACADEMY (FSC-TATS)

L672

JUN 06

MANUAL FOR COURTS MARTIAL

PRERESIDENT TRAINING SUPPORT PACKAGE



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PRERESIDENT TRAINING SUPPORT PACKAGE (TSP)

| | |
|--|---|
| TSP Number / Title | L672 / MANUAL FOR COURTS-MARTIAL |
| Effective Date | 01 Jun 2006 |
| Supersedes TSP(s) / Lesson(s) | L672, Manual for Courts-Martial, Jun 05. |
| TSP Users | 521-SQIM (DL), First Sergeant Course |
| Proponent | The proponent for this document is the Sergeants Major Academy. |
| Improvement Comments | <p>Users are invited to send comments and suggested improvements on DA Form 2028, <i>Recommended Changes to Publications and Blank Forms</i>. Completed forms, or equivalent response, will be mailed or attached to electronic e-mail and transmitted to:</p> <p>COMDT USASMA ATTN ATSS DCF BLDG 11291 BIGGS FIELD FORT BLISS TX 79918-8002</p> <p>Telephone (Comm) (915) 568-8875 Telephone (DSN) 978-8875</p> <p>E-mail: atss-dcd@bliss.army.mil</p> |
| Security Clearance / Access | Unclassified |
| Foreign Disclosure Restrictions | FD5. This product/publication has been reviewed by the product developers in coordination with the USASMA foreign disclosure authority. This product is releasable to students from all requesting foreign countries without restrictions. |

PREFACE

Purpose

This Training Support Package provides the student with a standardized lesson plan for presenting instruction for:

Task Number

Task Title

181-331-1001

Employ Military Justice

This TSP
Contains

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**MANUAL FOR COURTS-MARTIAL
L672 / Version 1
01 Jun 2006**

SECTION I. ADMINISTRATIVE DATA

| | | | |
|--|--|---------------------------|-------------------------------|
| All Courses Including This Lesson | <u>Course Number</u> | <u>Version</u> | <u>Course Title</u> |
| | 521-SQIM (DL) | 1 | First Sergeant Course |
| Task(s) Taught(*) or Supported | <u>Task Number</u> | <u>Task Title</u> | |
| | 181-331-1001 | Employ Military Justice | |
| Reinforced Task(s) | <u>Task Number</u> | <u>Task Title</u> | |
| | None | | |
| Academic Hours | The academic hours required to teach this lesson are as follows: | | |
| | <u>Distance Learning Hours/Methods</u> | | |
| | | 1 hr | / Study Assignment |
| | Test | 0 hrs | |
| | Test Review | 0 hrs | |
| | Total Hours: | 1 hr | |
| Test Lesson Number | | <u>Hours</u> | <u>Lesson No.</u> |
| | Testing (to include test review) | 3 hrs | E651 version 1 |
| Prerequisite Lesson(s) | <u>Lesson Number</u> | <u>Lesson Title</u> | |
| | None | | |
| Clearance Access | Security Level: Unclassified Requirements: There are no clearance or access requirements for the lesson. | | |
| Foreign Disclosure Restrictions | FD5. This product/publication has been reviewed by the product developers in coordination with the USASMA foreign disclosure authority. This product is releasable to students from all requesting foreign countries without restrictions. | | |
| References | <u>Number</u> | <u>Title</u> | <u>Date</u> |
| | MCM 2005 | MANUAL FOR COURTS-MARTIAL | Edition 2005 |
| | | | <u>Additional Information</u> |
| | | | SH-1 |
| Student Study Assignments | <ul style="list-style-type: none"> • Read SH-1. | | |
| Instructor Requirements | None | | |

Additional Support Personnel Requirements

| <u>Name</u> | <u>Stu Ratio</u> | <u>Qty</u> | <u>Man Hours</u> |
|---|------------------|------------|------------------|
| MSG, FSC graduate, ITC, and SGITC graduate (Enlisted) | 1:14 | 1 | 1 hr |

Equipment Required for Instruction

| <u>Id Name</u> | <u>Stu Ratio</u> | <u>Instr Ratio</u> | <u>Spt</u> | <u>Qty</u> | <u>Exp</u> |
|----------------|------------------|--------------------|------------|------------|------------|
| None | | | | | |

* Before Id indicates a TADSS

Materials Required

Instructor Materials:
None

Student Materials:

- TSP.
- Pen or pencil and writing paper.

Classroom, Training Area, and Range Requirements

None

Ammunition Requirements

| <u>Id</u> | <u>Name</u> | <u>Exp</u> | <u>Stu Ratio</u> | <u>Instr Ratio</u> | <u>Spt Qty</u> |
|-----------|-------------|------------|------------------|--------------------|----------------|
| None | | | | | |

Instructional Guidance

None

Proponent Lesson Plan Approvals

| <u>Name</u> | <u>Rank</u> | <u>Position</u> | <u>Date</u> |
|-------------------------|-------------|-----------------------|-------------|
| Colyer, Donald J. | GS09 | Training Specialist | |
| Adams, Chris L. | SGM | Chief Instructor, FSC | |
| Graham, Kevin L. | SGM | Chief, FSC | |
| Collins, Curtis R. | SGM | Chief, SMC | |
| Bennett-Green, Agnes D. | SGM | Chief, CMDD | |

SECTION II. INTRODUCTION

| |
|--|
| Method of Instruction: <u>Study Assignment</u> |
| Technique of Delivery: <u>Individualized, self-paced Instruction</u> |
| Instructor to Student Ratio is: <u>1:14</u> |
| Time of Instruction: <u>5 mins</u> |
| Media: <u>None</u> |

Motivator

The purpose of military law is to promote justice, assist in maintaining good order and discipline in the armed forces, and promote efficiency and effectiveness in the military establishment, thereby, strengthening the national security of the United States. 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 Manual for Courts-Martial (MCM) contains military law.

Terminal Learning Objective

At the completion of this lesson, you [the student] will:

| | |
|--------------------|--|
| Action: | Advise the commander on legal matters from the Manual for Courts-Martial (MCM). |
| Conditions: | As a first sergeant in a self-study environment given extracted material from MCM 2005 (SH-1). |
| Standards: | Advised the commander on legal matters from the Manual for Courts-Martial 2005 (SH-1). |

Safety Requirements

None

Risk Assessment Level

Low

Environmental Considerations

NOTE: It is the responsibility of all Soldiers and DA civilians to protect the environment from damage.

None

Evaluation

At the end of your Phase I training and before entering Phase II, you will take an on-line, multiple-choice examination. It will test your comprehension of the learning objectives from this and other lessons in Phase I. You must correctly answer 70 percent or more of the questions on the examination to receive a GO. Failure to achieve a GO on the examination will result in a retest. Failure on the retest could result in your dismissal from the course.

**Instructional
Lead-In**

None

SECTION III. PRESENTATION

A. ENABLING LEARNING OBJECTIVE

| | |
|--------------------|--|
| ACTION: | Locate information in the MCM. |
| CONDITIONS: | As a first sergeant in a self-study environment given extracted material from MCM 2005 (SH-1). |
| STANDARDS: | Located information in the MCM 2005 (SH-1). |

1. Learning Step / Activity 1. Table of Contents

Method of Instruction: Study Assignment
Technique of Delivery: Individualized, self-paced Instruction
Instructor to Student Ratio: 1:14
Time of Instruction: 5 mins
Media: None

To complete this learning step activity, you are to--

- Read the above ELO.
- Read MCM 2005 (SH-1), pp SH-1-1 thru SH-1-6.
- Complete question 1 in PE-1, p C-2.
- Compare your response with the solution on p C-5.
- For any incorrect response, review the appropriate reference/lesson material.

CHECK ON LEARNING: The practical exercise (question 1) serves as the check on learning for ELO A.

B. ENABLING LEARNING OBJECTIVE

| | |
|--------------------|--|
| ACTION: | Determine the elements of Articles 77 and 79. |
| CONDITIONS: | As a first sergeant in a self-study environment given extracted material from MCM 2005 (SH-1). |
| STANDARDS: | Determined the elements of Articles 77 and 79 IAW MCM 2005 (SH-1). |

1. Learning Step / Activity 1. Articles 77 and 79

Method of Instruction: Study Assignment
Technique of Delivery: Individualized, self-paced Instruction
Instructor to Student Ratio: 1:14
Time of Instruction: 5 mins
Media: None

To complete this learning step activity, you are to--

- Read the above ELO.

NOTE: The first paragraph under discussion reads “Paragraphs 1 and 2” It should read “Paragraphs 1 and 3”

- Read MCM 2005 (SH-1), p SH-1-23, Part IV. Punitive Articles, first para under discussion.
- Read MCM 2005 (SH-1), pp SH-1-23, para 1, Article 77 - Principles.
- Read MCM 2005 (SH-1), pp SH-1-25, para 3, Article 79 - Conviction of lesser included offenses.
- Complete questions 2 and 3 in PE-1, p C-2.
- Compare your responses with the solutions on p C-5.
- For any incorrect responses, review the appropriate reference/lesson material.

CHECK ON LEARNING: The practical exercise (questions 2 and 3) serves as the check on learning for ELO B.

