



State of Wisconsin


LEGISLATIVE REFERENCE BUREAU

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

Date Transfer Requested: 11/03/2008 (Per: CJS)





Appendix A ... Pt. 02 of 04

 The 2007 drafting file for LRB-4378

has been transferred to the drafting file for

2009 LRB-0589

 This cover sheet, the final request sheet, and the final version of the 2007 draft were copied on yellow paper, and returned to the original 2005 drafting file.

 The attached 2007 draft was incorporated into the new 2009 draft listed above. For research purposes, this cover sheet and the complete drafting file were transferred, as a separate appendix, to the 2009 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

Article 43. Statute of limitations

(a) Except as otherwise provided in this article, a person charged with any offense is not liable to be tried by court-martial or punished under article 15 of this code if the offense was committed more than three (3) years before the receipt of sworn charges and specifications by an officer exercising court-martial jurisdiction over the command or before the imposition of punishment under article 15 of this code.

(b) Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this article.

(c) Periods in which the accused was absent from territory in which the State has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.

(d) When the United States is at war, the running of any statute of limitations applicable to any offense under this code —

(1) involving fraud or attempted fraud against the United States, any state, or any agency of either in any manner, whether by conspiracy or not;

(2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States or any state; or

(3) committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency;

is suspended until two (2) years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

(e) If charges or specifications are dismissed as defective or insufficient for any cause and the period prescribed by the applicable statute of limitations —

(A) has expired; or will be met.

(B) will expire within 180 days after the date of dismissal of the charges and specifications,

trial and punishment under new charges and specifications are not barred by the statute of limitations if the conditions specified in paragraph (2) are met.

(2) The conditions referred to in paragraph (1) are that the new charges and specifications must —

(A) be received by an officer exercising summary court-martial jurisdiction over the command within 180 days after the dismissal of the charges or specifications; and

(B) allege the same acts or omissions that were alleged in the dismissed charges or specifications (or allege acts or omissions that were included in the dismissed charges or specifications).

Annotation to Article 43

This article was derived from Section 843, Art. 43, UCMJ. In section (a) the drafters combined, for practical reasons, the UCMJ's five (5) year general statute of limitations for trials by court-martial and the two (2) year statute of limitations for imposition of non-judicial punishment, into one three (3) year statute of limitations for both trials by court-martial and non-judicial punishment. Section (a) of the UCMJ was deleted because this Code does not contain provisions for the death penalty. The drafters recommend that desertion not be included because the gravity of the offense is not as great as it is in the active duty component. Discussion arose over desertion as a "Title 10" offense. The statute of limitations tolls while a violator is outside of the state lines and cannot be apprehended by the state police forces of the state in which the violator serves. This is regardless of whether the state law enforcement force where the violator may be located has the authority to apprehend the violator. Paragraph (e) allows for new charges, if previously dismissed, when the statute of limitations has expired or will expire within 180 days if the new charges allege the same acts or omissions originally alleged and those new charges are brought within 180 days of the dismissal. The state is cautioned that while its criminal procedure laws may not allow for new civilian charges if the original, similar charges are dismissed, this Code otherwise provides in the military justice context. The language of this article is intended to cover those wars declared by the President, whether or not actually declared under Article 1 of the Constitution of the United States.

Article 44. Former jeopardy

- (a) No person may, without his consent, be tried a second time for the same offense.
- (b) No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.
- (c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article.

Annotation to Article 44

This article was adopted from section 844, Art. 44, UCMJ with clarifying language, deleting any reference to death penalty cases.

Article 45. Pleas of the accused

- (a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though the accused had pleaded not guilty.
- (b) With respect to any charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event, the proceedings shall continue as though the accused had pleaded not guilty.

Annotation to Article 45

This article was adopted from Section 845, Art. 45, UCMJ with clarifying language, deleting any reference to death penalty cases. The Code deleted reference to regulations permitting the immediate entering of a finding of guilty on a plea of guilty; and thus no implementing regulations are required.

