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CRIMINAL LAW

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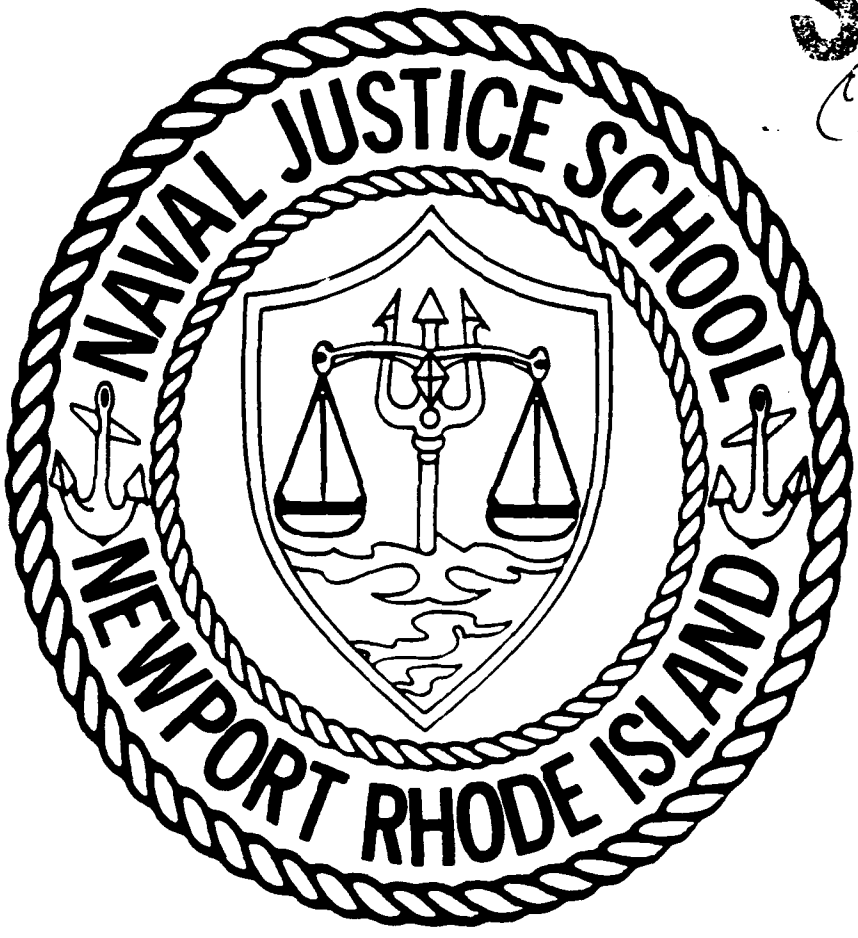

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PREFACE

The purpose of the Naval Justice School lawyer course in military criminal law is to prepare military attorneys to develop competent legal analyses and solutions to substantive criminal law problems. Two basic legal skills will be developed in the course: (1) Accurate identification of key issues in a factual situation, and (2) correct application of principles of military criminal law.

This study guide is the primary text for students in the course and may also be useful to practicing judge advocates as a "starting point" for research. While exhaustive of neither topics discussed nor references cited, it does address fundamental concepts of criminal liability, defenses, and pleading, as well as offenses most commonly encountered in contemporary military criminal practice.

Every effort has been made to ensure this publication's accuracy, and it is continually being revised. As with any legal text, however, it will begin to be out-of-date even before it is printed. Accordingly, it should be used merely to assist, not substitute for, your own independent research. And please do not hesitate to advise us of any errors which you discover.

Citation form in the Navy and Marine Corps is generally controlled by A Uniform System of Citation (14th ed. 1986). In order to save space and make reading easier, frequently occurring references are cited throughout this text as indicated:

1. Uniform Code of Military Justice Articles 1-140, 10 U.S.C. §§ 801-940 (1970) [hereinafter UCMJ].

2. Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

3. R. Perkins, Criminal Law (2d ed., 1969) [hereinafter Perkins].

4. C. Torcia, Wharton's Criminal Law (14th ed., 1978) [hereinafter Wharton].

Military cases are digested in West's Military Justice Digest and also in West's Federal Practice Digest 2d & 3d (under the topic Military Justice).

