



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX - **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Transfer Requested: 04/16/2008 (Per: RPN/RLR)



 Appendix A ... Part 03 of 16

 The 2007 drafting file for LRB-2341/1

has been transferred to the drafting file for

2007 LRB-0517

(AB 400 ... Wisconsin Act 200)

 The attached 2007 draft was incorporated into the new 2007 draft listed above. For research purposes, this cover sheet and the attached drafting file were added, as an appendix, to the new 2007 drafting file. This section will be scanned and added, as a separate appendix, to the electronic drafting file folder.



Article 57. Effective date of sentences

- (a) Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date the sentence is approved by the convening authority. No forfeiture may extend to any pay or allowances accrued before that date.
- (b) Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement.
- (c) All other sentences of courts-martial are effective on the date ordered executed.

Annotation to Article 57

Section (a) was adopted from the both the 1961 and 1978 model codes. Sections (b) and (c) were adopted from the Section 857, Art. 57, UCMJ with clarifying language.

Article 57a. Deferment of sentences

- (a) On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under that person's jurisdiction, the person exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in that person's sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the person who granted it or, if the accused is no longer under that person's jurisdiction, by the person exercising general court-martial jurisdiction over the command to which the accused is currently assigned.
- (b) (1) In any case in which a court-martial sentences an accused referred to in paragraph (2) to confinement, the convening authority may defer the service of the sentence to confinement, without the consent of the accused, until after the accused has been permanently released to the state military forces by a State, the United States, or a foreign country referred to in that paragraph.
 - (2) Paragraph (1) applies to a person subject to this code who meets all of the following:
 - (A) While in the custody of a State, the United States, or a foreign country is temporarily returned by that State, the United States, or a foreign country to the state military forces for trial by court-martial.
 - (B) After the court-martial, is returned to that State, the United States, or a foreign country under the authority of a mutual agreement or treaty, as the case may be.
- (c) In any case in which a court-martial sentences an accused to confinement and the sentence to confinement has been ordered executed, but in which review of the case under article 67(a) of this code is pending, The Adjutant General may defer further service of the sentence to confinement while that review is pending.

- (d) A sentence of confinement shall address work release privileges.

Annotation to Article 57a

This article is adopted from Section 857a, Art. 57a, UCMJ with clarifying language, and deleting references to execution of death sentences. Similar to the UCMJ, while the convening authority, and in absence thereof, the general court-martial convening authority (GCMCA) of the command where the accused is currently assigned, may defer sentences of confinement with consent ("on application") of the accused, only the convening authority may defer a sentence of confinement without the consent of the accused. Only the first level GCMCA to which the accused is assigned may defer the sentence.

Article 58. Conditions of confinement

- (a) A sentence of confinement adjudged by a court-martial, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place authorized by this code. Persons so confined are subject to the same discipline and treatment as persons regularly confined or committed to that place of confinement.
- (b) The omission of hard labor as a sentence authorized under this code does not deprive the state confinement facility from employing it, if it otherwise is within the authority of that facility to do so.
- (c) No place of confinement may require payment of any fee or charge for receiving or confining a person except as otherwise provided by law.

Annotation to Article 58

This article was adopted from Section 858, Art. 58, UCMJ with clarifying language to include authorization of confinement in any confinement facility authorized by the Code as determined and adopted by the State. Paragraph (b) was added to allow State laws of confinement, funding, and payment of confinement of state prisoners to also govern the confinement of State military prisoners. See Article 11.

Article 58a. Sentences: reduction in enlisted grade upon approval

- (a) A court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes a dishonorable or bad-conduct discharge, or confinement, reduces that member to pay grade E-1, effective on the date of that approval.
- (a) If the sentence of a member who is reduced in pay grade under subsection (a) is set aside or disapproved, or, as finally approved, does not include any punishment named in subsection (a), the rights and privileges of which the person was deprived because of that reduction shall be restored, including pay and allowances.

Annotation to Article 58a

This article was adopted from Section 858a, Art. 58a, UCMJ with the deletion of the sentence "Unless otherwise provided in regulations to be prescribed by the Secretary concerned." A reduction is therefore required of those court-martial conviction sentences that include a bad conduct discharge or confinement. Also deleted was

subsection (a)(3) regarding "hard labor," which is not a sentence under the Model Code but is instead dictated by the state confinement facility where the accused is placed.

Article 58b. Sentences: forfeiture of pay and allowances during confinement

(a) (1) A court-martial sentence described in paragraph (2) shall result in the forfeiture of pay, or of pay and allowances, due that member during any period of confinement or parole. The forfeiture subject to this article shall take effect on the date determined under article 57(a) and may be deferred as provided by that article. The pay and allowances forfeited, in the case of a general court-martial, shall be all pay and allowances due that member during the period and, in the case of a special court-martial, shall be two-thirds of all pay due that member during the period.

(2) A sentence covered by this article is any sentence that includes any of the following:

(A) Confinement for more than six months.

(B) Confinement for six months or less and a dishonorable or bad-conduct discharge or dismissal.

(b) In a case involving an accused who has dependents, the convening authority or other person acting under article 60 may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed 6 months. Any amount of pay or allowances that, except for a waiver under this subsection, would be forfeited shall be paid, as the convening authority or other person taking action directs, to the dependents of the accused.

(c) If the sentence of a member who forfeits pay and allowances under subsection (a) is set aside or disapproved or, as finally approved, does not provide for a punishment referred to in subsection (a) (2), the member shall be paid the pay and allowances that the member would have been paid, except for the forfeiture, for the period during which the forfeiture was in effect.

Annotation to Article 58b

This article was adopted from Section 858b, Art. 58b, UCMJ without changes. Fiscal issues were discussed recognizing that United States Property and Fiscal Officer (USPFO) regulations provide for forfeitures to return to the federal government. Possible changes to those regulations may allow for the forfeiture to revert to a state's military justice fund. With regard to forfeiture issues, changes to the Department of Finance and Accounting Service's regulations by the Department of Defense may be needed to effectuate the system.

SUBCHAPTER IX. POST-TRIAL PROCEDURE AND REVIEW OF COURTS-MARTIAL

Article 59. Error of law; lesser included offense

(a) A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.

Annotation to Article 59

This article was adopted from Section 859, Art. 59, UCMJ without change.

Article 60. Action by the convening authority

(a) The findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence.

(b) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. Any submission shall be in writing. Except in a summary court-martial case, a submission shall be made within ten days after the accused has been given an authenticated record of trial and, if applicable, the recommendation of a judge advocate under subsection (d). In a summary court-martial case, a submission shall be made within seven days after the sentence is announced.

(1) If the accused shows that additional time is required for the accused to submit matters, the convening authority or other person taking action under this article, for good cause, may extend the applicable period for not more than an additional 20 days.

(2) In a summary court-martial case, the accused shall be promptly provided a copy of the record of trial for use in preparing a submission.

(3) The accused may waive the right to make a submission to the convening authority under paragraph (1). A waiver must be made in writing and may not be revoked. The time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of a waiver to the convening authority.

(c) The authority under this article to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority. If it is impractical for the convening authority to act, the convening authority shall forward the case to a person exercising general court-martial jurisdiction who may take action under this article.