Article 46. Opportunity to obtain witnesses and other evidence

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence as prescribed by regulations and provided by law. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall apply the principles of law and the rules of courts-martial generally recognized in military criminal cases in the courts of the armed forces of the United States, but which may not be contrary to or inconsistent with this code. Process shall run to any part of the United States, or the Territories, Commonwealths, and possessions, and may be executed by civil officers as prescribed by the laws of the place where the witness or evidence is located or of the United States.

Annotation to Article 46

This article was adopted from of the United States UCMJ with clarifying language adding “and may be executed by civil officers as prescribed by the laws of the State where the witness is located or of the United States.” The actual process that issues from the court martial proceeding will follow federal military justice procedures, but in order to allow for fast and effective service under the various states’ service of process procedures, the service of process will comply with the state process requirements where the witness or evidence is located, facilitating a more expeditious enforcement process.

Article 47. Refusal to appear or testify

(a) Any person not subject to this code who —

- (1) has been duly subpoenaed to appear as a witness or to produce books and records before a court-martial or court of inquiry, or before any military or civil officer designated to take a deposition to be read in evidence before such a court;
- (2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending a criminal court of the State; and
- (3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce;

may be punished by the military court in the same manner as a criminal court of the State.

(b) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses.

Annotation to Article 47

This article was adopted from Section 847, Art. 47, UCMJ with clarifying language. The drafters added the production of ‘books and records’ to (a) (1) to expand the article’s coverage beyond what the UCMJ provides in

recognition of reality.

Authorizing military courts to punish violations the same as civilian courts in the state eliminates the need to cede jurisdiction to civilian prosecutors and courts as provided in (b) and (c) of the UCMJ. All persons not subject to the Code may be charged under the state laws for failure to appear or testify. The authorization of military courts to punish violations as could a civilian court of the state under state law provides jurisdiction to the military court to punish persons not subject to the code, but under state civilian law, which the Code incorporates by reference here. This is a valid exercise of jurisdiction to the military court when the Code is enacted into law by the State.

The maximum fines and the sentencing for those absent military witnesses were adopted from the UCMJ with clarifying language for the sake of uniformity. All other witnesses not subject to the Code may be charged under the state laws for failure to appear or testify.

Fiscal law questions regarding which government entity will pay for fees, mileage, etc., of witnesses was addressed. Because the state is the government entity prosecuting the case, funding sources for witness costs could include the state court operating budget, adjutant general appropriations, or, possibly, "Title 32" funds. Use of "Title 32" funds is supported in that courts-martial are considered training for judge advocates and members of the military justice team.

Article 48. Contempts

A military judge may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.

(a) A person subject to this code may be punished for contempt by confinement not to exceed thirty (30) days or a fine of one hundred dollars (\$100), or both.

A person not subject to this code may be punished for contempt by a military court in the same manner as a criminal court of the State.

Annotation to Article 48

Those persons subject to the Code may be punished for contempt as defined by this Code. The military judge has the authority to punish for contempt. The State Model Code does not allow the president or panel members to punish for contempt. This is congruent with civilian criminal procedures wherein the judge, not the jury, punishes for contempt. Those persons not subject to the Code are subject to the state statutes on contempt.

Article 49. Depositions

(a) At any time after charges have been signed as provided in article 30 of this code, any party may take oral or written depositions unless the military judge or summary court-martial officer hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause.

(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the State or by the laws of the place where the deposition is taken to administer oaths.

(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of

audiotape, videotape, digital image or file, or similar material, may be played in evidence before any military court, if it appears —

- (1) that the witness resides or is beyond the State in which the court is ordered to sit, or beyond one hundred (100) miles from the place of trial or hearing Section 848, Art. 48;
- (2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, non amenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or
- (3) that the present whereabouts of the witness is unknown.