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MILITARY JUSTICE

CRIMINAL LAW STUDY GUIDE

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CHAPTER I

BASIC CONCEPTS OF CRIMINAL LIABILITY

0101 NATURE AND PURPOSE OF MILITARY CRIMINAL LAW (Key Number 801)

A. Purpose of military criminal law. The purpose of any system of criminal law is to define and minimize socially intolerable conduct. The needs of society ultimately determine what conduct will be outlawed. The military has long been recognized as a society that is separate and distinct from American civilian society. [For an extensive discussion, see Parker v. Levy, 417 U.S. 733 (1974)]. Therefore, military needs for preparedness, security, discipline, and morale may require criminalization of conduct which is tolerated in civilian society. Thus, military criminal law includes not only common law crimes (such as larceny and assault), but also purely military offenses (such as disrespect and unauthorized absence).

B. "Crime" defined. A crime is any social harm defined by law and made punishable by the government in a judicial proceeding in its own name. See Perkins, ch. I, sec. 1.

1. Social harm. Acts or omissions, by themselves, do not constitute criminality. It is the consequences which make conduct criminal. The accused's acts or omissions must impair a social interest.

Example: A rock is thrown for the malicious purpose of putting out another's eye. The intended victim (a) dodges successfully, (b) moves enough so that the rock strikes a glancing blow, (c) loses an eye, or (d) is killed by the rock. In each case the act is the same, but the crime committed is respectively (a) assault, (b) battery, (c) maiming, and (d) murder.

2. Defined and made punishable by law. Basic to the American theory of justice is the principle that there can be no punishment for harmful conduct unless it was prohibited by some law in existence at the time. Thus, some social harms are not crimes. In the military, conduct which is harmful to military society has been defined by Congress in its enactment of a Federal statute, the UCMJ. These offenses are further defined by the President of the United States in an executive order, MCM, 1984.

0102 GENERAL REQUIREMENTS FOR CRIMINAL LIABILITY (Key Numbers 801,550)

A. Overview. This section presents a legal analysis of the concept of crime. Every crime has two components: (1) an act or omission -- or actus reus, and (2) a mental state -- or mens rea.

B. The act

1. Requirement of an act. In the field of ethics, guilt depends upon the state of mind alone. It is impossible, however, to fathom the intentions of the mind except as they are demonstrated by outward actions, overt acts. Accordingly, evidence of a prohibited act or omission is a necessary requisite to criminal liability. See Perkins, ch. 7, sec. 3; 1 Wharton sec. 25; see also United States v. Doyle, 3 C.M.A. 585, 14 C.M.R. 3 (1954).

a. More than evil thinking. While evil thought alone is no crime, the law has defined as socially harmful and made punishable certain activity not far removed from mere evil thinking. For example, solicitation (requesting another to commit a crime) and communicating a threat are not much more than verbalized thought; but, the verbalization of such thought is an act which the law considers more than merely thinking about a crime. The making of such activity punishable is based upon the rationale that imposing a penalty at the early stage prevents the ultimate harm which such threats foretell. United States v. Rutherford, 4 C.M.A. 461, 462, 16 C.M.R. 35, 36 (1954).

b. Acts short of completed crimes. In other instances, acts of preparation and acts tending to effectuate a criminal objective are sufficient to qualify as "acts" for purposes of criminal liability even though the criminal objective is not achieved.

(1) For example, an act that is merely preparatory to committing a crime is sufficient to constitute the offense of conspiracy when the act is committed pursuant to an agreement to commit a crime.

(2) Likewise, an act that falls short of a completed crime, but would usually result in a crime being completed, can constitute a criminal attempt when the act is committed with the intent to commit a crime.