C. ENABLING LEARNING OBJECTIVE

| | |
|--------------------|--|
| ACTION: | Determine the elements of Articles 78, 80, 81, and 82. |
| CONDITIONS: | As a first sergeant in a self-study environment given extracted material from MCM 2005 (SH-1). |
| STANDARDS: | Determined the elements of Articles 78, 80, 81, and 82 IAW MCM 2005 (SH-1). |

1. Learning Step / Activity 1. Articles 78, 80, 81, and 82

Method of Instruction: Study Assignment
 Technique of Delivery: Individualized, self-paced Instruction
 Instructor to Student Ratio: 1:14
 Time of Instruction: 10 mins
 Media: None

To complete this learning step activity, you are to--

- Read the above ELO.
- Read MCM 2005 (SH-1), pp SH-1-24 and SH-1-25, para 2a and 2b, Article 78 - Accessory after the fact.
- Read MCM 2005 (SH-1), pp SH-1-26, para 4a, Article 80 - Attempts.
- Read MCM 2005 (SH-1), p SH-1-27, para 5a and 5b, Article 81 - Conspiracy.
- Read MCM 2005 (SH-1), pp SH-1-29 and SH-1-30, para 6, Article 82 - Solicitation.

- Complete questions 4 thru 7 in PE-1, pp C-2 and C-3.
- Compare your responses with the solutions on pp C-5 and C-6.
- For any incorrect responses, review the appropriate reference/lesson material.

CHECK ON LEARNING: The practical exercise (questions 4 thru 7) serves as the check on learning for ELO C.

D. ENABLING LEARNING OBJECTIVE

| | |
|--------------------|---|
| ACTION: | Interpret Military Rules of Evidence (MRE) Rule 313, Inspections and inventories in the armed forces. |
| CONDITIONS: | As a first sergeant in a self-study environment given extracted material from MCM 2005 (SH-1). |
| STANDARDS: | Interpreted Military Rules of Evidence (MRE) Rule 313, Inspections and inventories in the armed forces IAW MCM 2005 (SH-1). |

1. Learning Step / Activity 1. Military Rules of Evidence (MRE) Rule 313, Inspections and Inventories in the Armed Forces

Method of Instruction: Study Assignment
 Technique of Delivery: Individualized, self-paced Instruction
 Instructor to Student Ratio: 1:14
 Time of Instruction: 5 mins
 Media: None

To complete this learning step activity, you are to--

- Read the above ELO.
- Read MCM 2005 (SH-1), p SH-1-17, para (b), Rule 313, Inspections and inventories in the armed forces.
- Complete question 8 in PE-1, p C-3.
- Compare your response with the solution on p C-6.
- For any incorrect response, review the appropriate reference/lesson material.

CHECK ON LEARNING: The practical exercise (question 8) serves as the check on learning for ELO D.

E. ENABLING LEARNING OBJECTIVE

| | |
|--------------------|--|
| ACTION: | Interpret MRE Rule 314, Searches not requiring probable cause. |
| CONDITIONS: | As a first sergeant in a self-study environment given extracted material from MCM 2005 (SH-1). |
| STANDARDS: | Interpreted MRE Rule 314, Searches not requiring probable cause IAW MCM 2005 (SH-1). |

1. Learning Step / Activity 1. MRE Rule 314, Searches Not Requiring Probable Cause

Method of Instruction: Study Assignment
Technique of Delivery: Individualized, self-paced Instruction
Instructor to Student Ratio: 1:14
Time of Instruction: 5 mins
Media: None

To complete this learning step activity, you are to--

- Read the above ELO.
- Read MCM 2005 (SH-1), pp SH-1-18 and SH-1-19, Rule 314, Searches not requiring probable cause.
- Complete question 9 in PE-1, p C-3.
- Compare your response with the solution on p C-6.
- For any incorrect response, review the appropriate reference/lesson material.

CHECK ON LEARNING: The practical exercise (question 9) serves as the check on learning for ELO E.

F. ENABLING LEARNING OBJECTIVE

| | |
|--------------------|--|
| ACTION: | Interpret MRE 315, Probable cause searches. |
| CONDITIONS: | As a first sergeant in a self-study environment given extracted material from MCM 2005 (SH-1). |
| STANDARDS: | Interpreted MRE 315, Probable cause searches IAW MCM 2005 (SH-1). |

1. Learning Step / Activity 1. MRE 315, Probable Cause Searches

Method of Instruction: Study Assignment
Technique of Delivery: Individualized, self-paced Instruction
Instructor to Student Ratio: 1:14
Time of Instruction: 5 mins
Media: None

To complete this learning step activity, you are to--

- Read the above ELO.
- Read MCM 2005 (SH-1), pp SH-1-20, para d and f, Rule 315, Probable cause searches.
- Complete questions 10 and 11 in PE-1, p C-3.
- Compare your responses with the solutions on p C-6.
- For any incorrect responses, review the appropriate reference/lesson material.

CHECK ON LEARNING: The practical exercise (questions 10 and 11) serves as the check on learning for ELO F.

G. ENABLING LEARNING OBJECTIVE

| | |
|--------------------|--|
| ACTION: | Interpret MRE Rule 316, Seizures. |
| CONDITIONS: | As a first sergeant in a self-study environment given extracted material from MCM 2005 (SH-1). |
| STANDARDS: | Interpreted MRE Rule 316, Seizures IAW MCM 2005 (SH-1). |

1. Learning Step / Activity 1. MRE Rule 316, Seizures

Method of Instruction: Study Assignment
Technique of Delivery: Individualized, self-paced Instruction
Instructor to Student Ratio: 1:14
Time of Instruction: 5 mins
Media: None

To complete this learning step activity, you are to--

- Read the above ELO.
- Read MCM 2005 (SH-1), p SH-1-21, Rule 316, Seizures.
- Complete question 12 in PE-1, p C-4.
- Compare your response with the solution on p C-6.
- For any incorrect response, review the appropriate reference/lesson material.

CHECK ON LEARNING: The practical exercise (question 12) serves as the check on learning for ELO G.

SECTION IV. SUMMARY

| |
|--|
| Method of Instruction: <u>Study Assignment</u> |
| Technique of Delivery: <u>Individualized, self-paced Instruction</u> |
| Instructor to Student Ratio is: <u>1:14</u> |
| Time of Instruction: <u>5 mins</u> |
| Media: <u>None</u> |

Check on Learning

The practical exercise in Appendix C will serve as the check on learning for this lesson.

Review / Summarize Lesson

The purpose of this lesson was to acquaint you with the Manual for Courts-Martial (MCM). Through the subjects we discussed and the research you accomplished, you can see how involved military law and the Manual for Courts-Martial can get. The best advice we can give you is, before giving advice or pressing an issue concerning military law, contact your local JAG officer.

SECTION V. STUDENT EVALUATION

**Testing
Requirements**

At the end of your Phase I training and before entering Phase II, you will take an on-line, multiple-choice examination. It will test your comprehension of the learning objectives from this and other lessons in Phase I. You must correctly answer 70 percent or more of the questions on the examination to receive a GO. Failure to achieve a GO on the examination will result in a retest. Failure on the retest could result in your dismissal from the course.

**Feedback
Requirements**

NOTE: Feedback is essential to effective learning. Please complete the student questionnaire and mail to USASMA.

Questionnaire L672

Directions

Complete the following actions:

- Enter your name, your rank, and the date you complete this questionnaire.

Name:

Rank:

Date:

- Answer items 1 through 6 below.
- Fold the questionnaire, so the address for USASMA is visible.
- Print your return address, add postage, and mail.

NOTE: Your response to this questionnaire will assist the Academy in refining and improving this course. When completing the questionnaire, answer each question frankly. Your assistance helps build and maintain the best curriculum possible.

Item 1

Do you feel you have mastered the learning objectives of this lesson?

Item 2

Was the material covered in this lesson new to you?

Item 3

Which parts of this lesson were most helpful to you in learning the objectives?

Item 4

How could we improve the format of this lesson?

Item 5

How could we improve the content of this lesson?

Item 6

Do you have additional questions or comments? If you do please list them here. You may add additional pages if necessary.