(1) Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this article. Action may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting matters expires, whichever is earlier. The convening authority or other person taking action, in that person's sole discretion may approve, disapprove, commute, or suspend the sentence in whole or in part.

(2) Action on the findings of a court-martial by the convening authority or other person acting on the sentence is not required. However, person, in the person's sole discretion may do any of the following:

(A) Dismiss any charge or specification by setting aside a finding of guilty.

(B) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

(d) Before acting under this article on any general or special court-martial case in which there is a finding of guilt, the convening authority or other person taking action under this article shall obtain and consider the written recommendation of a judge advocate. The convening authority or other person taking action under this article shall refer the record of trial to the judge advocate, and the judge advocate shall use the record in the preparation of the recommendation. The recommendation of the judge advocate shall include matters as may be prescribed by regulation and shall be served on the accused, who may submit any matter in response. Failure to object in the response to the recommendation or to any matter attached to the recommendation waives the right to object.

(e) The convening authority or other person taking action under this article, in the person's sole discretion, may order a proceeding in revision or a rehearing.

(1) A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case, however, may a proceeding in revision perform any of the following:

(A) Reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;

(B) Reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this code; or

(C) Increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(2) A rehearing may be ordered by the convening authority or other person taking action under this article if that person disapproves the findings and sentence and states the reasons for disapproval of the findings. If a person disapproves the findings and sentence and does not order a rehearing, that person shall dismiss the charges. A rehearing as to the findings may not be ordered where there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered if the convening authority or other person taking action under this subsection disapproves the sentence.

Annotation to Article 60

This article was adopted from Section 860, Art. 60, UCMJ with clarifying language. Section (d) requires that the convening authority consider the recommendation of a judge advocate in general or special courts-martial with a guilty finding. The drafters deleted the language requiring a recommendation from the "Staff Judge Advocate" because many convening authorities do not have an assigned or imbedded "Staff Judge Advocate" in their chain of command. See annotation to Article 1 (defining "judge advocate"). The drafters recognize that most convening authorities will utilize their staff judge advocate if they have one. Deletion of the term "staff" lifts the requirement of a recommendation by only one particular judge advocate, who may or may not be available. In some cases the next judge advocate in the chain of command may be the State Judge Advocate who has separate review responsibility under Article 64 and, therefore, should not draft the recommendation. This also provides for cross use of Army and Air Guard judge advocates when manpower resources are an issue.

Article 61. Withdrawal of appeal

- (a) In each case subject to appellate review under this code, the accused may file with the convening authority a statement expressly withdrawing the right of the accused to appeal. A withdrawal shall be signed by both the accused and his defense counsel and must be filed in accordance with appellate procedures as provided by law.
- (b) The accused may withdraw an appeal at any time in accordance with appellate procedures as provided by law.

Annotation to Article 61

This article was adopted from Section 861, Art. 61, UCMJ with clarifying language and deleting any reference to the death penalty. The state must determine whether it chooses to process an appeal through its criminal appeals courts or directly to the state's highest court. Due to the procedural differences between a court-martial and a civilian criminal trial, the drafters recommend the state rely on the state's highest court to act as the appellate authority. This recommendation is based on factors that include the projected low number of courts-martial that would reach the state's civilian appellate courts and the hope that one court body would develop consistent and uniform case law within the state. The accused must file an appeal in accordance with the rules of the court the state designates as the appropriate appellate court. The accused must file an appeal within the timeline prescribed by the designated state appellate court procedural rules. Failure to file a timely appeal also constitutes a waiver of appeal.

Article 62. Appeal by the State

(a) In a trial by court-martial in which a punitive discharge may be adjudged, the State may appeal the following, other than a finding of not guilty with respect to the charge or specification by the members of the court-martial, or by a judge in a bench trial, so long as it is not made in reconsideration:

(A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.

(B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.

(C) An order or ruling which directs the disclosure of classified information.

(D) An order or ruling which imposes sanctions for nondisclosure of classified information.

(E) A refusal of the military judge to issue a protective order sought by the State to prevent the disclosure of classified information.

(F) A refusal by the military judge to enforce an order described in subparagraph (E) that has previously been issued by appropriate authority.

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and, if the order or ruling appealed is one which excludes evidence, that the evidence excluded is substantial proof of a fact material in the proceeding.

- (3) An appeal under this article shall be diligently prosecuted as provided by law.
- (b) An appeal under this article shall be forwarded to the court prescribed in article 67a. In ruling on an appeal under this article, that court may act only with respect to matters of law.
- (c) Any period of delay resulting from an appeal under this article shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.

Annotation to Article 62

This article was derived, with modifications, from Section 862, Art. 62, UCMJ. State appeals of those matters listed in section (a) may be made to the highest court of the state or the state appellate court chosen by the state to review courts-martial decisions in accordance with that court's procedural laws. See Annotation to Article 61. The state may not appeal a finding of not guilty when a judge makes the finding in a bench trial and the finding is not made in reconsideration, nor may the state appeal such a finding by the members of the court-martial. However, the state may appeal a judge's judgment of acquittal, notwithstanding the verdict of guilty by the panel, or any other ruling tantamount to such a finding. Likewise, in a bench trial the state may appeal a judge's reconsideration of a guilty finding. In both cases, the prohibition against double jeopardy is not violated because the accused is not subjected to another trial based on the same offense. See *Illinois v. Mink*, 565 N.E.2d 975 (Ill. 1990); *Block v. Maryland*, 407 A.2d 320 (Md. 1979).

Article 63. Rehearings

Each rehearing under this code shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon a rehearing the accused may not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence may be approved, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings, or unless the sentence prescribed for the offense is mandatory. If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes a plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.

Annotation to Article 63

This article was adopted from Section 863, Art. 63, UCMJ without change.

Article 64. Review by the State Senior Force Judge Advocate

(a) Each general and special court-martial case in which there has been a finding of guilty shall be reviewed by the senior force judge advocate, or a designee. The state senior force judge advocate, or designee, may not review a case under this subsection if that person has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or

has otherwise acted on behalf of the prosecution or defense. The senior force judge advocate's review shall be in writing and shall contain the following:

(1) Conclusions as to whether:

- (A) The court had jurisdiction over the accused and the offense.
- (B) The charge and specification stated an offense.
- (C) The sentence was within the limits prescribed as a matter of law.

(2) A response to each allegation of error made in writing by the accused.

(3) If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

(b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to The Adjutant General, under any of the following circumstances:

(1) The judge advocate who reviewed the case recommends corrective action.

(2) The sentence approved under article 60(c) extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months.

(3) Action is otherwise required by regulations of The Adjutant General.

(4) The Adjutant General may do any of the following:

(A) Disapprove or approve the findings or sentence, in whole or in part;

(B) Remit, commute, or suspend the sentence in whole or in part;

(C) Except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(D) Dismiss the charges.

(5) If a rehearing is ordered but the convening authority finds a rehearing impracticable, the convening authority shall dismiss the charges.

(6) If the opinion of the senior force judge advocate, or designee, in the senior force judge advocate's review under subsection (a) is that corrective action is required as a matter of law and if The Adjutant General does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and action thereon shall be sent to the Governor for review and action as deemed appropriate.