2. Nature of the act of commission or omission. It is essential that the act be either a willed movement or the omission of a possible, legally required performance. The fact that the consequences of the act or omission were unintentional, or that the act or omission was done under the stress and strain of difficult circumstances, does not render it less an "act" for purposes of criminal responsibility. The circumstances surrounding the commission or omission, however, may be sufficient to negate the required mental element and thus legally excuse criminal liability. (See discussion of general intent below.)

a. Example: Smith shoots a gun at Jones to scare him, but not meaning to hit him. The bullet expended by the gun killed Jones. The intentional shooting of the gun was an act of commission. The unintended result may reduce or eliminate mens rea which will be discussed below.

b. Example: Smith has no means of escaping death other than by punching Jones, an innocent person. Even though Smith did not want to punch Jones, and only did so under extreme stress, Smith nonetheless intended to commit an act of punching Jones. (No criminal liability because the assault and battery was due to conditions amounting to duress.)

c. Example: Brown is ordered by his commanding officer to get a regulation haircut. Brown fails to do so because he does not believe the regulation haircut requirements are appropriate. Brown has intentionally omitted to do a legally required act and is criminally liable for that omission.

C. The mental element

1. General concept. Crime requires a certain mens rea, or "mind at fault."

2. Types of mens rea. Military law, based on the Uniform Code of Military Justice, recognizes five types of mens rea: (1) general intent; (2) specific intent; (3) negligence; (4) willfulness; and (5) knowledge. The type of mens rea varies with different offenses and affects the manner of proving guilt and the availability of certain defenses. (See chart I, infra, p. 1-10)

a. General intent offenses. General intent is defined as an intent to do or fail to do the act, the actus reus. See United States v. Bryant, 39 C.M.R. 380, 383 (A.B.R.), petition denied, 38 C.M.R. 441 (1968). For example, in assault and battery, the actus reus is an offensive touching. Because there is a general intent to do the actus reus, the mere fact of commission or omission of a required act permits the prosecution to rely on inference to prove general intent. Thus, by merely proving the actus reus, the prosecution has established prima facie the required mens rea in general intent offenses. See United States v. O'Brien, 9 C.M.R. 201 (A.B.R. 1952), aff'd, 3 C.M.A. 105, 11 C.M.R. 105 (1953).

b. Specific intent offenses. Specific intent has been defined as something which "involves a further or ulterior purpose beyond the mere commission of the act." United States v. Bryant, 39 C.M.R. 380, 383 (A.B.R.), petition denied, 38 C.M.R. 441 (1968). A specific intent offense requires, as an element of the offense, proof of an intent particularized by the offense. The prosecution cannot rely on the inference that is permitted to find general intent. Rather, the specific mental state must be proven beyond a reasonable doubt, either by direct or circumstantial evidence. It is important to note several peculiarities with regard to specific intent. First, more than one offense may involve the same general intent, but may or may not have the same specific intent, or a specific intent may not be present at all. Second, a specific intent offense can be a lesser included offense (see section 0109, infra) of a general intent offense. Third, an actus reus may be the same in any two offenses, but the presence or absence of specific intent is what differentiates the crimes. Examples of specific intent and its peculiarities follow.

(1) Example: Larceny has both a general intent and a specific intent. Because it has a specific intent element, it has been labeled a specific intent offense. The general intent in larceny is the taking of property. The specific intent; that is, the "further or ulterior purpose" beyond the mere taking of property, is the intent to deprive the owner of the property permanently.

(2) Example: Desertion is a specific intent offense. The specific intent element required to be proven is the individual's intent to remain away from his unit or organization permanently. The general intent is to remain away from one's unit or organization, the same general intent as the offense of unauthorized absence.

(3) Example: Larceny and desertion can also serve as examples of the first peculiarity discussed above. Both larceny and wrongful appropriation have the same general intent -- that is, the taking of property -- but the specific intents of each offense differ. In larceny the specific intent is to deprive the owner of his property permanently, while in wrongful appropriation the specific intent is to deprive the owner of his property temporarily. In desertion and unauthorized absence, the general intent is to be absent from one's unit or organization. While desertion has a specific intent, unauthorized absence does not have any specific intent.