Annotation to Article 49

This article was adopted from Section 849, Art. 49, UCMJ with clarifying language, excluding all references to capital cases. Although many states do not allow depositions in state criminal matters, the worldwide mission of the military and military exigencies necessitate deposition use for courts-martial. The military judge or court-martial convening authority may forbid a deposition for good cause. The use of the term “for good cause” is a term allowing for broad application by the military judge or court-martial convening authority. The drafters added ‘digital image or file’ in (d) in recognition of modern technology although it is not included in the UCMJ.

Article 50. Admissibility of records of courts of inquiry

- (a) In any case not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of such evidence.
- (b) Such testimony may be read in evidence only by the defense in cases extending to the dismissal of a commissioned officer.
- (c) Such testimony may also be read in evidence before a court of inquiry.

Annotation to Article 50

This article was adopted from Section 850, Art. 50, UCMJ excluding all references to capital cases.

Article 50a. Defense of lack of mental responsibility

- (a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.
- (b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall instruct the members of the court as to the defense of lack of mental responsibility under this article and charge them to find the accused —

- (1) guilty;
- (2) not guilty; or
- (3) not guilty only by reason of lack of mental responsibility.

(d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only or a summary court-martial officer, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge or summary court-martial officer shall find the accused —

- (1) guilty;
- (2) not guilty; or
- (3) not guilty only by reason of lack of mental responsibility.

(e) Notwithstanding the provisions of article 52 of this code, the accused shall be found not guilty only by reason of lack of mental responsibility if —

(1) a majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established; or

(2) in the case of a court-martial composed of a military judge only or a summary court-martial officer, the military judge or summary court-martial officer determines that the defense of lack of mental responsibility has been established.

Annotation to Article 50a

This article was adopted from Section 850a, Art. 50a, UCMJ.

Article 51. Voting and rulings

(a) Voting by members of a general or special court-martial on the findings and on the sentence shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused is final and constitutes the ruling of the court. However, the military judge may change the ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in article 52 of this code, beginning with the junior in rank.

(c) Before a vote is taken on the findings, the military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them —

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

(3) that, if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the State.

(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition, on request, find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Annotation to Article 51

This article was adopted from Section 851, Art. 51, UCMJ with clarifying language.

Article 52. Number of votes required

(a) No person may be convicted of an offense except as provided in article 45(b) of this code or by the concurrence of two-thirds (2/3) of the members present at the time the vote is taken.

(b) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

Annotation to Article 52

This article was adopted from Section 852, Art. 52, UCMJ with clarifying language, deleting all references to death penalty cases. Section (a) allows for a conviction by two-thirds of the members, however, states generally require a unanimous vote for a criminal conviction. Because courts-martial are statutory courts, the state constitution should not be an impediment to the number of votes herein. Nevertheless, the state must determine whether the two-thirds vote of a voting body (as little as three members in the case of the special court-martial) will constitutionally or statutorily allow the imposition of a state criminal conviction. Section (b) was eliminated because military offenses are capped by a ten-year sentence, therefore, there could not be a three-fourths concurrence vote by members for a sentence longer than this as per the UCMJ. Hence, this section is inapplicable and is absent from the current Model State Code. The tie vote on the insanity issue was adopted from the UCMJ.

Article 53. Court to announce action

A court-martial shall announce its findings and sentence to the parties as soon as determined.

Annotation to Article 53

This article was adopted from Section 853, Art. 53, UCMJ.

Article 54. Record of trial

(a) Each general and special court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member, if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. In a court-martial consisting of only a military judge, the record shall be authenticated by the court reporter under the same conditions which would impose such a duty on a member under this subsection.

(b)

(1) A complete verbatim record of the proceedings and testimony shall be prepared in each general and special court-martial case resulting in a conviction; and

(2) In all other court-martial cases, the record shall contain such matters as may be prescribed by regulations.

(c) Each summary court-martial shall keep a separate record of the proceedings in each case, and the record shall be authenticated in the manner as may be prescribed by regulations.

(d) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated.

Annotation to Article 54

This article was adopted from Section 854, Art. 54, UCMJ with the distinction that the records of all general and special courts-martial will be verbatim. The drafters consolidated the UCMJ provisions without regard to differences in sentences. Also, the drafters added the authority of the court reporter to authenticate the record in summary courts-martial.