(c) The senior force judge advocate, or a designee, may review any case in which there has been a finding of not guilty of all charges and specifications. The senior force judge advocate, or designee, may not review a case under this subsection if that person has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense. The senior force judge advocate's review shall be limited to questions of subject matter jurisdiction.

(d) The record of trial and related documents in each case reviewed under subsection (d) shall be sent for action to The Adjutant General.

(1) The Adjutant General may do any of the following:

(A) When subject matter jurisdiction is found to be lacking, void the court-martial *ab initio*, with or without prejudice to the Government, as The Adjutant General deems appropriate.

(B) Return the record of trial and related documents to the senior force judge advocate for appeal by the Government as provided by law.

Annotation to Article 64

This article was derived, with modifications, from Section 864, Art. 64, UCMJ. This is the first level of legal review above the convening authority level of a court-martial. The review includes procedural and substantive analysis of the merits of the case for consideration by The Adjutant General (TAG). The senior force judge advocate may designate another judge advocate to complete the review due to a conflict of interest as listed in paragraph (a) or for other good cause. If the senior force judge advocate or his designee recommends corrective action as a matter of law, and the TAG does not take action that is at least as favorable as recommended by the senior force judge advocate or his designee, the Governor shall act as final review authority. Review of not guilty verdicts is authorized, but the review is limited to questions of subject matter jurisdiction. *See Block v. Maryland*, 407 A.2d 320 (Md. 1979). This provides training for judge advocates and allows secondary review of the most complex issue in the National Guard military justice arena.

Article 65. Disposition of records after review by the convening authority

Except as otherwise required by this code, all records of trial and related documents shall be transmitted and disposed of as prescribed by regulation and provided by law.

Annotation to Article 65

This article was adopted from Section 865, Art. 65, UCMJ with clarifying language and applying state-specific language. The transfer of the records will comply with the adopting state's appellate court rules of procedure. If the case is not appealed, the disposition of the records will comply with state criminal case disposition law; however, the state may choose to designate the Office of The Adjutant General or the Office of the State Judge Advocate as the custodian of the record. The issue of reporting the conviction was discussed. In most states, the clerk of court's office sends a record of conviction to a central data bank that then reports the conviction to a national data bank. To effectuate this, a reporting mechanism will be drafted in the accompanying Model State Manual.

Article 67a. Review by State Appellate Authority

Decisions of a court-martial are from a court with jurisdiction to issue felony convictions and appeals are to the Wisconsin Court of Appeals District IV and, if necessary, to the Wisconsin Supreme Court. The appellate procedures to be followed shall be those provided by Wisconsin statute.

Annotation to Article 67a

There is no automatic appellate review of court-martial convictions in the State Model Code.

Article 70. Appellate counsel

- (a) The state senior force judge advocate shall detail a judge advocate as appellate Government counsel to represent the State in the review or appeal of cases specified in article 67a of this code and before any Federal court when requested to do so by the State Attorney General. Appellate Government counsel must be a member in good standing of the bar of the highest court of the State to which the appeal is taken.
- (b) Upon an appeal by the State, an accused has the right to be represented by detailed military counsel before any reviewing authority and before any appellate court.
- (c) Upon the appeal by an accused, the accused has the right to be represented by military counsel before any reviewing authority.
- (d) Upon the request of an accused entitled to be so represented, the state senior force judge advocate shall appoint a judge advocate to represent the accused in the review or appeal of cases specified in subsections (b) and (c) of this article.
- (e) An accused may be represented by civilian appellate counsel at no expense to the State.

Annotation to Article 70

This article was derived from Section 870, Art. 70, UCMJ. The senior force judge advocate may designate any judge advocate licensed by the state's bar to serve as appellate government counsel, including the judge advocate originally serving as trial counsel to the court-martial. Appellate defense counsel will be appointed if the state appeals the case. If the member appeals the case, a request for military counsel can be made to the senior force judge advocate, who may detail appellate defense counsel if reasonably available.

Article 71. Execution of sentence; suspension of sentence

- (a) If the sentence of the court-martial extends to dismissal or a dishonorable or bad-conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn under article 61, that part of the sentence extending to dismissal or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings. A judgment as to the legality of the proceedings is final in cases when review is completed by an appellate court prescribed in article 67a., and is deemed final by the law of state where the judgment was had.
- (b) If the sentence of the court-martial extends to dismissal or a dishonorable or bad conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn under article 61, that part of the sentence extending to dismissal or a dishonorable or bad-conduct discharge may not be executed until review of the case by the senior force judge advocate and any action on that review under article 64 is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under article 60 when so approved under that article.

Annotation to Article 71

This section was derived, as modified, from Section 871, Art. 71, UCMJ. Paragraphs (a) and (b) were adopted from 1978 Draft State Code. The "final judgment as to the legality of the proceedings" is determined by the adopting

state's appellate procedures.

Article 72. Vacation of suspension

- (a) Before the vacation of the suspension of a special court-martial sentence, which as approved includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on an alleged violation of probation. The probationer shall be represented at the hearing by military counsel if the probationer so desires.
- (b) The record of the hearing and the recommendation of the officer having special court-martial jurisdiction shall be sent for action to the officer exercising general court-martial jurisdiction over the probationer. If the officer vacates the suspension, any unexecuted part of the sentence, except a dismissal, shall be executed, subject to applicable restrictions in this code.
- (c) The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence.

Annotation to Article 72

This article was adopted from Section 872, Art. 72, UCMJ with clarifying language. Although the UCMJ is not specific, based on actual practice on active duty of providing military defense counsel in these proceedings, "military counsel" was added.

Article 73. Petition for a new trial

At any time within two years after approval by the convening authority of a court-martial sentence the accused may petition The Adjutant General for a new trial on the grounds of newly discovered evidence or fraud on the court-martial.

Annotation to Article 73

This article was derived from Section 873, Art. 73, UCMJ. The drafters recognize that conflicting state statutes regarding the statute of limitations for appeal of a criminal conviction based on newly discovered evidence or fraud might exist. Many, if not all, state appellate courts do not consider new evidence upon appellate review. Rather, the appellate court only reviews the trial court records on questions of law or allegations of procedural error. In conducting its review, the appellate courts are restricted to reviewing the evidence and exhibits presented at trial. Consequently, upon The Adjutant General's receipt of a request for a new trial, The Adjutant General, as convening authority, should take appropriate action in accordance with the following alternatives:

- a. If at the time the case is on appeal, submit the request to that court to consider new evidence, if it is authorized to do so, or
- b. Direct a new court-martial and advise the appellate court of the directive.

Article 74. Remission and suspension

(a) Any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the Governor.

(b) The Governor may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.

Annotation to Article 74

This article was adopted from Section 874, Art. 74, UCMJ with clarifying language deleting any reference to sentences of confinement for life.

Article 75. Restoration

(a) Under regulations as may be prescribed, all rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and the executed part is included in a sentence imposed upon the new trial or rehearing.

(b) If a previously executed sentence of dishonorable or bad-conduct discharge is not imposed on a new trial, the Governor may substitute therefore a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of the accused's enlistment.