(4) Example: Assault with the intent to commit sodomy, a specific intent offense, is a lesser included offense of the general intent offense of sodomy. United States v. Morgan, 8 C.M.A. 341, 24 C.M.R. 151 (1957). Similarly, assault with the intent to commit rape is a lesser included offense of the general intent offense of rape. See United States v. King, 10 C.M.A. 465, 28 C.M.R. 31 (1959).

c. Negligence offenses. Some of the offenses under the UCMJ require only a negligent act. The degree of negligence required varies. Some offenses, such as assault and unauthorized absence, are both general intent and negligence offenses because they may be committed either through intentional or negligent acts. Therefore, in one case an assault may be prosecuted as a general intent offense, and in another case another assault may be treated as a negligence offense.

(1) Negligence defined. Negligence has been defined as "...any conduct, except conduct intentionally or wantonly and willfully disregardful of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm." Perkins at 753.

(2) Causal relationship required. In all crimes involving a negligent state of mind, there must exist a causal relationship between the negligent act or omission and the harm prohibited by the statute. There are therefore two questions which must be answered: (1) Is the accused guilty of negligence; and (2) was that negligence the proximate cause of the alleged harm or injury? In determining proximate cause, the test applied is whether or not the negligent conduct played a "material role" in the criminal result. United States v. Romero, 1 M.J. 227 (C.M.A. 1975).

(3) Degrees of negligence. There are three degrees of negligence recognized by the UCMJ: (1) simple negligence; (2) culpable negligence; and (3) wantonness. The ability to distinguish between degrees of negligence is important in determining whether the prosecution has met its burden of proving the element of negligence required by a particular offense. For example, the offenses of negligent homicide (article 134) and involuntary manslaughter (article 119) have negligence as an element to be proven by the prosecution. In the former, the degree of negligence required is simple negligence, whereas in the latter the degree of negligence required is culpable negligence.

(a) Simple negligence. Simple negligence is defined as "...the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances." Part IV, para. 85(c)(2), MCM, 1984. United States v. Greenfeather, 13 C.M.A. 151, 32 C.M.R. 151 (1962); United States v. Russell, 3 C.M.A. 696, 14 C.M.R. 114 (1954). It is "...the lack of due diligence or of due care or the failure to use or exercise ordinary care," United States v. Ritcheson, 3 C.M.R. 759, 763 (A.B.R. 1952), "so as to avoid injury to others." United States v. Cuthbertson, 46 C.M.R. 977, 980 (A.C.M.R. 1972).

-1- Example: Negligent homicide (article 134). United States v. Greenfeather, 13 C.M.A. 151, 32 C.M.R. 151 (1962): Accused was convicted of causing the deaths of three persons when the car he was driving crossed over the center line and collided head-on with another vehicle. Due to weather conditions, the curve in the road, the intersection located in the area, and the speed the accused was traveling, the court concluded that the accused, who was familiar with these facts, failed to exercise, at the least, "the care that a reasonably prudent man would have exercised under the same or similar circumstances." Id. at 157, 32 C.M.R. at 157.

-2- Example: Negligent destruction, damage, or loss of military property of the United States (article 108). United States v. Donnelly, 19 C.M.R. 549 (N.B.R. 1955): Accused operated a military vehicle while intoxicated and collided with another vehicle. The military vehicle was damaged. The court held that drunkenness does not per se constitute negligence, but "...a reasonable man of ordinary prudence does not drive while drunk .... The prosecution therefore made out a case of simple negligence against this accused by showing that he operated the jeep while intoxicated and with his physical and mental ability to control it impaired." The court went on to use the proximate cause doctrine to show the causal relationship of the accused's negligence and the damage to the vehicle. Id. at 551.

-3- Example: Hazarding a vessel (article 110). United States v. Day, 23 C.M.R. 651 (N.B.R. 1957): Commanding Officer failed to exercise that degree of ordinary care which a commanding officer would exercise under the circumstances and, as a result, his ship grounded.