CMDT USASMA
ATTN ATSS DCF FSC TATS
BLDG 11291 BIGGS FLD
FT BLISS TX 79918-8002

Appendix A - Viewgraph Masters (N/A)

Appendix B - Test(s) and Test Solution(s) (N/A)

Appendix C

PRACTICAL EXERCISE 1

| | | | | | | | |
|-------------------------------------|---|----------------|---|--------------------|--|-------------------|--|
| Title | MANUAL FOR COURTS-MARTIAL | | | | | | |
| Lesson Number / Title | L672 version 1 / MANUAL FOR COURTS-MARTIAL | | | | | | |
| Introduction | Before completing this practical exercise, study the student handout. This PE begins with a review identifying the items located in the index SH-1. | | | | | | |
| Motivator | None | | | | | | |
| Terminal Learning Objective | At the completion of this lesson, you [the student] will: <table border="1"><tr><td>Action:</td><td>Advise the commander on legal matters from the Manual for Courts-Martial (MCM).</td></tr><tr><td>Conditions:</td><td>As a first sergeant in a self-study environment given extracted material from MCM 2005 (SH-1).</td></tr><tr><td>Standards:</td><td>Advised the commander on legal matters from the Manual for Courts-Martial 2005 (SH-1).</td></tr></table> | Action: | Advise the commander on legal matters from the Manual for Courts-Martial (MCM). | Conditions: | As a first sergeant in a self-study environment given extracted material from MCM 2005 (SH-1). | Standards: | Advised the commander on legal matters from the Manual for Courts-Martial 2005 (SH-1). |
| Action: | Advise the commander on legal matters from the Manual for Courts-Martial (MCM). | | | | | | |
| Conditions: | As a first sergeant in a self-study environment given extracted material from MCM 2005 (SH-1). | | | | | | |
| Standards: | Advised the commander on legal matters from the Manual for Courts-Martial 2005 (SH-1). | | | | | | |
| Safety Requirements | None | | | | | | |
| Risk Assessment | Low | | | | | | |
| Environmental Considerations | None | | | | | | |
| Evaluation | Check your responses with the solutions on pp C-5 and C-6. If your responses do not match the responses in the solution, you should study the appropriate references as indicated. | | | | | | |
| Instructional Lead-In | This practical exercise will help you become familiar with military law and the Manual for Courts-Martial. | | | | | | |
| Resource Requirements | Instructor Materials: None Student Materials: <ul style="list-style-type: none">• TSP.• Pen or pencil and writing paper. | | | | | | |
| Special Instructions | Do not use any reference material or refer to the solution until after you complete the questions in this practical exercise. Write your answers in the space provided. | | | | | | |

Procedures

1. Using the table of contents, what are the parts of the Manual for Courts-Martial?

2. How does the MCM 2005 define "perpetrator" (Article 77)?

3. What two articles of the code in the punitive articles portion are not punitive?

4. What are the four offenses of solicitation per Article 82?

- (1) _____
- (2) _____
- (3) _____
- (4) _____

5. IAW MCM 2005, Article 78, what are the four elements that constitute an "accessory after the fact" violation?

- (1) _____
- (2) _____
- (3) _____
- (4) _____

6. How does the MCM define "attempts" (Article 80)?

Procedures,
continued

7. According to Article 81, what elements constitute conspiracy?

(1) _____

(2) _____

8. According to the MCM, what constitutes an inspection?

9. What types of searches do not require probable cause?

(1) _____

(2) _____

(3) _____

(4) _____

(5) _____

(6) _____

(7) _____

(8) _____

(9) _____

(10) _____

10. Who has the power to authorize a search?

11. IAW MCM 2005, when does probable cause to search exist?

Procedures,
continued

12. Who has the power to seize property?

**Feedback
Requirements**

None

**SOLUTION FOR
PRACTICAL EXERCISE 1**

1. Using the table of contents, what are the parts of the Manual for Courts-Martial?

ANSWER:

- (1) Part I (Preamble)
- (2) Part II (Rules for courts-martial)
- (3) Part III (Military rules of evidence)
- (4) Part IV (Punitive articles)
- (5) Part V (Nonjudicial punishment procedure)

Ref: MCM 2005 (SH-1), pp SH-1-2 thru SH-1-6, Table of Contents

2. How does the MCM 2005 define “perpetrator” (Article 77)?

ANSWER:

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.

Ref: MCM 2005 (SH-1), p SH-1-23, para 1b(2)(a)

3. What two articles of the code in the punitive articles portion are not punitive?

ANSWER: Article 77 (Principals) and Article 79 (Lesser included offenses).

Ref: MCM 2005 (SH-1), p SH-1-23, Part IV, Punitive Articles, first paragraph under Discussion

4. What are the four offenses of solicitation per Article 82?

ANSWER:

- (1) To desert.
- (2) To mutiny.
- (3) To commit an act of misbehavior before the enemy.
- (4) To commit an act of sedition.

Ref: MCM 2005 (SH-1), p SH-1-29, para 6e(1) thru (4)

5. IAW MCM 2005, Article 78, what are the four elements that constitute an “accessory after the fact” violation?

ANSWER:

- (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.

Ref: MCM 2005 (SH-1), pp SH-1-24 and SH-1-25, para 2b(1) thru (4)

6. How does the MCM define “attempts” (Article 80)?

ANSWER: 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.

Ref: MCM 2005 (SH-1), p SH-1-26, para 4a(a)

7. According to Article 81, what elements constitute conspiracy?

ANSWER:

- (1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and
- (2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

Ref: MCM 2005 (SH-1), p SH-1-27, para 5b (1) and (2)

8. According to the MCM, what constitutes an inspection?

ANSWER: 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 ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle.

Ref: MCM 2005 (SH-1), p SH-1-17, Part III, Section III, Rule 313, para (b)

9. What types of searches do not require probable cause?

ANSWER:

- (1) Border searches.
- (2) Searches upon entry to or exit from United States installations, aircraft, and vessels abroad.
- (3) Searches of government property.
- (4) Consent searches.
- (5) Searches incident to a lawful stop.
- (6) Searches incident to a lawful apprehension.
- (7) Searches within jails, confinement facilities, or similar facilities.
- (8) Emergency searches to save life or for related purposes.
- (9) Searches of open fields or woodlands.
- (10) Other searches.

Ref: MCM 2005 (SH-1), pp SH-1-18 and SH-1-19, Rule 314, para (b) thru (k)

10. Who has the power to authorize a search?

ANSWER: The commander or a military judge.

Ref: MCM 2005 (SH-1), p SH-1-20, Rule 315, para (d) (1) and (2)

11. IAW MCM 2005, when does probable cause to search exist?

ANSWER: 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 search.

Ref: MCM 2005 (SH-1), pp SH-1-20, Rule 315, para (f)(2)

12. Who has the power to seize property?

ANSWER: 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.

Ref: MCM 2005 (SH-1), p SH-1-21, Rule 316, para (e)

Appendix D

HANDOUTS FOR LESSON 1: L672 version 1

This appendix contains the items listed in this table--

| Title/Synopsis | Pages |
|--|---------------------|
| SH-1, Extracted Material from Manual for Courts-Martial (MCM) 2005 | SH-1-1 thru SH-1-31 |

Student Handout 1

Extracted Material from Manual for Courts-Martial (MCM) 2005

This student handout contains 30 pages of material from the following publication:

Manual for Courts-Martial (MCM), 2005

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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 procedures 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 there under, the constitutional powers of the President and regulations issued there under, 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 (Part I–V). This Manual shall be applied consistent with the purpose of military law.

The Manual shall be identified as “Manual for Courts-Martial, United States (2002 edition).” Any amendments to the Manual made by Executive Order shall be identified as “2002” Amendments to the Manual for Courts-Martial, United States, “2002” being the year the Executive Order was signed. If two or more Executive Orders amending the Manual are signed during the same year, then the second and any subsequent Executive Orders will be identified by placing a small case letter of the alphabet after the last digit of the year beginning with “a” for the second Executive Order and continuing in alphabetic order for subsequent Executive Orders.

Discussion

The Department of Defense, in conjunction with the Department of Transportation, has published supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Discussion (accompanying the Preamble, the Rules for Courts-Martial, and the Punitive Articles), an Analysis, and various appendices. These supplementary materials do not constitute the official views of the Department of Defense, the Department of Transportation, the Department of Justice, the military departments, the United States Court of Appeals for the Armed Forces, or any other authority of the Government of the United States, and they do not constitute rules. Cf., for example, 5 U.S.C. § 551 (1982). The supplementary materials do not create rights or responsibilities that are binding on any person, party, or other entity (including any authority of the Government of the United States whether or not included in the definition of “agency” in 5 U.S.C. § 551(1)). Failure to comply with matter set forth in the supplementary materials does not, of itself, constitute error, although these materials may refer to requirements in the rules set forth in the Executive Order or established by other legal authorities (for example, binding judicial

precedents applicable to courts-martial) which are based on sources of authority independent of the supplementary materials.

The 1995 amendment to paragraph 4 of the Preamble is intended to eliminate the practice of identifying the Manual for Courts-Martial, United States, by a particular year. As long as the Manual was published in its entirety sporadically (*e.g.*, 1917, 1921, 1928, 1949, 1951, 1969 and 1984), with amendments to it published piecemeal, it was logical to identify the Manual by the calendar year of publication, with periodic amendments identified as “Changes” to the Manual. The more frequent publication of a new edition of the Manual, however, means that it is more appropriately identified by the calendar year of edition. Amendments made in a particular calendar year will be identified by publishing the relevant Executive order containing those amendments in its entirety in a Manual appendix.

The amendment to paragraph 4 of the Preamble is intended to address the possibility of more frequent amendments to the Manual and the arrival of the 21st century. In the event that multiple editions of the Manual are published in the same year, the numbering and lettering of the edition should match that of the most recent Executive Order included in the publication.

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.).

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.

Discussion

“Jurisdiction” means the power to hear a case and to render a legally competent decision. A court-martial has no power to adjudge civil remedies. For example, a court-martial may not adjudge the payment of damages, collect private debts, order the return of property, or order a criminal forfeiture of seized property. A summary court-martial

appointed under 10 U.S.C. §§ 4712 or 9712 to dispose of the effects of a deceased person is not affected by these Rules or this Manual.

(2) The code applies in all places.