(c) If a previously executed sentence of dismissal is not imposed on a new trial, the Governor may substitute a form of discharge authorized for administrative issue, and the commissioned officer dismissed by that sentence may be reappointed by the Governor alone to a commissioned grade and rank as in the opinion of the Governor that former officer would have attained had he not been dismissed. The reappointment of a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the Governor may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances.

Annotation to Article 75

This article was adopted from Section 875, Art. 75 UCMJ with clarifying language.

Article 76. Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this code, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken subject to those proceedings are binding upon all departments, courts, agencies, and officers of the United States and the several

states, subject only to action upon a petition for a new trial as provided in article 73 and to action under article 74.

Annotation to Article 76

This article was adopted from Section 876, Art. 76 UCMJ with clarifying language.

Article 76a. Leave required to be taken pending review of certain court-martial convictions

Under regulations prescribed, an accused who has been sentenced by a court-martial may be required to take leave pending completion of action under this article if the sentence, as approved under article 60, includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The accused may be required to begin leave on the date on which the sentence is approved under article 60 or at any time after that date, and any leave may be continued until the date on which action under this article is completed or may be terminated at any earlier time.

Annotation to Article 76a

This article was adopted from Section 876a, Art. 76a UCMJ without change.

Article 76b. Lack of mental capacity or mental responsibility: commitment of accused for examination and treatment.

(a) Persons incompetent to stand trial.

(1) In the case of a person determined under this code to be presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case, the general court-martial convening authority for that person shall commit the person to the custody of the State Attorney General.

(2) The State Attorney General shall take action in accordance with the state statute applicable to persons incompetent to stand trial. If at the end of the period for hospitalization provided for in the state statute applicable to persons incompetent to stand trial, it is determined that the committed person's mental condition has not so improved as to permit the trial to proceed, action shall be taken in accordance with the state statute applicable to persons incompetent to stand trial.

(A) When the director of a facility in which a person is hospitalized subject to paragraph (2) determines that the person has recovered to an extent that the person is able to understand the nature of the proceedings against the person and to conduct or cooperate intelligently in the defense of the case, the director shall promptly transmit a notification of that determination to the State Attorney General and to the general court-martial convening authority for the person. The director shall send a copy of the notification to the person's counsel.

(B) Upon receipt of a notification, the general court-martial convening authority shall promptly take custody of the person unless the person covered by the notification is no

longer subject to this code. If the person is no longer subject to this code, the State Attorney General shall take any action within the authority of the State Attorney General that the State Attorney General considers appropriate regarding the person.

(C) The director of the facility may retain custody of the person for not more than 30 days after transmitting the notifications required by subparagraph (4)(A).

(3) In the application of the state statute applicable to persons incompetent to stand trial to a case under this subsection, references to the court that ordered the commitment of a person, and to the clerk of court, shall be deemed to refer to the general court-martial convening authority for that person. However, if the person is no longer subject to this code at a time relevant to the application of an article to the person, the state trial court with felony jurisdiction in the county where the person is hospitalized or otherwise may be found shall be considered as the court that ordered the commitment of the person.

(b) Persons found not guilty by reason of lack of mental responsibility.

(1) If a person is found by a court-martial not guilty only by reason of lack of mental responsibility, the person shall be committed to a suitable facility until the person is eligible for release in accordance with this article.

(2) The court-martial shall conduct a hearing on the mental condition in accordance with the state statute applicable to persons incompetent to stand trial.

(3) A report of the results of the hearing shall be made to the general court-martial convening authority for the person.

(4) If the court-martial fails to find by the standard specified in the state statute applicable to persons incompetent to stand trial, that the person's release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the following action may be taken:

(A) The general court-martial convening authority may commit the person to the custody of the State Attorney General.

(B) The States Attorney General shall take action in accordance with the state statute applicable to persons incompetent to stand trial.

(5) The state statute applicable to persons incompetent to stand trial, shall apply in the case of a person hospitalized subject to subparagraph (4)(B), except that the state trial court with felony jurisdiction in the county where the person is hospitalized shall be considered as the court that ordered the person's commitment.

(c) General provisions.

(1) Except as otherwise provided in this subsection and subsection (d)(1), the state statute most closely comparable to 18 U.S.C. § 4247(d), apply in the administration of this article.

(2) In the application of the state statute most closely comparable to 18 U.S.C. § 4247(d), to hearings conducted by a court-martial under this article or by a general court-martial convening authority under this article, the reference in that article to article 3006A of such title does not apply.

(d) Applicability.

(1) The state statute most closely comparable to chapter 313 of title 18, United States Code, [10 U.S.C. § 4241 *et seq.*] referred to in this article apply according to the provisions of this article notwithstanding article 4247(j) of title 18.

(2) If the status of a person as described in article 2 terminates while the person is, subject to this article, in the custody of the State Attorney General, hospitalized, or on conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment, the provisions of this article establishing requirements and procedures regarding a person no longer subject to this code shall continue to apply to that person notwithstanding the change of status.

Annotation to Article 76b

This article was derived from Section 876b, Art. 76b, UCMJ. The drafters recognized that this is a state-specific regulated area of law.

SUBCHAPTER X. PUNITIVE ARTICLES

Article 77. Principals

Any person who either commits an offense punishable by this code, or aids, abets, counsels, commands, or procures its commission, or causes an act to be done which if directly performed by him or her would be punishable is a principal.

Annotation to Article 77

Although the state criminal code may have a crime that parallels this article, the application of "Principals" under this Code is only for use in conjunction with crimes punishable by this Code. This article is derived from Section 877, Art. 77, UCMJ.

Article 78. Accessory after the fact

Any person who, knowing that an offense punishable by this code 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.

Annotation to Article 78

This article is derived from Section 878, Art. 78, UCMJ. Although the state criminal code may have a crime that parallels this article, the application of "Accessory after the fact" under this Code is only for use in conjunction with crimes punishable by this Code.

Article 79. Conviction of lesser included offense

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.

Annotation to Article 79

This article was adopted from Section 879, Art. 79 UCMJ without change.

Article 80. Attempts

- (a) An act, done with specific intent to commit an offense under this code, 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 who attempts to commit any offense punishable by this code shall be punished as a court-martial may direct, unless otherwise specifically prescribed.
- (c) Any person may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

Annotation to Article 80

This article is derived from Section 880, Art. 80, UCMJ. Although the state criminal code may have a crime that parallels this article, the application of "Attempts" under this Code is only for use in conjunction with a crime punishable by this Code.

Article 81. Conspiracy

Any person who conspires with any other person to commit an offense under this code 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.

Annotation to Article 81

This article is derived from Section 881, Art. 81, UCMJ. Although the state criminal code may have a crime that parallels this article, the application of "Conspiracy" under the Code is only for use in conjunction with a crime punishable by this Code.

Article 82. Solicitation

- (a) Any person who solicits or advises another or others to desert in violation of article 85 or mutiny in violation of 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, the person shall be punished as a court-martial may direct.
- (b) Any person who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of article 99 or sedition in violation of 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, the person shall be punished as a court-martial may direct.