PART VIII. SENTENCES

Article 55. Cruel and unusual punishments prohibited

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment may not be adjudged by a court-martial or inflicted upon any person subject to this code. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

Annotation to Article 55

This article was adopted from Section 848, Art. 48, UCMJ without change.

Article 56. Maximum limits

(a) The punishment which a court-martial may direct for an offense may not exceed such limits as prescribed by this code, but in no instance may a sentence exceed more than ten (10) years for a military offense, nor shall a sentence of death be adjudged. A conviction by general court-martial of any military offense for which an accused may receive a sentence of confinement for more than one (1) year is a felony offense. Except for convictions by a summary court-martial, all other military offenses are misdemeanors. Any conviction by a summary court-martial is not a criminal conviction.

(b) The limits of punishment for violations of the punitive articles prescribed herein shall be lesser of the sentences prescribed by the manual for courts-martial of the United States in effect on January 1, 2004, and the State manual for courts-martial, but in no instance shall any punishment exceed that authorized by this code.

Annotation to Article 56

This article follows the numbering system of Section 856, Art. 56, UCMJ but is more extensive. The drafters set a maximum sentence of ten years confinement and eliminated the death penalty. Types of crimes were delineated by types of courts-martial and in conjunction with the terms of the sentence. Additionally, the characterization of discharge is prescribed as is contained in the federal Manual for Courts-Martial. The issue of discharge validity and effect on the reserve appointment in the federal system was discussed. If a state court-martial dishonorably discharges the member, the member is discharged from the state military forces but does not lose federal membership. The member may be free to secure another position in another state's National Guard or another reserve component. The active duty component may have to effectuate regulatory changes to recognize or incorporate state punitive discharges as a basis for removal of federal recognition and discharge. Since the state Code establishes that state court-martial is a civilian criminal conviction, a valid discharge basis currently exists in federal regulations.

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) 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.

(1) Paragraph (1) applies to a person subject to this code who —

(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; and

(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.

(2) In this subsection, the term "State" includes the District of Columbia and any Commonwealth, Territory, or possession of the United States.

(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 so 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 —

- (1) a dishonorable or bad-conduct discharge; or
- (2) confinement;

reduces that member to pay grade E-1, effective on the date of that approval.

(b) 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) (1) or (2), 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 pursuant to this article shall take effect on the date determined under article 57(a) of

this code 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 such period and, in the case of a special court-martial, shall be two-thirds (2/3) of all pay due that member during such period.

(2) A sentence covered by this article is any sentence that includes —

(A) confinement for more than six (6) months; or

(B) confinement for six (6) 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 of this code may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six (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 which 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.

PART 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 such submission shall be in writing. Except in a summary court-martial case, such a submission shall be made within ten (10) 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, such a submission shall be made within seven (7) days after the sentence is announced.

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

(3) The accused may waive the right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of subsection (c) (2), the time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of such 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. Such action may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier. The convening authority or other person taking such 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, such person, in the person's sole discretion may

(A) dismiss any charge or specification by setting aside a finding of guilty thereto;
or

(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 such record in the preparation of the recommendation. The

recommendation of the judge advocate shall include such matters as may be prescribed by regulation and shall be served on the accused, who may submit any matter in response under subsection (b). Failure to object in the response to the recommendation or to any matter attached to the recommendation waives the right to object thereto.

(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 —

(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 such 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 such appeal. Such 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 seventy-two (72) hours of the order or ruling. Such 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 of this code. 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; and

(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, if —

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

(2) the sentence approved under article 60(c) of this code extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six (6) months; or

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

(4) The Adjutant General may —

(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 —

(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; or

(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 of this code, 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 such cases when review is completed by an appellate court prescribed in article 67a. of this code, 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 of this code, 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 of this code 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 of this code 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 (2) 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 such 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 such 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 therefore a form of discharge authorized for administrative issue, and the commissioned officer dismissed by that sentence may be reappointed by the Governor alone to such commissioned grade and with such rank as in the opinion of the Governor that former officer would have attained had he not been dismissed. The reappointment of such 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 pursuant 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 of this code and to action under article 74 of this code.