(b) Culpable negligence. Culpable negligence is defined as that "...degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission." Part IV, para. 44c(2), MCM, 1984. Culpable negligence has also been defined as recklessness. Recklessness is defined in Part IV, para. 35, MCM, 1984 (see discussion of article 111), as the exhibiting of "a culpable disregard of foreseeable consequences to others from the act or omission involved."

(c) Wantonness offenses. Wantonness is a callous disregard for the probable consequences of an act. The United States Court of Military Appeals has defined wantonness as a legal equivalent to general intent in United States v. Craig, 2 C.M.A. 650, 10 C.M.R. 148 (1953). In Craig, the court, with regard to the concept of the intent required for murder, one of the two offenses under the Uniform Code of Military Justice which refers to wantonness, stated: "...[P]remeditated murder only requires a specific intent to kill and that the other intents may be inferred from the nature (sic) and probable consequences of the act if purposely done. This amounts to a general criminal intent." Craig, supra, at 659, 10 C.M.R. at 157; see United States v. Cook, 12 C.M.A. 173, 30 C.M.R. 173 (1961). Part IV, para. 43c(4), MCM, 1984, defines wanton as "the performance of (an) act (showing) a wanton disregard for human life. Such a disregard is characterized by a heedlessness of the probable consequences of the act or omission, an indifference that death or great bodily harm is likely to ensure." In defining wanton, the MCM states that it includes the lesser degree of "reckless" and further states that if motor vehicles are involved it may connote "willfulness." Part IV, para. 35c(5), MCM, 1984. The Manual does recognize, however, that offenses involving wantonness are aggravated offenses. In fact, in situations where death occurs, malice may be implied from wanton conduct such that a charge of murder could result. United States v. Judd, 10 C.M.A. 113, 27 C.M.R. 187 (1959); Part IV, para. 43c(4)(a), MCM, 1984.

d. Knowledge offenses. Knowledge is closely related to, and often confused with, the concept of intent. In fact, the courts have recognized that offenses which have knowledge as an element are equivalent to specific intent offenses. United States v. Joyner, 6 C.M.R. 854 (A.B.R. 1952); United States v. Stone, 13 C.M.R. 906 (A.F.B.R. 1953); see United States v. Curtin, 9 C.M.A. 427, 26 C.M.R. 207 (1958). Many offenses require that the accused possess a certain specific knowledge at the time he commits the offense as an element of the offense. In such offenses, the prosecution must present evidence of the accused's knowledge in order to establish a prima facie case. In other offenses, knowledge is not an element of proof, but the lack of knowledge is an affirmative defense. When the affirmative defense of lack of knowledge is raised in such cases, the burden is then placed upon the prosecution to prove the accused's knowledge beyond a reasonable doubt. Finally, in still other offenses, the accused's knowledge is irrelevant; that is, knowledge is not an element the prosecution is required to prove, and lack of knowledge is not available as an affirmative defense.

(1) Knowledge has been defined as the "mental capability to entertain conscious thought." It is the same mental capability which is the prerequisite for specific intent. United States v. Stone, 13 C.M.R. 906, 910 n. 1 (A.F.B.R. 1953). It is important to note, when discussing knowledge as an

issue in current military law, that constructive knowledge is almost never the test. In prior editions of the Manual for Courts-Martial, there was language that the prosecution could succeed in proving certain knowledge elements by proving that the accused knew or had "reasonable cause to know." See para. 166, MCM, 1969 (Rev.). Case law and revisions in the Manual have almost completely eliminated any such references to constructive knowledge. See, e.g., United States v. Chandler, 23 C.M.A. 193, 48 C.M.R. 945 (1974); United States v. Zammit, 16 M.J. 330 (C.M.A. 1983); United States v. Shelley, 19 M.J. 325 (C.M.A. 1985). The only exception to this is the offense of dereliction of duty, a violation of Article 92, UCMJ. The 1984 Manual states that the accused must have known or "reasonably should have known" of the duty he was derelict in performing before he may be convicted. Part IV, para. 16c, MCM, 1984.