Annotation to Article 82

Although the state criminal code may have a crime that parallels this article, "Solicitation" under this article applies to crimes of desertion, mutiny, misbehavior before the enemy, or sedition. However, solicitation to commit other crimes may be charged under Articles 133 or 134. This article is derived from Section 882, Art. 82 UCMJ.

Article 83. Fraudulent enlistment, appointment, or separation

A court-martial may direct punishment on any person who does any of the following:

(1) Procures his own enlistment or appointment in the state military forces by knowingly false representation or deliberate concealment as to his qualifications for that enlistment or appointment and receives pay or allowances there under.

(2) Procures his own separation from the state military forces by knowingly false representation or deliberate concealment as to his eligibility for that separation.

Annotation to Article 83

This article was adopted from Section 883, Art. 83 UCMJ with clarifying language.

Article 84. Unlawful enlistment, appointment, or separation

Any person who effects an enlistment or appointment in or a separation from the state military forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.

Annotation to Article 84

This article was adopted from Section 884, Art. 84 UCMJ with clarifying language.

Article 85. Desertion

(a) Any member of the state military forces is guilty of desertion if he or she does any of the following:

(1) Without authority goes or remains absent from his unit, organization, or place of duty with intent to remain away there from permanently.

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

(3) Without being regularly separated from one of the state military forces enlists or accepts an appointment in the same or another one of the state military forces, or in one of the

armed forces of the United States, without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States.

(b) Any commissioned officer of the state military forces who, after tender of his resignation and before notice of its acceptance, quits his post or proper duties without leave and with intent to remain away there from permanently is guilty of desertion.

(c) Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by confinement of not more than 10 years or other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by punishment as a court-martial may direct.

Annotation to Article 85

This article was adopted from Section 885, Art. 85 UCMJ with clarifying language, deleting reference to the death penalty and caps the confinement length to ten (10) years as provided in this Code.

Article 86. Absence without leave

A court-martial may direct punishment on any person who, without authority, does any of the following:

- (1) Fails to go to his appointed place of duty at the time prescribed.
- (2) Goes from that place.
- (3) Absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed.

Annotation to Article 86

This article was adopted from Section 886, Art. 86 UCMJ with clarifying language.

Article 87. Missing movement

Any person who through neglect or design misses the movement of a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial may direct.

Annotation to Article 87

This article was adopted from Section 887, Art. 87 UCMJ with clarifying language.

Article 88. Contempt toward officials

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the

Secretary of Homeland Security, or the Governor or legislature of the State of Wisconsin shall be punished as a court-martial may direct.

Annotation to Article 88

This article was adopted from Section 888, Art. 88 UCMJ with clarifying language. Secretary of Homeland Security was substituted for Secretary of Transportation since the UCMJ was last amended. The Governor is the Commander in Chief of a state military forces member when not serving in a Title 10 status.

Article 89. Disrespect toward superior commissioned officer

Any person who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct.

Annotation to Article 89

This article was adopted from Section 889, Art. 89 UCMJ with clarifying language.

Article 90. Assaulting or willfully disobeying superior commissioned officer

A court-martial may direct punishment on any person who does any of the following:

- (1) Strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office.
- (2) Willfully disobeys a lawful command of his superior commissioned officer.

Annotation to Article 90

This article was adopted from Section 890, Art. 90 the UCMJ with clarifying language and with the deletion of the death penalty and caps the confinement length to ten (10) years as provided in this Code.

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

A court-martial may direct punishment on any warrant officer or enlisted member who does any of the following:

- (1) Strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office.
- (2) Willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer.
- (3) Treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office.

Annotation to Article 91

This article was adopted from Section 891, Art. 91 UCMJ with clarifying language.

Article 92. Failure to obey order or regulation

A court-martial may direct punishment on any person who does any of the following:

- (1) Violates or fails to obey any lawful general order or regulation.
- (2) Having knowledge of any other lawful order issued by a member of the state military forces, which it is his duty to obey, fails to obey the order.
- (3) Is derelict in the performance of his duties.

Annotation to Article 92

This article was adopted from Section 892, Art. 92 UCMJ with clarifying language.

Article 93. Cruelty and maltreatment

Any person who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

Annotation to Article 93

This article was adopted from Section 893, Art. 93 UCMJ with clarifying language.

Article 94. Mutiny or sedition

(a) A court-martial may direct punishment on any person who does any of the following:

- (1) With intent to usurp or override lawful military authority, refuses, in concert with any other person, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny.
- (2) With intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence, or other disturbance against that authority is guilty of sedition.
- (3) Fails to do his utmost to prevent and suppress a mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior commissioned officer or commanding officer of a mutiny or sedition which he or she knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

(b) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished as a court-martial may direct.

Annotation to Article 94

This article was adopted from Section 894, Art. 94 UCMJ with clarifying language, deleting the reference to the death penalty.

Article 95. Resistance, flight, breach of arrest, and escape

A court-martial may direct punishment on any person who does any of the following:

- (1) Resists apprehension.
- (2) Flees from apprehension.
- (3) Breaks arrest.
- (4) Escapes from custody or confinement.

Annotation to Article 95

This article was adopted from Section 895, Art. 95 UCMJ with clarifying language.

Article 96. Releasing prisoner without proper authority

Any person who, without proper authority, releases any prisoner committed to his charge, or who through neglect or design causes any prisoner to escape, shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law.

Annotation to Article 96

This article was adopted from Section 896, Art. 96 UCMJ with clarifying language.

Article 97. Unlawful detention

Any person who, except as provided by law or regulation, apprehends, arrests, or confines any person shall be punished as a court-martial may direct.

Annotation to Article 97

This article was adopted from Section 897, Art. 97 UCMJ with clarifying language.

Article 98. Noncompliance with procedural rules

A court-martial may direct punishment on any person who does any of the following:

- (1) Is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code.
- (2) Knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after trial of an accused.

Annotation to Article 98

This article was adopted from Section 898, Art. 98 UCMJ with clarifying language.

Article 99. Misbehavior before the enemy

A court-martial may direct punishment on any person who before or in the presence of the enemy does any of the following:

- (1) Runs away.
- (2) Shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend.
- (3) Through disobedience, neglect, or intentional misconduct endangers the safety of any command, unit, place, or military property.
- (4) Casts away his arms or ammunition.
- (5) Is guilty of cowardly conduct.
- (6) Quits his place of duty to plunder or pillage.
- (7) Causes false alarms in any command, unit, or place under control of the armed forces of the United States or the state military forces.
- (8) Willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy.
- (9) Does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies, to the State, or to any other state, when engaged in battle.

Annotation to Article 99

This article was adopted from Section 899, Art. 99 UCMJ with clarifying language. The state should review its constitution and statutes to determine who is an "enemy" of the state. Cognizant of the probable role of the National Guard in Homeland Defense, an "enemy" of the state may include a person within the borders of the United States, who intends to inflict damage or harm to the United States or its citizens. The drafters recommend that the state recognize that any enemy of the United States is the enemy of the individual state.

Article 100. Subordinate compelling surrender

Any person who compels or attempts to compel the commander of any of the state military forces of the State, or of any other state, place, vessel, aircraft, or other military property, or of any body of members of the armed forces, to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished as a court-martial may direct.