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 of this code, includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge. The accused may be required to begin such leave on the date on which the sentence is approved under article 60 of this code or at any time after such date, and such 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 pursuant to paragraph (2) determines that the person has recovered to such 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 thirty (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 such 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 such 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 —

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

(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 pursuant 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 (or by order of) 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, pursuant 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.

PART X. PUNITIVE ARTICLES

Article 77. Principals

Any person subject to this code who —

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

(2) causes an act to be done which if directly performed by him would be punishable by this code;

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 subject to this code 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 therein.

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 subject to this code 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 subject to this code 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 subject to this code 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 subject to this code who solicits or advises another or others to desert in violation of article 85 of this code or mutiny in violation of article 94 of this code 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 subject to this code who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of article 99 of this code or sedition in violation of article 94 of this code 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

Any person who —

(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; or

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

shall be punished as a court-martial may direct.

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 subject to this code 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 who —

(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; or

(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;

is guilty of desertion.

(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 ten (10) years or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment 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

Any person subject to this code who, without authority —

- (1) fails to go to his appointed place of duty at the time prescribed;
 - (2) goes from that place; or
 - (3) absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;
- shall be punished as a court-martial may direct.

Annotation to Article 86

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

Article 87. Missing movement

Any person subject to this code 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 subject to this code 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

Any person subject to this code who —

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by confinement of not more than ten (10) years or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment as a court-martial may direct.

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

Any warrant officer or enlisted member who —

(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office;

(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office;

shall be punished as a court-martial may direct.

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

Any person subject to this code who —

- (1) violates or fails to obey any lawful general order or regulation;
 - (2) having knowledge of any other lawful order issued by a member of the state military forces, which it is his duty to obey, fails to obey the order; or
 - (3) is derelict in the performance of his duties;
- shall be punished as a court-martial may direct.

Annotation to Article 92

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

Article 93. Cruelty and maltreatment

Any person subject to this code 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) Any person subject to this code who —

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

(b) A person who is found guilty of attempted mutiny, mutiny, sedition, or failure to suppress or report a mutiny or sedition shall be punished 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

Any person subject to this code who —

- (1) resists apprehension;
- (2) flees from apprehension;
- (3) breaks arrest; or
- (4) escapes from custody or confinement;

shall be punished as a court-martial may direct.

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

Annotation to Article 96

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

Article 97. Unlawful detention

Any person subject to this code 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

Any person subject to this code who —

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code; or

(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; shall be punished as a court-martial may direct.

Annotation to Article 98

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

Article 99. Misbehavior before the enemy

Any person subject to this code who before or in the presence of the enemy —

- (1) runs away;
- (2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;
- (3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;
- (4) casts away his arms or ammunition;
- (5) is guilty of cowardly conduct;
- (6) quits his place of duty to plunder or pillage;
- (7) causes false alarms in any command, unit, or place under control of the armed forces 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; or
- (9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies, to the State, or to any other state, when engaged in battle; shall be punished as a court-martial may direct.

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

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) Any person subject to this code who —

(1) fails to carry out the duties prescribed in subsection (a);

(2) buys, sells, trades, or in any way deals in or disposes of 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; or

(3) engages in looting or pillaging;

shall be punished as a court-martial may direct.

Annotation to Article 103

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

Article 104. Aiding the enemy

Any person subject to this code who —

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall be punished as a court-martial may direct.

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

Any person subject to this code who, while in the hands of the enemy in time of war —

(1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or

(2) while in a position of authority over such persons maltreats them without justifiable cause;

shall be punished as a court-martial may direct.

Annotation to Article 105

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

Article 107. False official statements

Any person subject to this code 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

Any person subject to this code who, without proper authority —

- (1) sells or otherwise disposes of;
- (2) willfully or through neglect damages, destroys, or loses; or
- (3) willfully or through neglect suffers to be lost, damaged, destroyed, sold, or wrongfully disposed of;

any military property of the United States, the State, or of any state, shall be punished as a court-martial may direct.