Discussion

Except insofar as required by the Constitution, the code, or the Manual, jurisdiction of courts-martial does not depend on where the offense was committed. The code applies in all places (Article 5), but its application may be limited by the service-connection doctrine. The location of an offense is often of major importance in the application of this doctrine. See R.C.M. 203 and discussion. Article 2(a) (11) and (12) establishes court-martial jurisdiction only in certain places.

See R.C.M. 202.

(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.

Discussion

In addition to the power to try persons for offenses under the code, general courts-martial have power to try certain persons for violations of the law of war and for crimes or offenses against 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. See R.C.M. 201(f)(1)(B). In cases where a person is tried by general court-martial for offenses against the law of an occupied territory, the court-martial normally sits in the country where the offense is committed, and must do so under certain circumstances. See Articles 4, 64, and 66, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, arts. 4, 64, and 66, 6 U.S.T. 3516, 3559-60 T.I.A.S. No. 3365.

(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;

Discussion

See R.C.M. 504; 1302.

(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;

Discussion

See R.C.M. 501-504; 1301.

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

Discussion

See R.C.M. 601.

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

Discussion

See R.C.M. 202.

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

Discussion

See R.C.M. 203.

The judgment of a court-martial without jurisdiction is void and is entitled to no legal effect. See R.C.M. 907(b) (2) (C) (iv). *But see* R.C.M. 810(d) concerning the effect of certain decisions by courts-martial without 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.

Discussion

See R.C.M. 809 for procedures and standards for contempt proceedings.

(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.

Discussion

In the case of an act or omission which violates the code and a criminal law of a State, the United States, or both, the determination which agency shall exercise jurisdiction should normally be made through consultation or prior agreement between appropriate military officials (ordinarily the staff judge advocate) and appropriate civilian authorities (United

States Attorney, or equivalent).

See also Memorandum of Understanding Between Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction at Appendix 3. Under the Constitution, a person may not be tried for the same misconduct by both a court-martial and another federal court. See R.C.M. 907(b) (2) (C). Although it is constitutionally permissible to try a person by court-martial and by a State court for the same act, as a matter of policy a person who is pending trial or has been tried by a State court should not ordinarily be tried by court-martial for the same act. Overseas, international agreements might preclude trial by one state of a person acquitted or finally convicted of a given act by the other state. Under international law, a friendly foreign nation has jurisdiction to punish offenses committed within its borders by members of a visiting force, unless expressly or impliedly consents to relinquish its jurisdiction to the visiting sovereign. The procedures and standards for determining which nation will exercise jurisdiction are normally established by treaty. See, for example, NATO Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, and T.I.A.S. No. 2846. As a matter of policy, efforts should be made to maximize the exercise of court-martial jurisdiction over persons subject to the code to the extent possible under applicable agreements.

See R.C.M. 106 concerning delivery of offenders to civilian authorities.

See also R.C.M. 201(g) concerning the jurisdiction of other military tribunals.

(e) *Reciprocal jurisdiction*.

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

(2)(A) A commander of a unified or specified combatant command may convene courts-martial over members of any of the armed forces.

(B) So much of the authority vested in the President under Article 22(a) (9) to empower any commanding officer of a joint command or joint task force to convene courts-martial is delegated to the Secretary of Defense, and such a commanding officer may convene general courts-martial for the trial of members of any of the armed forces.

(C) A commander who is empowered to convene a court-martial under subsections (e) (2) (A) or (e) (2) (B) of this rule 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 command 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 authorized to convene courts-martial under subsection (e) (2) of this rule; 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.

(6) When there is a disagreement between the Secretaries of two military departments or between the Secretary of a military department and the commander of a unified or specified combatant command or other joint command or joint task force as to which organization should exercise jurisdiction over a particular case or class of cases, the Secretary of Defense or an official acting under the authority of the Secretary of Defense shall designate which organization will exercise jurisdiction.

(7) Except as provided in subsections (5) and (6) or as otherwise directed by the President or Secretary of Defense, whenever action under this Manual is required or authorized to be taken by a person superior to—

(A) a commander of a unified or specified combatant command or;

(B) a commander of any other joint command or joint task force that is not part of a unified or specified combatant command, the matter shall be referred to the Secretary of the armed force of which the accused is a member. The Secretary may convene a court-martial, take

other appropriate action, or, subject to R.C.M. 504(c), refer the matter to any person authorized to convene a court-martial of the accused.

Discussion

“Manifest injury” does not mean minor inconvenience or expense. Examples of manifest injury include direct and substantial effect on morale, discipline, or military operations, substantial expense or delay, or loss of essential witnesses. As to the composition of a court-martial for the trial of an accused who is a member of another armed force, see R.C.M.

503(a) (3) Discussion. Cases involving two or more accused who are members of different armed forces should not be referred to a court-martial for a common trial.

(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) Not with standing 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 non-capital.

(B) *Cases under the law of war.*

(i) General courts-martial may try any 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.

Discussion

Subsection (f) (1) (B) (i) (b) is an exercise of the power of military government.

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

Discussion

Certain limitations on the discretion of military tribunals to adjudge punishment under the law of war are prescribed in international conventions. See, for example, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365.

(C) *Limitations 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 1 year, 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 1 year.

(ii) A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, 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, confinement for more than six months, or forfeiture of pay for more than six months, 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.

Discussion

See R.C.M. 503 concerning detailing the military judge and counsel. The requirement for counsel is satisfied when counsel qualified under Article 27(b), and not otherwise disqualified, has been detailed and made available, even though the accused may not choose to cooperate with, or use the services of, such detailed counsel. The physical condition or military exigency exception to the requirement for a military judge does not apply to the requirement for detailing counsel qualified under Article 27(b). See also R.C.M. 1103(c) concerning the requirements for a record of trial in special courts-martial.

(C) *Capital offenses*

(i) A capital offense for which there is prescribed a mandatory punishment 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.

Discussion

See R.C.M. 103(3) for a definition of capital offenses.

(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

court , 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.

Discussion

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

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

Rule 301. Report of offense

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

Discussion

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

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

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

Rule 307. Preferral of charges

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

Discussion

No person may be ordered to prefer charges to which that person is unable to make truthfully the required oath. See Article 30(a) and subsection (b) of this rule. A person who has been the accuser or nominal accuser (see Article 1(9)) may not also serve as the convening authority of a general or special

court-martial to which the charges are later referred. See Articles 22(b) and 23(b); R.C.M. 601; however, see R.C.M. 1302(b) (summary court-martial convening authority is not disqualified by being the accuser). A person authorized to dispose of offenses (see R.C.M. 306(a); 401—404 and 407) should not be ordered to prefer charges when this would disqualify that person from exercising that persons authority or would improperly restrict that person's discretion to act on the case. See R.C.M. 104 and 504(c).

Charges may be preferred against a person subject to trial by court-martial at any time but should be preferred without unnecessary delay. See the statute of limitations prescribed by Article 43. Preferral of charges should not be unnecessarily delayed. When a good reason exists—as when a person is permitted to continue a course of conduct so that a ringleader or other conspirators may also be discovered or when a suspected counterfeiter goes uncharged until guilty knowledge becomes apparent a reasonable delay is permissible. However, see R.C.M. 707 concerning speedy trial requirements.

- (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.

Discussion

See Article 136 for authority to administer oaths. The following form may be used to administer the oath:

"You (swear) (affirm) that you are a person subject to the Uniform Code of Military Justice, that you have personal knowledge of or have investigated the matters set forth in the foregoing charge(s) and specification(s), and that the same are true in fact to the best of your knowledge and belief. (So help you God.)"

The accuser's belief may be based upon reports of others in whole or in part.

- (c) *How to allege offenses.*

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

Discussion

See Appendix 4 for a sample of a Charge Sheet (DD Form 458).

(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.

Discussion

The particular subdivision of an article of the code (for example, Article 118(1)) should not be included in the charge. When there are numerous infractions of the same article, there will be only one charge, but several specifications thereunder. There may also be several charges, but each must allege a violation of a different article of the code. For violations of the law of war, see (D) below.

- (A) *Numbering charges*. If there is only one charge, it is not numbered. When there is more than one charge, each charge is numbered by a Roman numeral.
- (B) *Additional charges*. Charges preferred after others have been preferred are labeled "additional charges" and are also numbered with Roman numerals, beginning with "I" if there is more than one additional charge. These ordinarily relate to offenses not known at the time or committed after the original charges were preferred. Additional charges do not require a separate trial if incorporated in the trial of the original charges before arraignment. See R.C.M. 601(e)(2).
- (C) *Preemption*. An offense specifically defined by Articles 81 through 132 may not be alleged as a violation of Article 134. See paragraph 60c(5)(a) of Part IV. *But see* subsection (d) of this rule.
- (D) *Charges under the law of war*. In the case of a person subject to trial by general court-martial for violations of the law of war (see Article 18), the charge should be; "Violation of the Law of War"; or "Violation of _____"referring to the local penal law of the occupied territory. See R.C.M. 201(f)(1)(B). *But see* subsection (d) of this rule. Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war.

(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.

Discussion

How to draft specifications.