Annotation to Article 100

This article was adopted from Section 900, Art. 100 UCMJ with clarifying language, deleting reference to the death penalty.

Article 101. Improper use of countersign

Any person who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another, who is entitled to receive and use the parole or countersign, a different parole or countersign from that which, to his knowledge, he or she was authorized and required to give, shall be punished as a court-martial may direct.

Annotation to Article 101

This article was adopted from Section 901, Art. 101 UCMJ with clarifying language, deleting reference to the death penalty.

Article 102. Forcing a safeguard

Any person who forces a safeguard shall be punished as a court-martial may direct. Forcing a safeguard means to perform any act in violation of the protection of a detachment, guard, or detail posted by a commander for protection .

Annotation to Article 102

This article was adopted from Section 902, Art. 102 UCMJ with clarifying language, deleting reference to the death penalty.

Article 103. Captured or abandoned property

(a) All persons subject to this code shall secure all public property taken for the service of the United States or the State, or of any other state, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody, or control.

(b) A court-martial may direct punishment on any person subject to this code who does any of the following:

- (1) Fails to carry out the duties prescribed in subsection (a).
- (2) Buys, sells, trades, or in any way deals in or disposes of taken, captured, or abandoned property, whereby he receives or expects any profit, benefit, or advantage to himself or another directly or indirectly connected with himself.
- (3) Engages in looting or pillaging.

Annotation to Article 103

This article was adopted from Section 903, Art. 103 UCMJ with clarifying language.

Article 104. Aiding the enemy

A court-martial may direct punishment on any person who does any of the following:

- (1) Aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things.
- (2) Without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly.

Annotation to Article 104

This article was adopted from Section 904, Art. 104 UCMJ with clarifying language, deleting reference to the death penalty. The state must determine who is an "enemy" of the State. Due to the National Guard's anticipated involvement in Homeland Defense, an "enemy" of the state may include a person within the borders of the United States, who intends to inflict damage or harm to the United States or its citizens. *See* Annotation to Article 99.

Article 105. Misconduct as prisoner

A court-martial may direct punishment on any person who, while in the hands of the enemy in time of war does any of the following:

- (1) For the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners.
- (2) While in a position of authority over such persons maltreats them without justifiable cause.

Annotation to Article 105

This article was adopted from Section 905, Art. 105 UCMJ with clarifying language.

Article 107. False official statements

Any person who, with intent to deceive, signs any false record, return, regulation, order, or other official document made in the line of duty, knowing it to be false, or makes any other false official statement made in the line of duty, knowing it to be false, shall be punished as a court-martial may direct.

Annotation to Article 107

This article was adopted from Section 907, Art. 107 UCMJ with clarifying language. The article is only applicable to those false official statements made in the line of duty or connected to or regarding military service.

Article 108. Military property — Loss, damage, destruction, or wrongful disposition

A court-martial may direct punishment on any person who, without proper authority, does any of the following:

(1) Sells or otherwise disposes of any military property of the United States, the State, or of any state.

(2) Willfully or through neglect damages, destroys, or loses any military property of the United States, the State, or of any state.

(3) Willfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of any military property of the United States, the State, or of any state..

Annotation to Article 108

This article was adopted from Section 908, Art. 108 UCMJ with clarifying language with the addition of property of any State.” The drafters recognize the issues stemming from joint use of property by several state military forces.

Article 109. Property other than military property — Waste, spoilage, or destruction

Any person who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the United States, the State, or of any state, shall be punished as a court-martial may direct.

Annotation to Article 109

This article was adopted from Section 909, Art. 109 UCMJ with clarifying language and with the addition of property of any State.

Article 110. Improper hazarding of vessel

(a) Any person who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces of the United States, this State, or any other state military forces shall suffer punishment as a court-martial may direct.

(b) Any person who negligently hazards or suffers to be hazarded any vessel of the armed forces of the United States, the State, or any other state, state military forces shall be punished as a court-martial may direct.

Annotation to Article 110

This article was adopted from Section 910, Art. 110 UCMJ with clarifying language and with the addition of “any state military forces” and the deletion of any reference to the death penalty.

Article 111. Drunken or reckless operation of a vehicle, aircraft, or vessel

(a) A court-martial may direct punishment on any person who does any of the following:

(1) Operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section 912a(b) of this title, article 112a(b).

(2) Operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood or breath is equal to or exceeds the applicable limit under subsection (b).

(b)(1) For purposes of subsection (a), the applicable limit on the alcohol concentration in a person's blood or breath is:

(A) In the case of the operation or control of a vehicle, aircraft, or vessel in the United States, any limit is the lesser of any of the following:

(i) The blood alcohol content limit under the law of the State in which the conduct occurred, except as may be provided under paragraph (2) for conduct on a military installation that is in more than one State.

(ii) The blood alcohol content limit specified in paragraph (3).

(B) In the case of the operation or control of a vehicle, aircraft, or vessel outside the United States, the applicable blood alcohol content limit is the blood alcohol content limit specified in paragraph (3) or any lower limit as the Secretary of Defense may by regulation prescribe.

(2) In the case of a military installation that is in more than one State, if those States have different blood alcohol content limits under their respective State laws, the Secretary may select one blood alcohol content limit to apply uniformly on that installation.

(3) For purposes of paragraph (1), the blood alcohol content limit with respect to alcohol concentration in a person's blood is 0.08 grams of alcohol per 100 milliliters of blood and with respect to alcohol concentration in a person's breath is 0.08 grams of alcohol per 210 liters of breath, as shown by chemical analysis.

(4) In this subsection:

(A) The term "blood alcohol content limit" means the amount of alcohol concentration in a person's blood or breath at which operation or control of a vehicle, aircraft, or vessel is prohibited.

(B) The term "United States" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and the term "state" includes each of those jurisdictions.

Article 112. Drunk on duty

Any person other than a sentinel or lookout, who is found drunk on duty, shall be punished as a court-martial may direct.

Annotation to Articles 112

This article was adopted in its entirety from the UCMJ.

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

(a) Any person who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle, or aircraft used by or under the control of the armed forces of the United States, the State, or of any other state, state military forces a substance described in subsection (b) shall be punished as a court-martial may direct.

(b) The substances referred to in subsection (a) are the following:

(1) Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any of these substances.

(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of the Uniform Code of Military Justice of the armed forces of the United States, 10 U.S.C. § 801 *et seq.*

(3) Any other substance not specified in clause (1) or contained on a list prescribed by the President under clause (2) that is listed in schedules I through V of article 202 of the Controlled Substances Act, 21 U.S.C. § 812.

Annotation to Articles 112a

This article was adopted from Section 912a, Art. 112aUCMJ. The drafters recognize that initially this article may not be considered a purely military crime. Cognizant that state civilian criminal statutes may be sufficient to prosecute a similar crime in the state criminal court this punitive article is adopted because all state military forces are held to the higher federal UCMJ standards for drug use and possession. Subsection b(3) refers to the Code of the Federal Regulations wherein presidential and congressional authority to list a drug as illegal is established through the Drug Enforcement Agency at 21 C.F.R., pt. 1308 and the Attorney General at 21 U.S.C. § 811(a). Currently, all illegal drugs are maintained together on the Controlled Substance List. States should NOT substitute state language for federal language, and the federal military case law on drug abuse should be followed. This guidance will ensure that the article is a purely military offense. The references to the substances and authorities for their amendment will keep this article current without constant separate amendment.