(2) The three contexts in which knowledge can arise are further illustrated:

(a) Knowledge required as an element of the offense; lack of knowledge as an affirmative defense. The prosecution must present evidence of the accused's knowledge in order to establish a prima facie case. The accused may either present no evidence -- thus putting the prosecution to the test of meeting its burden of proof -- or the defense may present evidence of the accused's lack of the requisite knowledge -- thus negating an element of the offense. For example, disobedience of a lawful order which is not a general order requires, as an element of the offense, that the accused know of the order. The prosecution's failure to prove that the accused knew about the order will result in a finding of not guilty to any one of these types of orders violations. Likewise, assuming the prosecution established a prima facie case of disobedience, presentation of evidence tending to show lack of knowledge of that order by the defense may tend to negate the prosecution's evidence such that proof beyond a reasonable doubt may not be found. Therefore, while knowledge and intent are generally independent concepts, it is in this context that knowledge is functionally indistinguishable from a specific intent. Accordingly, offenses which require certain specific knowledge as an element of proof should be considered specific intent offenses. See United States v. Joyner, supra. With regard to orders violations under articles 90 and 91, there are two types of knowledge. There is knowledge that an order was given and understood -- referred to by the courts as "comprehension" -- and there is knowledge that the order was given by a commissioned officer superior to the receiver of the order, or by a warrant, noncommissioned, or petty officer -- referred to by the courts as "recognition." Compare United States v. Simmons, 5 C M.R. 119 (C.M.A. 1952) with United States v. Joyner, supra. (See discussions on willfulness, infra and Chapter IV, infra, OFFENSES AGAINST AUTHORITY.)

(b) Knowledge not required as an element; lack of knowledge an affirmative defense. In offenses not requiring knowledge as an element of proof, the prosecution need not present evidence of an accused's knowledge in order to establish a prima facie case. If the defense raises the issue that the accused was ignorant -- that is, lacked knowledge -- the prosecution must prove the accused's knowledge beyond a reasonable doubt. Because knowledge has been equated to specific intent, honest lack of knowledge or honest ignorance would be an affirmative defense. United States v. Lampkins, 4 C.M.A. 31, 15 C.M.R. 31 (1954). For example, in Lampkins, the

accused was charged with the wrongful possession of marijuana. Knowledge is not an element of the offense of wrongful possession of marijuana which the prosecution is required to prove. The accused, however, raised the affirmative defense of lack of knowledge; that is, lack of knowledge that he possessed the substance as opposed to knowledge he possessed the substance but lacked knowledge that it was marijuana. The prosecution then had the burden of proving that the accused was aware of its presence, or had knowledge of its presence, beyond a reasonable doubt. The court found that such a defense was proper and the court should have been instructed that the accused should not be found guilty if it found that his lack of knowledge was honest. Thus, the affirmative defense of lack of knowledge is equatable to the affirmative defense of mistake of fact. (See discussion in Chapter X, AFFIRMATIVE DEFENSES.)

(c) Knowledge not required as an element; lack of knowledge not a possible defense. This issue is most often discussed as ignorance (or mistake) of law or facts.

-1- Ignorance of fact. In most instances, a mistake or ignorance of fact will give rise to a defense. Some offenses, however, in reflecting society's desire to provide special protection against a particular harm, impose strict criminal liability wherein the accused's lack of knowledge, no matter how honest or reasonable, will not constitute a defense. See R.C.M. 916(j). For example, in a prosecution for carnal knowledge (Article 120, UCMJ), the military equivalent of statutory rape, "it is no defense that the accused is ignorant or misinformed as to the true age of the female..." Part IV, para. 45c(2), MCM, 1984.

-2- Ignorance of law. "Ignorance or mistake of law, including general orders or regulations, ordinarily is not a defense." R.C.M. 916(l)(1).