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 subject to this code 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 subject to this code 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 such punishment as a court-martial may direct.
- (b) Any person subject to this code 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) Any person subject to this chapter who—

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

(2) operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood or breath is equal to or exceeds the applicable limit under subsection (b), shall be punished as a court-martial may direct.

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

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

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

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

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

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

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

(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 subject to this code 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 subject to this code 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 such substance.

(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of 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 ten (10) years or other punishment as a court-martial may direct, but if the offense is committed at any other time, by such 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 subject to this code 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

Any person subject to this code who for the purpose of avoiding work, duty, or service —

- (1) feigns illness, physical disablement, mental lapse, or derangement; or
- (2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.

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 subject to this code 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 subject to this code 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 subject to this chapter 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) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person—

(1) who is not that person's spouse; and

(2) 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 that—

(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; and

(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 subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—

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

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

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

Article 122. Robbery

Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property or to the person or property of a relative or

member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct.

Article 123. Forgery

Any person subject to this chapter who, with intent to defraud—

- (1) falsely makes or alters any signature, to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice; or
- (2) utters, offers, issues, or transfers such a writing, known by him to be so made or altered; is guilty of forgery and shall be punished as a court-martial may direct.

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

Any person subject to this chapter who—

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

Article 124. Maiming

Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which

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

Article 126. Arson

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

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

Article 127. Extortion

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

Article 128. Assault

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

(b) Any person subject to this chapter who—

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

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon; is guilty of aggravated assault and shall be punished as a court martial may direct.

Article 129. Burglary

Any person subject to this chapter who, with intent to commit an offense punishable under section 918–928 of this title (article 118–128), breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court martial may direct.

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 therein is guilty of housebreaking and shall be punished as a court-martial may direct.

Article 131. Perjury

Any person subject to this chapter who in a judicial proceeding or in a course of justice willfully and corruptly—

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

(2) in any declaration, certificate, verification, or statement under penalty 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;

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

Article 132. Frauds against the government

Any person subject to this code —

(1) who, knowing it to be false or fraudulent —

(A) makes any claim against the United States, the State, or of any state, or any officer thereof; or

(B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States, the State, or of any state, or any officer thereof;

(2) who, 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 thereof —

(A) makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;

(B) makes any oath, affirmation or certification to any fact or to any writing or other paper knowing the oath, affirmation or certification to be false; or

(C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited;

(3) who, having charge, possession, custody, or control of any money, or other property of the United States, the State, or of any state, furnished or intended for the armed forces of the United States, the State, or of any state, knowingly delivers to any person having authority to receive it, any amount thereof less than that for which he receives a certificate or receipt; or

(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States, the State, or of any state, furnished or intended for the armed forces of the United States, the State, or of any state, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States, the State, or of any state;

shall, upon conviction, be punished as a court-martial may direct.

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) of this code.

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.

PART 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 have requested such an inquiry.

(b) A court of inquiry consists of three (3) or more commissioned officers. For each court of inquiry, the convening authority shall also appoint counsel for the court.

(c) Any person subject to this code 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 such person, 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 explained

(a)

(1) The articles of this code specified in paragraph (3) shall be carefully explained to each enlisted member at the time of, or within thirty (30) days after, the member's initial entrance into a duty status with the state military forces.

(2) Such articles shall be explained again —

(A) after the member has completed basic or recruit training; and

(B) at the time when the member reenlists.

(3) This subsection applies with respect to articles 2, 3, 7-15, 25, 27, 31, 37, 38, 55, 77-134, and 137-139 of this code.

(b) The text of the code and of the regulations prescribed under such code 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 had thereon.

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 such regulations prescribed, convene a board to investigate the complaint. The board shall consist of from one (1) to three (3) 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 such proportion as may be considered just upon the individual members thereof 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 such 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 thereof

(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).