Article 113. Misbehavior of sentinel

Any sentinel or look-out who is found drunk or sleeping upon his post or leaves it before being regularly relieved, shall be punished, if the offense is committed in time of war, by confinement of not more than 10 years or other punishment as a court-martial may direct, but if the offense is committed at any other time, by punishment as a court-martial may direct.

Annotation to Article 113

This article was adopted from Section 913, Art. 113 UCMJ with clarifying language, deleting the reference to the death penalty.

Article 114. Dueling

Any person who fights or promotes, or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct.

Annotation to Article 114

This article was adopted from Section 914, Art. 114 UCMJ. The drafters recognize that this is not a purely military crime. A state's civilian criminal statutes may be sufficient to prosecute the crime in the state criminal court. Nevertheless, this article is adopted as a military offense.

Article 115. Malingering

A court-martial may direct punishment on any person who for the purpose of avoiding work, duty, or service does any of the following:

- (1) Feigns illness, physical disablement, mental lapse, or derangement.
- (2) Intentionally inflicts self-injury.

Annotation to Article 115

This article was adopted in its entirety from Section 915, Art. 115 UCMJ.

Article 116. Riot or breach of peace

Any person who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.

Annotation to Article 116

This article was adopted from Section 916, Art. 116 UCMJ. The drafters recognize that this may not be a purely military crime. A state's civilian criminal statutes may have a similar crime and may choose to punish a violator under the state criminal code. Nevertheless, this article is adopted as a military offense.

Article 117. Provoking speeches or gestures

Any person who uses provoking or reproachful words or gestures towards any other person subject to this code shall be punished as a court-martial may direct.

Annotation to Article 117

This article was adopted in its entirety from Section 917, Art. 117UCMJ.

Article 120. Rape and carnal knowledge

(a) Any person who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished as a court-martial may direct.

(b) A court-martial may direct punishment on any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person who is not that person's spouse, and who has not attained the age of sixteen years; is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

(d) (1) In a prosecution under subsection (b), it is an affirmative defense if all of the following conditions are established:

(A) The person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years.

(B) The accused reasonably believed that that person had at the time of the alleged offense attained the age of sixteen years.

(2) The accused has the burden of proving a defense under paragraph (1) by a preponderance of the evidence.

Article 121. Larceny and wrongful appropriation

(a) Any person who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind if any of the following apply:

(1) With intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny.

(2) With intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

Article 122. Robbery

Any person who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.

Article 123. Forgery

A court-martial may direct punishment on any person who, with intent to defraud who does any of the following:

- (1) Falsely makes or alters any signature, to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice.
- (2) Utters, offers, issues, or transfers a writing, known by him to be so made or altered; is guilty of forgery.

Article 123a. Making, drawing, or uttering check, draft, or order without sufficient funds

A court-martial may direct punishment on any person who does any of the following:

- (1) Procurement of any article or thing of value, with intent to defraud.
- (2) Payment of any past due obligation, or for any other purpose, with intent to deceive; makes, draws, utters, or delivers any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time that the maker or drawer has not or will not have sufficient funds in, or credit with, the bank or other depository for the payment of that check, draft, or order in full upon its presentment. The making, drawing, uttering, or delivering by a maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in the drawee's possession or control, is prima facie evidence of his intent to defraud or deceive and of his knowledge of insufficient funds in, or credit with, that bank or other depository, unless the maker or drawer pays the holder the amount due within five days after receiving notice, orally or in writing, that the check, draft, or order was not paid on presentment.
- (3) In this article, the word "credit" means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft, or order.

Article 124. Maiming

Any person who, with intent to injure, disfigure, or disable, inflicts on the person of another an injury which does any of the following:

- (1) Seriously disfigures his person by a mutilation.
- (2) Destroys or disables any member or organ of his body.
- (3) Seriously diminishes his physical vigor by the injury of any member or organ; is guilty of maiming and shall be punished as a court-martial may direct.

Article 126. Arson

(a) Any person who willfully and maliciously burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as court-martial may direct.

(b) Any person who willfully and maliciously burns or sets fire to the property of another, except as provided in subsection (a), is guilty of simple arson and shall be punished as a court-martial may direct.

Article 127. Extortion

Any person who communicates threats to another person with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and shall be punished as a court-martial may direct.

Article 128. Assault

(a) Any person who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) A court-martial may direct punishment on any person who does any of the following:

(1) Commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.

(2) Commits an assault and intentionally inflicts grievous bodily harm with or without a weapon; is guilty of aggravated assault.

Article 129. Burglary

Any person who, with intent to commit an offense punishable under articles 120–128, breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct.

Article 130. Housebreaking

Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense is guilty of housebreaking and shall be punished as a court-martial may direct.

Article 131. Perjury

A court-martial may direct punishment on any person who in a judicial proceeding or in a course of justice willfully and corruptly does any of the following:

(1) Upon a lawful oath or in any form allowed by law to be substituted for an oath, gives any false testimony material to the issue or matter of inquiry.

(2) In any declaration, certificate, verification, or statement under penalty or perjury as permitted under section 1746 of title 28, United States Code, subscribes any false statement material to the issue or matter of inquiry.

Article 132. Frauds against the government

A court-martial may direct punishment on any person who does any of the following knowing it to be false or fraudulent:

(1) For the purpose of obtaining the approval, allowance, or payment of any claim against the United States, the State, or of any state, or any officer:

- (a) Makes or presents a claim.
- (b) Makes or uses any writing or other paper,
- (c) Makes any oath, affirmation or certification to any fact or to any writing or other paper.

(2) For the purpose of defrauding the United States, the State, or of any state, or any officer:

- (a) Forges or counterfeits any signature upon any writing or other paper, or uses any signature knowing it to be forged or counterfeited.
- (b) Delivers to any person having authority to receive it, any amount less than that for which he receives a certificate or receipt.
- (c) Makes or delivers to any person, a writing without having full knowledge of the truth of the statements contained therein.

Annotation to Article 132

This article was adopted from Section 932, Art. 132 UCMJ with clarifying language and the addition of the word "State."

Article 133. Conduct unbecoming an officer and a gentleman

Any commissioned officer, cadet, candidate, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

Annotation to Article 133

This article was adopted from Section 933, Art. 133 UCMJ without change, save the addition of the term "candidate." See Annotation to article 1(a)(2). In looking at the legislative history and case law, the phrase "and a gentleman" does not appear to be essential to the charging of the offense of "conduct unbecoming an officer and a gentleman." In fact, when the court-martial pertains to a female accused, courts have either read/substituted the phrase with "and a gentlewoman" or "and a lady" or focused almost exclusively on the term "officer." See *U.S. v. Halliwill*, 4 CMR 283 (court interpreting "gentleman" as "gentlewoman"); *U.S. v. Norvell*, 26 MJ 477 (court substituting "gentleman" with "lady" and focusing almost exclusively on the term "officer"); and *U.S. v. Walts*, 1997 CCA LEXIS 258 (court focusing almost exclusively on the term "officer"). In 1984 the drafters amended the explanation under Article 133 to make clear that the term "gentleman" includes "both male and female commissioned officers, cadets, and midshipmen." See MCM, Part IV, paragraph 59c(1) (1984).