- (A) *Sample specifications*. Before drafting a specification, the drafter should read the pertinent provisions of Part IV, where the elements of proof of various offenses and forms for specifications appear.
- (B) *Numbering specifications*. If there is only one specification under a charge it is not numbered. When there is more than one specification under any charge, the specifications are numbered in Arabic numerals. The term "additional" is not used in connection with the specifications under an additional charge.
- (C) *Name and description of the accused*.
- (i) *Name*. The specification should state the accused's full name: first name, middle name or initial, last name. If the accused is known by more than one name, the name acknowledged by the accused should be used. If there is no such acknowledgment, the name believed to be the true name should be listed first, followed by all known aliases. For example: Seaman John P. Smith, U.S. Navy, alias Lt. Robert R. Brown, U.S. Navy.
- (ii) *Military association*. The specification should state the accused's rank or grade. If the rank or grade of the accused has changed since the date of an alleged offense, and the change is pertinent to the offense charged, the accused should be identified by the present rank or grade followed by rank or grade on the date of the alleged offense. For example: In that Seaman then Seaman Apprentice, etc.
- (iii) *Social security number or service number*. The social security number or service number of an accused should not be stated in the specification.
- (iv) *Basis of personal jurisdiction*.
- (a) *Military members on active duty*. Ordinarily, no allegation of the accused's armed force or unit or organization is necessary for military members on active duty.
- (b) *Persons subject to the code under Article 2(a), subsections (3) through (12), or subject to trial by court-martial under Articles 3 or 4*. The specification should describe the accused's armed force, unit or organization, position, or status which will

indicate the basis of jurisdiction. For example: John Jones, (a person employed by and serving with the U.S. Army in the field in time of war) (a person convicted of having obtained a fraudulent discharge), etc.

(D) *Date and time of offense*

(i) *In general.* The date of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand what particular act or omission to defend against.

(ii) *Use of "on or about."* In alleging the date of the offense it is proper to allege it as "on or about" a specified day.

(iii) *Hour.* The exact hour of the offense is ordinarily not alleged except in certain absence offenses. When the exact time is alleged, the 24-hour clock should be used. The use of "at or about" is proper.

(iv) *Extended periods.* When the acts specified extend(s) over a considerable period of time it is proper to allege it (or them) as having occurred, for example, "from about 15 June 1983 to about 4 November 1983," or "did on divers occasions between 15 June 1983 and 4 November 1983."

(E) *Place of offense.* The place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand the particular act or omission to defend against. In alleging the place of the offense, it is proper to allege it as "at or near" a certain place if the exact place is uncertain.

(F) *Subject-matter jurisdiction allegations.* Pleading the accused's rank or grade along with the proper elements of the offense normally will be sufficient to establish subject-matter jurisdiction.

(G) *Description of offense.*

(i) *Elements.* The elements of the offense must be alleged, either expressly or by necessary implication. If a specific intent, knowledge, or state of mind is an element of the offense, it must be alleged.

(ii) *Words indicating criminality.* If the alleged act is not itself an offense but is made an offense either by applicable statute (including Articles 133 and 134), or regulation or custom having the effect of law, then words indicating criminality such as "wrongfully," "unlawfully," or "without authority" (depending upon the nature of the offense) should be used to describe the accused's acts.

(iii) *Specificity.* The specification

should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy. Only those facts that make the accused's conduct criminal ordinarily should be alleged. Specific evidence supporting the allegations ordinarily should not be included in the specifications.

(iv) *Duplicity.* One specification should not allege more than one offense, either conjunctively (the accused "lost and destroyed") or alternatively (the accused "lost or destroyed"). However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively. See R.C.M. 906(b)(5).

(H) *Other considerations in drafting specifications.*

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.

Discussion

See R.C.M. 504 as to who may convene courts-martial and paragraph 2 of Part V as to who may administer nonjudicial punishment. If the power to convene courts-martial and to administer nonjudicial punishment has been withheld, a commander may not dispose of charges under this rule.

Ordinarily charges should be forwarded to the accused's immediate commander for initial consideration as to disposition. Each commander has independent discretion to determine how charges will be disposed of, except to the extent that the commander's authority has been withheld by superior competent authority. See also R.C.M. 104.

Each commander who forwards or disposes of charges may make minor changes therein. See R.C.M. 603(a) and (b). If major changes are necessary, the affected charge should be preferred anew. See R.C.M. 603(d). If a commander is an accuser (see Article 1(9); 307(a)) that commander is ineligible to refer such charges to a general or special court-martial. See R.C.M. 601(c). However, see R.C.M. 1302(b) (accuser may refer charges to a summary court-martial).

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.

Discussion

See R.C.M. 1301(a) concerning composition of summary courts-martial.

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.

Discussion

Referral of charges requires three elements: a convening authority who is authorized to convene the court-martial and is not disqualified (see R.C.M. 601(b) and (c)); preferred charges which have been received by the convening authority for disposition (see R.C.M. 307 as to referral of charges and Chapter IV as to disposition); and a court-martial convened by that convening authority or a predecessor (see R.C.M. 504).

If trial would be warranted but would be detrimental to the prosecution of a war or inimical to national security, see R.C.M. 401(d) and 407(b).

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.

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.

Discussion

The military judge is responsible for ensuring that court martial proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources. Unless otherwise specified, the president of a special court-martial without a military judge has the same authority and responsibility as a military judge. See R.C.M. 502(b)(2).

CHAPTER IX. TRIAL PROCEDURES THROUGH FINDINGS

Rule 901. Opening session

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

Discussion

The military judge should examine the charge sheet, convening order, and any amending orders before calling the initial session to order.

Article 35 provides that in time of peace, no proceedings, including Article 39(a) sessions, may be conducted over the accused's objection until five days have elapsed from the service of charges on the accused in the case of a general court-martial. The period is three days for a special court-martial. In computing these periods, the date of service and the date of the proceedings are excluded. Holidays and Sundays are not excluded. Failure to object waives the right to the waiting period, but if it appears that the waiting period has not elapsed, the military

judge should bring this to the attention of the defense and secure an affirmative waiver on the record.

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.

CHAPTER XI. POST-TRIAL PROCEDURE

Rule 1101. Report of result of trial; post-trial restraint; deferment of confinement, forfeitures and reduction in grade; waiver of Article 58b forfeitures

(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.

Discussion

Deferment is not suspension of the

sentence or a form of clemency.

CHAPTER XII. APPEALS AND REVIEW

Rule 1201. Action by the Judge Advocate General

(a) *Cases required to be referred to a Court of Criminal Appeals.* The Judge Advocate General shall refer to a Court of Criminal Appeals 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.

Discussion

See R.C.M. 1110 concerning waiver or withdrawal of appellate review.

See also subsection (b)(1) of this rule concerning cases reviewed by the Judge Advocate General which may be referred to a Court of Criminal Appeals.

See R.C.M. 1203 concerning review by the Court of Criminal Appeals and the powers and responsibilities of the Judge Advocate General after such review. See R.C.M. 1202 concerning appellate counsel.

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.

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.

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.

SECTION III

EXCLUSIONARY RULES AND RELATED MATTERS CONCERNING SELF-INCRIMINATION, SEARCH AND SEIZURE, AND EYEWITNESS IDENTIFICATION

Rule 313. Inspections and inventories in the armed forces

(a) *General rule.* Evidence obtained from inspections and inventories in the armed forces conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Inspections.* An “inspection” is an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an

incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle. An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce body fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule. If a purpose of an examination is to locate weapons or contraband, and if: (1) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled; (2) specific individuals are selected for examination; or (3) persons examined are subjected to substantially different intrusions during the same examination, the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this rule. Inspections shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected. Unlawful weapons, contraband, or other evidence of crime located during an inspection may be seized.

(c) *Inventories.* Unlawful weapons, contraband, or other evidence of crime discovered in the process of an inventory, the primary purpose of which is administrative in nature, may be seized. Inventories shall be conducted in a reasonable fashion and shall comply with Mil. R. Evid. 312, if applicable. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this rule.

Rule 314. Searches not requiring probable cause

(a) *General rule.* Evidence obtained from reasonable searches not requiring probable cause conducted pursuant to this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Border searches.* Border searches for customs or immigration purposes may be conducted when authorized by Act of Congress.

(c) *Searches upon entry to or exit from United States installations, aircraft, and vessels abroad.* In addition to the authority to conduct inspections under Mil. R. Evid. 313(b), a commander of a United States military installation, enclave, or aircraft on foreign soil, or in foreign or international airspace, or a United States vessel in foreign or international waters, may authorize appropriate personnel to search persons or the property of such persons upon entry to or exit from the installation, enclave, aircraft, or vessel to ensure the security, military fitness, or good order and discipline of the command. Such searches may not be conducted at a time or in a manner contrary to an express provision of a treaty or agreement to which the United States is a party. Failure to comply with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311. A search made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceeding is not authorized by this subdivision.

(d) *Searches of government property.* Government property may be searched under this rule unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use; but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.

(e) *Consent searches.*

(1) *General rule.* Searches may be conducted of any person or property with lawful consent.

(2) *Who may consent.* A person may consent to a search of his or her person or

property, or both, unless control over such property has been given to another. A person may grant consent to search property when the person exercises control over that property.

(3) *Scope of consent.* Consent may be limited in any way by the person granting consent, including limitations in terms of time, place, or property and may be withdrawn at any time.

(4) *Voluntariness.* To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. Mere submission to the color authority of personnel performing law enforcement duties or acquiescence in an of announced or indicated purpose to search is not a voluntary consent.