Article 134. General Article

Though not specifically mentioned in this code, all disorders and neglects to the prejudice of good order and discipline in the State military forces and all conduct of a nature to bring discredit upon the State military forces shall be taken cognizance of by a court-martial and punished at the discretion of a military court. However, where a crime constitutes an offense that violates both this code and the criminal laws of the state where the offense occurs or criminal laws of the United States, jurisdiction of the military court must be determined in accordance with article 2(b).

Annotation to Article 134

This article was adopted from Section 934, Art. 134 UCMJ with clarifying language applying to the state. The article includes those general crimes punishable because of the additional elements of prejudice to the good order and discipline in the state military forces or discredit upon the state military forces.

SUBCHAPTER XI. MISCELLANEOUS PROVISIONS

Article 135. Courts of inquiry

(a) Courts of inquiry to investigate any matter of concern to the state military forces may be convened by any person authorized to convene a general court-martial, whether or not the persons involved has requested an inquiry.

(b) A court of inquiry consists of three or more commissioned officers. For each court of inquiry, the convening authority shall also appoint counsel for the court.

(c) Any person whose conduct is subject to inquiry shall be designated as a party. Any person subject to this code who has a direct interest in the subject of inquiry has the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and has the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.

(d) Members of a court of inquiry may be challenged by a party, but only for cause stated to the court.

(e) The members, counsel, the reporter, and interpreters of courts of inquiry shall take an oath to faithfully perform their duties.

(f) Witnesses may be summoned to appear and testify and be examined before courts of inquiry, as provided for courts-martial.

(g) Courts of inquiry shall make findings of fact but may not express opinions or make recommendations unless required to do so by the convening authority.

(h) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. If the record cannot be authenticated by the president, it shall be signed by a member

in lieu of the president. If the record cannot be authenticated by the counsel for the court, it shall be signed by a member in lieu of the counsel.

Annotation to Article 135

This article was adopted from Section 936, Art. 135 UCMJ with clarifying language, adding references to the state.

Article 136. Authority to administer oaths and to act as notary

(a) The following persons may administer oaths for the purposes of military administration, including military justice:

- (1) All judge advocates.
- (2) All summary courts-martial.
- (3) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.
- (4) All commanding officers of the naval militia.
- (5) All other persons designated by regulations of the armed forces of the United States or by statute.

(b) The following persons may administer oaths necessary in the performance of their duties:

- (1) The president, military judge, and trial counsel for all general and special courts-martial.
- (2) The president and the counsel for the court of any court of inquiry.
- (3) All officers designated to take a deposition.
- (4) All persons detailed to conduct an investigation.
- (5) All recruiting officers.
- (6) All other persons designated by regulations of the armed forces of the United States or by statute.

(c) The signature without seal of any of the above persons, together with the title of his office, is prima facie evidence of the person's authority.

Annotation to Article 136

This article was adopted in its entirety from Section 936, Art. 136 UCMJ. See Article 42.

Article 137. Articles to be available

The code and the manual for courts-martial shall be made available to a member of the state military forces, upon request by the member, for the member's personal examination.

Annotation to Article 137

This article was adopted from Section 937, Art. 137 UCMJ with clarifying language.

Article 138. Complaints of wrongs

Any member of the state military forces who believes himself wronged by a commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and shall, as soon as possible, send to The Adjutant General a true statement of that complaint, with the proceedings.

Annotation to Article 138

This article was adopted from Section 938, Art. 138 UCMJ with clarifying language and application to the state military forces.

Article 139. Redress of injuries to property

(a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that the person's property has been wrongfully taken by members of the state military forces, that person may, under the regulations prescribed, convene a board to investigate the complaint. The board shall consist of from one to three commissioned officers and, for the purpose of that investigation, it has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by that officer shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for payment to the injured parties of the damages so assessed and approved.

(b) If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in proportion as may be considered just upon the individual members who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board.

Annotation to Article 139

This article was adopted from Section 939, Art. 139 UCMJ with application to the state military forces.

Article 140. Delegation by the Governor

The Governor may delegate any authority vested in the Governor under this code, and provide for the sub-delegation of any authority, except the power given the Governor by article 22 of this code.

Annotation to Article 140

This article was adopted from Section 940, Art. 140 UCMJ with the substitution of "Governor" for "President" and reference to the appropriate article.

Article 141. Payment of fees, costs, and expenses

(a) The fees and authorized travel expenses of all witnesses, experts, victims, court reporters, and interpreters, fees for the service of process, the costs of collection, apprehension, detention and confinement, and all other necessary expenses of prosecution and the administration of military justice, not otherwise payable by any other source, shall be paid by the Wisconsin National Guard.

Annotation to Article 141

The drafters propose enabling language for the establishment and funding of a military justice fund within each state. It is recommended that this fund's title contain the words "military justice" to include courts-martial and nonjudicial punishments. The word "victim" was added in recognition of current victims and witness assistance acts.

Article 142. Payment of fines and disposition

(a) Fines imposed by a military court or through imposition of non-judicial punishment may be paid to the State and delivered to the court or imposing officer, or to a person executing their process. Fines may be collected in the following manner:

(1) By cash or money order.

(2) By retention of any pay or allowances due or to become due the person fined from any state or the United States.

(3) By garnishment or levy, together with costs, on the wages, goods, and chattels of a person delinquent in paying a fine, as provided by law.

(b) Any sum so received or retained shall be deposited with the Wisconsin National Guard or to where the court so directs.

(c) Nothing in this code shall be construed to prohibit restitution.

Article 143. Uniformity of interpretation.

This code shall be so construed as to effectuate its general purpose to make it uniform, so far as practical, with the Uniform Code of Military Justice, chapter 47 of title 10, United States Code.

Annotation to Article 143

This article was adopted from the both the 1961 and 1978 model codes. The intention of the drafters is that states adopt the Model State Code to facilitate uniformity of military discipline among the states' military forces. The drafters recognize that the Model State Code contains articles wherein adopting states may incorporate state-specific laws in accordance with the state's statutes or constitution, i.e., number of persons required to convict for a state crime, appellate court and process, etc. This may vary each state's Code slightly, but uniformity is the general goal. The states should parallel this Model State Code of Military Justice to every extent practicable.

Article 144. Immunity for action of military courts

All persons acting under the provisions of this code, whether as a member of the military or as a civilian, shall be immune from any personal liability for any of the acts or omissions which they did or failed to do as part of their duties under this code.

Annotation to Article 144

This article was adopted from the both the 1961 and 1978 model codes. Judge advocates serving in a "Title 32" status are covered by the Federal Tort Claims Act if acting within the scope of their duties. Those serving on state active duty, however, are not covered by the Federal Tort Claims Act. *See, e.g., Biven v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).