(5) *Burden of proof* Consent must be shown by clear and convincing evidence. The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of consent, but it does not affect the burden of proof.

(f) *Searches incident to a lawful stop.*

(1) *Stops.* A person authorized to apprehend under R.C.M. 302(b) and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

(2) *Frisks.* When a lawful stop is performed, the person stopped may be frisked for weapons when that person is reasonably believed to be armed and presently dangerous. Contraband or evidence located in the process of a lawful frisk may be seized.

(3) *Motor vehicles.* When a person lawfully stopped is the driver or a passenger in a motor vehicle, the passenger compartment of the vehicle may be searched for weapons if the official who made the stop has a reasonable belief that the person stopped is dangerous and that the person stopped may gain immediate control of a weapon.

(g) *Searches incident to a lawful apprehension.*

(1) *General rule.* A person who has been lawfully apprehended may be searched.

(2) *Search for weapons and destructible evidence.* A search may be conducted for weapons or destructible evidence, in the area within the immediate control of a person who has been apprehended. The area within the person's "immediate control" is the area 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.*

(A) When an apprehension takes place at a location in which other persons might be present who might endanger those conducting the apprehension and others in the area of the apprehension, a reasonable examination may be made of the general area in which such other persons might be located. A reasonable examination under this rule is permitted if the apprehending officials have a reasonable suspicion based on specific and articulable facts that the area to be examined harbors an individual posing a danger to those in the area of the apprehension.

(B) Apprehending officials may, incident to apprehension, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of apprehension from which an attack could be immediately launched.

(h) *Searches within jails, confinement facilities, or similar facilities.* Searches within jails, confinement facilities, or similar facilities may be authorized by persons with authority over the institution.

(i) *Emergency searches to save life or for related purposes.* In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of such aid, or to prevent immediate or ongoing personal injury.

(j) *Searches of open fields or woodlands.* A search of open fields or woodlands is not an unlawful search within the meaning of Mil. R. Evid. 311.

(k) *Other searches.* A search of a type not otherwise included in this rule and not requiring probable cause under Mil. R. Evid.

315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces.

Rule 315. Probable cause searches

(a) *General rule.* Evidence obtained from searches requiring probable cause conducted in accordance with this rule is admissible at trial when relevant and not otherwise inadmissible under these rules.

(b) *Definitions.* As used in these rules:

(1) *Authorization to search.* An "authorization to search" is an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

(2) *Search warrant.* A "search warrant" is an express permission to search and seize issued by competent civilian authority.

(c) *Scope of authorization.* A search authorization may be issued under this rule for a search of:

(1) *Persons.* The person of anyone subject to military law or the law of war wherever found;

(2) *Military property.* Military property of the United States or of nonappropriated fund activities of an armed force of the United States wherever located;

(3) *Persons and property within military control.* Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located; or

(4) *Nonmilitary property within a foreign country.*

(A) Property owned, used, occupied by, or in the possession of an agency of the United States other than the Department of Defense when situated in a foreign country. A search of such property may not be conducted without the concurrence of an appropriate representative of the agency concerned. Failure to obtain such concurrence, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311.

(B) Other property situated in a foreign country. If the United States is a party to a treaty or agreement that governs a search in a foreign country, the search shall be conducted in accordance with the treaty or agreement. If there is no treaty or agreement, concurrence should be obtained from an appropriate representative of the foreign

country with respect to a search under paragraph (4)(B) of this subdivision. Failure to obtain such concurrence or noncompliance with a treaty or agreement, however, does not render a search unlawful within the meaning of Mil. R. Evid. 311.

(d) *Power to authorize.* Authorization to search pursuant to this rule may be granted by an impartial individual in the following categories:

(1) *Commander.* A commander or other person serving in a position designated by the Secretary concerned as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war; or

(2) *Military judge.* A military judge or magistrate if authorized under regulations prescribed by the Secretary of Defense or the Secretary concerned. An otherwise impartial authorizing official does not lose the character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when such previous authorization is similar in intent or function to a pretrial authorization made by the United States district courts.

(e) *Power to search.* Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police, or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this rule or a search would otherwise be proper under subdivision (g).

(f) *Basis for Search authorizations.*

(1) *Probable cause requirement.* A search authorization issued under this rule must be based upon probable cause.

(2) *Probable cause determination.* Probable cause to search exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be search. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this rule shall be

based upon any or all of the following:

(A) Written statements communicated to the authorizing officer;

(B) Oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; or

(C) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion. The Secretary of Defense or the Secretary concerned may prescribe additional requirements.

(g) *Exigencies.* A search warrant or search authorization is not required under this rule for a search based on probable cause when:

(1) *Insufficient time.* There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence sought;

(2) *Lack of communications.* There is a reasonable military operational necessity that is reasonably believed to prohibit or prevent communication with a person empowered to grant a search warrant or authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, 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) *Inventories*. Under regulations prescribed by the Secretary concerned, and with such exceptions as may be authorized by the Secretary, an inventory of the property seized shall be made at the time of a seizure under this rule or as soon as practicable thereafter. At an appropriate time, a copy of the inventory shall be given to a person from whose possession or premises the property was taken. Failure to make an inventory, furnish a copy thereof, or otherwise comply with this paragraph does not render a search or seizure unlawful within the meaning of Mil. R. Evid. 311.

(3) *Foreign searches*. Execution of a search authorization outside the United States and within the jurisdiction of a foreign nation should be in conformity with existing agreements between the United States and the foreign nation. Noncompliance with such an agreement does not make an otherwise lawful search unlawful.

(4) *Search warrants*. Any civilian or military criminal investigator authorized to request search warrants pursuant to applicable law or regulation is authorized to serve and execute search warrants. The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the Constitution of the United States or an applicable Act of Congress.

Rule 316. Seizures

(a) *General rule*. Evidence obtained from seizures conducted in accordance with this rule is admissible at trial if the evidence was not obtained as a result of an unlawful search and if the evidence is relevant and not otherwise inadmissible under these rules.

(b) *Seizure of property*. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband, evidence of crime, or might be used to resist apprehension or to escape.

(c) *Apprehension*. Apprehension is governed by R.C.M. 302.

(d) *Seizure of property or evidence*.

(1) *Abandoned property*. Abandoned property may be seized without probable cause and without a search warrant or search authorization. Such seizure may be made by any person.

(2) *Consent*. Property or evidence may be seized with consent consistent with the requirements applicable to consensual searches under Mil. R. Evid. 314.

(3) *Government property*. Government property may be seized without probable cause and without a search warrant or search authorization by any person listed in subdivision (e), unless the person to whom the property is issued or assigned has a reasonable expectation of privacy therein, as provided in Mil. R. Evid. 314(d), at the time of the seizure.

(4) *Other property*. Property or evidence not included in paragraph (l)-(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.

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.

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.

SECTION VI

WITNESSES

Rule 601. General rule of competency

Every person is competent to be a witness except as otherwise provided in these rules.

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 the testimony of the witness or the determination of a fact in issue.

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.

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.

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.

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 fact finding proceedings ordered on review; to proceedings in revision; and to contempt proceedings except those in which the judge may act summarily.

PART IV. PUNITIVE ARTICLES

Discussion

Paragraphs 1 and 2 discuss the two articles of the code that are located in the punitive article subchapter of the code, but which are not punitive as such: Article 77, principals; and Article 79, lesser included offenses.

R.C.M. 307 prescribes rules for preferral of charges. The discussion under that rule explains how to allege violations under the code using the format of charge and specification.

Beginning with paragraph 3, the punitive articles of the code are discussed using the following sequence:

- a. Text of the article
- b. Elements of the offense or offenses
- c. Explanation
- d. Lesser included offenses
- e. Maximum punishment
- f. Sample specifications

The term “elements,” as used in Part IV, includes both the statutory elements of the offense and any aggravating factors listed under the President’s authority which increases the **maximum** permissible punishment when specified aggravating factors are pleaded and proven.

The prescriptions of maximum punishments in subparagraph e of each

paragraph of this part must be read in conjunction with R.C.M. 1003, which prescribes additional punishments that may be available and additional limitations on punishments. The sample specifications provided in subparagraph f of each paragraph in this part are guides. The specifications may be varied in form and content as necessary. See R.C.M. 307 for additional guidance.

1. Article 77—Principals

a. *Text.* “Any person punishable under this chapter who—

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or

(2) causes an act to be done which if directly performed by him would be punishable by this chapter; is a principal.”

b. *Explanation.*

(1) *Purpose.* Article 77 does not define an offense. Its purpose is to make clear that a person need not personally perform the acts necessary to constitute an offense to be guilty of it. A person who aids, abets, counsels, commands, or procures the commission of an offense, or who causes an act to be done which, if done by that person directly, would be an offense is equally guilty of the offense as one who commits it directly, and may be punished to the same extent.

Article 77 eliminates the common law distinctions between principal in the first degree (“perpetrator”); principal in the second degree (one who aids, counsels, commands, or encourages the commission of an offense and who is present at the scene of the crime—commonly known as an “aider and abettor”); and accessory before the fact (one who aids, counsels, commands, or encourages the commission of an offense and who is not present at the scene of the crime). All of these are now “principals.”

(2) *Who may be liable for an offense.*

(a) *Perpetrator.* A perpetrator is one who actually commits the offense, either by the perpetrator’s own hand, or by causing an offense to be committed by knowingly or intentionally inducing or setting in motion acts by an animate or inanimate agency or instrumentality which result in the commission of an offense. For example, a person who knowingly conceals contraband drugs in an automobile, and then induces another person, who is unaware and has no reason to know of the presence of drugs, to drive the automobile onto a military installation, is, although not present in the automobile, guilty of wrongful

introduction of drugs onto a military installation. (On these facts, the driver would be guilty of no crime.) Similarly, if, upon orders of a superior, a [S]oldier shot a person who appeared to the [S]oldier to be an enemy, but was known to the superior as a friend, the superior would be guilty of murder (but the [S]oldier would be guilty of no offense).

(b) *Other Parties*. If one is not a perpetrator, to be guilty of an offense committed by the perpetrator, the person must:

(i) Assist, encourage, advise, instigate, counsel, command, or procure another to commit, or assist, encourage, advise, counsel, or command another in the commission of the offense; and

(ii) Share in the criminal purpose of design. One who, without knowledge of the criminal venture or plan, unwittingly encourages or renders assistance to another in the commission of an offense is not guilty of a crime. See the parentheticals in the examples in paragraph 1b(2)(a) above. In some circumstances, inaction may make one liable as a party, where there is a duty to act. If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime *if* such a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) *Presence*.

(a) *Not necessary*. Presence at the scene of the crime is not necessary to make one a party to the crime and liable as a principal. For example, one who, knowing that person intends to shoot another person and intending that such an assault be carried out, provides the person with a pistol, is guilty of assault when the offense is committed, even though not present at the scene.

(b) *Not sufficient*. Mere presence at the scene of a crime does not make one a principal unless the requirements of paragraph 1b(2)(a) or (b) have been met.

(4) *Parties whose intent differs from the perpetrator's*. When an offense charged requires proof of a specific intent or particular state of mind as an element, the evidence must prove that the accused had that intent or state of mind, whether the accused is charged as a perpetrator or an "other party" to crime. It is possible for a party to have a state of mind more or less culpable than the perpetrator of the offense. In such a case, the party may be guilty of a more or less serious offense than that committed by the perpetrator. For example, when a homicide is committed, the

perpetrator may act in the heat of sudden passion caused by adequate provocation and be guilty of manslaughter, while the party who, without such passion, hands the perpetrator a weapon and encourages the perpetrator to kill the victim, would be guilty of murder. On the other hand, if a party assists a perpetrator in an assault on a person who, known only to the perpetrator, is an officer, the party would be guilty only of assault, while the perpetrator would be guilty of assault on an officer. -

(5) *Responsibility for other crimes*. A principal may be convicted of crimes committed by another principal if such crimes are likely to result as a natural and probable consequence of the criminal venture or design. For example, the accused who is a party to a burglary is guilty as a principal not only of the offense of burglary, but also, if the perpetrator kills an occupant in the course of the burglary, of murder. (see also paragraph 5 concerning liability for offenses committed by co-conspirators.)

(6) *Principals independently liable*. One may be a principal, even if the perpetrator is not identified or prosecuted, or is acquitted.

(7) *Withdrawal*. A person may withdraw from a common venture or design and avoid liability for any offenses committed after the withdrawal. To be effective, the withdrawal must meet the following requirements:

(a) It must occur before the offense is committed;

(b) The assistance, encouragement, advice, instigation, counsel, command, or procurement given by the person must be effectively countermanded or negated; and

(c) The withdrawal must be clearly communicated to the would-be perpetrators or to appropriate law enforcement authorities in time for the perpetrators to abandon the plan or for law enforcement authorities to prevent the offense.

2. Article 78—Accessory after the fact

a. *Text*. "Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a court-martial may direct."

b. *Elements*.

(1) That an offense punishable by the code was committed by a certain person;

(2) That the accused knew that this person had committed such offense;

(3) That thereafter the accused received,

comforted, or assisted the offender; and

(4) That the accused did so for the purpose of hindering or preventing the apprehension, trial, or punishment of the offender.

c. *Explanation.*

(1) *In general.* The assistance given a principal by an accessory after the fact is not limited to assistance designed to effect the escape or concealment of the principal, but also includes acts performed to conceal the commission of the offense by the principal (for example, by concealing evidence of the offense).

(2) *Failure to report offense.* The mere failure to report a known offense will not make one an accessory after the fact. Such failure may violate a general order or regulation, however, and thus constitute an offense under Article 92. See paragraph 16. If the offense involved is a serious offense, failure to report it may constitute the offense of misprision of a serious offense, under Article 134. See paragraph 95.

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

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

(5) *Conviction or acquittal of principal.* The prosecution must prove that a principal committed the offense to which the accused is allegedly an accessory after the fact. However, evidence of the conviction or acquittal of the principal in a separate trial is not admissible to show that the principal did or did not commit the offense. Furthermore, an accused may be convicted as an accessory after the fact despite the acquittal in a separate trial of the principal whom the accused allegedly comforted, received, or assisted.

(6) *Accessory after the fact not a lesser included offense.* The offense of being an accessory after the fact is not a lesser included offense of the primary offense.

(7) *Actual knowledge.* Actual knowledge is required but may be proved by circumstantial evidence.

d. *Lesser included offense.* Article 80-attempts

e. *Maximum punishment.* Any person subject to the code who is found guilty as an accessory after the fact to an offense punishable by the code shall be subject to the maximum punishment authorized for the

principal offense, except that in no case shall the death penalty nor more than one-half of the maximum confinement authorized for that offense be adjudged, nor shall the period of confinement exceed 10 years in any case, including offenses for which life imprisonment may be adjudged.

f. *Sample specification.*

In that _____ (personal jurisdiction data), knowing that (at/on board—location), on or about _____ 20 _____ had committed an offense punishable by the Uniform Code of Military Justice, to wit: _____, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, in order to (hinder) (prevent) the (apprehension) (trial) (punishment) of the said _____ (receive) (comfort) (assist) the said _____ by

3. Article 79—Conviction of lesser included offenses

a. *Text.* “An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.”

b. *Explanation.*

(1) *In general.* A lesser offense is included in a charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged. This requirement of notice may be met when:

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

(b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is legally less serious (for example, 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 offense by the process of exception and substitution. The court-martial may except (that is, delete) the words in the specification that pertain to the offense charged and, if necessary, substitute language appropriate to the lesser included offense. For example, the accused is charged with murder in violation of Article 118, but found guilty of voluntary manslaughter in violation of Article 119. Such a finding may be worded as follows:

Of the Specification: Guilty, except the word "murder," substituting therefor the words "willfully and unlawfully kill", of the excepted word, not guilty, of the substituted words, guilty. Of the Charge: Not guilty, but guilty of a violation of Article 119.

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

(4) *Specific lesser included offenses.*

Specific lesser included offenses, if any, are listed for each offense discussed in this Part, but the lists are not all-inclusive.

4. Article 80—Attempts

a. *Text.*

"(a) An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.

(c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated."

b. *Elements.*

(1) That the accused did a certain overt

act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

c. *Explanation.*

(1) *In general.* To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose.

(2) *More than preparation.* Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to applying a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) *Factual impossibility.* A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt. For example, if A, without justification or excuse and with intent to kill B, points a gun at B and pulls the trigger, A is guilty of attempt to murder, even though, unknown to A, the gun is defective and will not fire. Similarly, a person who reaches into the pocket of another with the intent to steal that person's billfold is guilty of an attempt to commit larceny, even though the pocket is empty.

(4) *Voluntary abandonment.* It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from

other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. A person who is entitled to the defense of voluntary abandonment may nonetheless be guilty of a lesser included, completed offense. For example, a person who voluntarily abandoned an attempted armed robbery may nonetheless be guilty of assault with a dangerous weapon.

(5) *Solicitation*. Soliciting another to commit an offense does not constitute an attempt. See paragraph 6 for a discussion of article 82, solicitation.

(6) *Attempts not under Article 80*. While most attempts should be charged under Article 80, the following attempts are specifically addressed by some other article, and should be charged accordingly:

- (a) Article 85—desertion
- (b) Article 94—mutiny or sedition.
- (c) Article 1 00—subordinate compelling
- (d) Article 104—aiding the enemy
- (e) Article I 06a—espionage
- (f) Article 128—assault

(7) *Regulations*. An attempt to commit conduct which would violate a lawful general order or regulation under Article 92 (see paragraph 16) should be charged under Article 80. It is not necessary in such cases to prove that the accused intended to violate the order or regulation, but it must be proved that the accused intended to commit the prohibited conduct.

d. *Lesser included offenses*. If the accused is charged with an attempt under Article 80, and the offense attempted has a lesser included offense, then the offense of attempting to commit the lesser included offense would ordinarily be a lesser included offense to the charge of attempt. For example, if an accused was charged with attempted larceny, the offense of attempted wrongful appropriation would be a lesser included offense, although it, like the attempted larceny, would be a violation of Article 80.

e. *Maximum punishment*. Any person subject to the code who is found guilty of an attempt under Article 80 to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death penalty be adjudged, nor shall any mandatory minimum punishment provisions apply; and in no case,

other than attempted murder, shall confinement exceeding 20 years be adjudged.

f. *Sample specification*.

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

5. Article 81—Conspiracy

a. *Text*. “Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.”

b. *Elements*.

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

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

c. *Explanation*.

(1) *Co-conspirators*. Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established. The accused must be subject to the code, but the other co-conspirators need not be. A person may be guilty of conspiracy although incapable of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the car to be used in a robbery. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. However, the conspirator who joined an existing conspiracy can be convicted of this offense only if, at or after the time of joining the conspiracy, an overt act in furtherance of the object of the agreement is committed.

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

conspirator is to play.

(3) *Object of the agreement.* The object of the agreement must, at least in part, involve the commission of one or more offenses under the code. An agreement to commit several offenses is ordinarily but a single conspiracy. Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense. Examples include dueling, bigamy, incest, adultery, and bribery.

(4) *Overt act.*

(a) The overt act must be independent of the agreement to commit the offense; must take place at the time of or after the agreement; must be done by one or more of the conspirators, but not necessarily the accused; and must be done to effectuate the object of the agreement.

(b) The overt act need not be in itself criminal, but it must be a manifestation that the agreement is being executed. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough, no matter how preliminary or preparatory in nature, as long as it is a manifestation that the agreement is being executed.

(c) An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details of the execution of the conspiracy.

(5) *Liability for offenses.* Each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it.

(6) *Withdrawal.* A party to the conspiracy who abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connection with the conspiracy. A conspirator who effectively abandons or withdraws from the conspiracy after the performance of an overt act by one of the conspirators remains guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the abandonment or withdrawal.

However, a person who has abandoned or withdrawn from the conspiracy is not liable for offenses committed thereafter by the remaining conspirators. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) *Factual impossibility.* It is not a defense that the means adopted by the conspirators to achieve their object, if apparently adapted to that end, were actually not capable of success, or that the conspirators were not physically able to accomplish their intended object.

(8) *Conspiracy as a separate offense.* A conspiracy to commit an offense is a separate and distinct offense from the offense which is the object of the conspiracy, and both the conspiracy and the consummated offense which was its object may be charged, tried, and punished. The commission of the intended offense may also constitute the overt act which is an element of the conspiracy to commit that offense.

(9) *Special conspiracies under Article 134.* The United States Code prohibits conspiracies to commit certain specific offenses which do not require an overt act. These conspiracies should be charged under Article 134.

Examples include conspiracies to impede or injure any Federal officer in the discharge of duties under 18 U.S.C. § 372, conspiracies against civil rights under 18 U.S.C. § 241, and certain drug conspiracies under 21 U.S.C. § 846. See paragraph 60c(4)(c)(ii).

d. *Lesser included offense.* Article 80— attempts

e. *Maximum punishment.* Any person subject to the code who is found guilty of conspiracy shall be subject to the maximum punishment authorized for the offense which is the object of the conspiracy, except that in no case shall the death penalty be imposed.

f. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20_____, conspire with _____ (and _____) to commit an offense under the Uniform Code of Military Justice, to wit: (larceny of _____, of a value of (about) _____\$, the property of _____), and in order to effect the object of the conspiracy the said _____ (and) did _____.

6. Article 82—Solicitation

a. Text.

(a) Any person subject to this chapter who solicits or advises another or other to desert in violation of section 885 of this title (Article 85) or mutiny in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of section 899 of this title (Article 99) or sedition in violation of section 894 of this title (Article 94) shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, he shall be punished as a court-martial may direct.”

b. Elements.

(1) That the accused solicited or advised a certain person or persons to commit any of the four offenses named in Article 82; and

(2) That the accused did so with the intent that the offense actually be committed.

[Note: If the offense solicited or advised was attempted or committed, add the following element]

(3) That the offense solicited or advised was (committed) (attempted) as the proximate result of the solicitation.

c. Explanation.

(1) *Instantaneous offense.* The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to influence another or others to commit any of the four offenses named in Article 82. It is not necessary that the person or persons solicited or advised agree to or act upon the solicitation or advice.

(2) *Form of solicitation.* Solicitation may be by means other than word of mouth or writing. Any act or conduct which reasonably may be construed as a serious request or advice to commit one of the four offenses named in Article 82 may constitute solicitation. It is not necessary that the accused act alone in the solicitation or in the advising; the accused may act through other persons in committing this offense.

(3) *Solicitations in violation of Article 134.* Solicitation to commit offenses other than violations of the four offenses named in Article

82 may be charged as violations of Article 134. See paragraph 105. However, some offenses require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under Articles 82 and 134. When the accuser's act of solicitation constitutes, by itself, a separate offense, the accused should be charged with that separate, distinct offense—for example, pandering (see paragraph 97) and obstruction of justice (see paragraph 96) in violation of Article 134.

d. *Lesser included offense.* Article 80—attempts

e. *Maximum punishment.* If the offense solicited or advised is committed or (in the case of soliciting desertion or mutiny) attempted, then the accused shall be punished with the punishment provided for the commission of the offense solicited or advised. If the offense solicited or advised is not committed or (in the case of soliciting desertion or mutiny) attempted, then the following punishment may be imposed:

(1) To desert—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) To mutiny—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(3) To commit an act of misbehavior before the enemy—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

(4) To commit an act of sedition—Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 10 years.

f. Sample specifications.

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

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20_____, (a time of war) by (here state the manner and form of solicitation or advice) _____, (solicit) (advise) (and _____) to (desert in violation of Article 85) (mutiny in violation of Article 94)

[Note. If the offense solicited or advised is attempted or committed, add the following at the end of the specification:]

(2) *For soliciting an act of misbehavior before the enemy (Article 99) or sedition (Article 94).*

In that _____ (personal jurisdiction data) did, (at/on board—location), on or about _____ 20_____, (a time of

war) by (here state the manner and form of solicitation or advice), (solicit) (advise)_____, (and_____) to commit (an act of misbehavior before the enemy in violation of Article 99) (sedition in violation of Article 94)

[*Note: If the offense solicited or advised is committed, add the following at the end of the specification:]* and, as a result of such (solicitation) (advice), the offense (solicited) (advised) was, on or about _____ 20 _____, (at/on board—location), committed by (and_____).

7. Article 83—Fraudulent enlistment, appointment, or separation

a. Text.

“Any person who—

(1) procures his own enlistment or appointment in the armed forces by knowingly false representation or deliberate concealment as to his qualifications for that enlistment or appointment and receives pay or allowances thereunder; or

(2) procures his own separation from the armed forces by knowingly false representation or deliberate concealment as to his eligibility for that separation; shall be punished as a court-martial may direct.”

b. Elements.

(1) *Fraudulent enlistment or appointment.*

(a) That the accused was enlisted or appointed in an armed force;

(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding qualifications of the accused for enlistment or appointment;

(c) That the accused’s enlistment or appointment was obtained or procured by that knowingly false representation or deliberate concealment; and

(d) That under this enlistment or appointment that accused received pay or allowances or both.

(2) *Fraudulent separation.*

(a) That the accused was separated from an armed force;

(b) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts about the accused’s eligibility for separation; and

(c) That the accused’s separation was obtained or procured by that knowingly false representation or deliberate concealment.

c. Explanation.

(1) *In general.* A fraudulent enlistment, appointment, or separation is one procured by

either a knowingly false representation as to any of the qualifications prescribed by law, regulation, or orders for the specific enlistment, appointment, or separation, or a deliberate concealment as to any of those disqualifications. Matters that may be material to an enlistment, appointment, or separation include any information used by the recruiting, appointing, or separating officer in reaching a decision as to enlistment, appointment, or separation in any particular case, and any information that normally would have been so considered had it been provided to that officer.

(2) *Receipt of pay or allowances.* A member of the armed forces who enlists or accepts an appointment without being regularly separated from a prior enlistment or appointment should be charged under Article 83 only if that member has received pay or allowances under the fraudulent enlistment or appointment. Acceptance of food, clothing, shelter, or transportation from the government constitutes receipt of allowances. However, whatever is furnished the accused while in custody, confinement, arrest, or other restraint pending trial for fraudulent enlistment or appointment is not considered an allowance. The receipt of pay or allowances may be proved by circumstantial evidence.

(3) *One offense.* One who procures one’s own enlistment, appointment, or separation by several misrepresentations or concealment as to 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/onboard — location), on or about _____ 20 _____, by means of (knowingly false representations that (here state the fact or facts material to qualification for enlistment or appointment which were represented), when in fact (here state the true fact of facts)) (deliberate concealment of the fact that (here state the fact or facts disqualifying the accused for enlistment or appointment which were

concealed)), procure himself/herself to be (enlisted as a _____) (appointed as a _____) in the (here state the armed force in which the accused procured the enlistment or appointment), and did thereafter, (at/onboard — location), receive (pay) (allowances) (pay and allowances) under the enlistment) (appointment) so procured.

(2) *For fraudulent separation.*

In that (personal jurisdiction data), did, (at/onboard — location), on or about _____ 20 _____, by means of (knowingly false representations that (here state the fact or facts material to eligibility for separation which were represented), when in fact (here state the true fact or facts)) (deliberate concealment of the fact that (here state the fact or facts concealed which made the accused ineligible for separation)), procure himself/herself to be separated from the (here state the armed force from which the accused procured his/her separation).

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 1g, 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 service members without the stigma of a court-martial conviction.