-3- Deliberate ignorance. While finding the principle inapplicable on the facts before it, the Court of Military Appeals appeared to agree that deliberate ignorance may, in a proper case, be the equivalent of actual knowledge. United States v. Newman, 14 M.J. 474 (C.M.A. 1983). As applied in the Federal courts, deliberate ignorance requires something more than "mere negligence, foolishness, or stupidity" of the accused, but must be based on a purposeful avoidance of truth, an awareness of the "high probability" of the fact in issue, and absence of an actual belief by the accused of the nonexistence of that fact. Id. at 478 (citing authority). Whether this principle is simply a form of circumstantial evidence, or whether it will be applied in the military, remains to be developed.

e. Willfulness offenses. Generally speaking, willfulness and specific intent are synonymous. Certain UCMJ offenses use the term willful in a slightly more complicated manner. For example, Articles 90 and 91, UCMJ, prohibit willful disobedience of superiors. In these offenses, willful has been defined not just as an intentional act, but as an act which was intentionally defiant of authority. Part IV, para. 14c(2)(f), MCM, 1984. It should also be noted that although Article 126, UCMJ, uses the term "willfully and maliciously" in defining arson, it has recently been held that arson is not an offense requiring specific intent. United States v. Acevedo-Velez, 17 M.J. 1 (C.M.A. 1983).

D. Motive. Motive is not a type of mens rea, nor is it an element of any offense. An evil motive will not, by itself, make an act criminal; nor will a good motive, not amounting to a defense, exonerate an individual from criminal liability. United States v. Simmelkjaer, 18 C.M.A. 406, 40 C.M.R. 118 (1969); United States v. Kastner, 17 M.J. 11 (C.M.A. 1983). Evidence of the accused's motives, however, is often admissible as circumstantial evidence of intent. Sometimes, as a practical matter, the distinction between motive and intent becomes unclear; however, the two concepts should not be confused.

E. Elements of the offense

1. Concept. Each specific offense is defined in terms of specific facts about which the prosecution must present evidence in order to make a prima facie case, and which the prosecution must prove beyond reasonable doubt in order to convict. Such essential facts constitute the elements of the offense. Thus, each crime is defined not in vague, abstract terms, but in terms of what the accused allegedly did.

2. As part of its discussion on each offense, this study guide lists the elements of each offense. Another generally reliable source of the elements of offenses is Part IV, MCM, 1984, which provides a discussion of most of the offenses under the code. Caution is necessary when using Part IV of the Manual. The Manual does not discuss all of the offenses under the code. Also, it may not reflect recent judicial interpretations of substantive law, which would take precedence over the Manual's provisions. A third generally reliable reference concerning elements of the offenses is the current edition of the Military Judge's Benchbook, DA Pam 27-9 (1982) with change 2, which lists the elements of each offense in the form that they would be discussed during instructions on findings.

CHART I

Mens Rea	Offense	Act (Actus Reus) ±	State of Mind (Mens Rea) ±	Affirmative Defense	Standard
NEGLIGENCE					
(1) Simple	(1)a. UA b. Neg. Homicide	(1)a. Fail to go. b. Drive through red light.		(1)a. Thought set alarm. b. Thought light was green.	No Defense.
(2) Culpable	(2) Invol.Man-slaughter	(2) Fast draw with loaded pistol.		(2) Thought safeties on.	(General Defense)
(3) Wanton-ness	(3) Unpremeditated Murder	(3) Fired loaded pistol through door into room knowing room occupied with people.		(3) Thought door would stop bullet.	Honest and reasonable.
GENERAL INTENT					
	(1) UA	(1) Left work.		(1) Thought had permission to leave when job was finished.	Honest and reasonable.
	(2) Aggravated Assault	(2) Pointed pistol at individual and fired, but missed.		(2) Thought pistol was unloaded.	
SPECIFIC	(1) Desertion	(1) Left organization never to return.		(1) Thought discharged when 1stSgt told him he was no longer in USMC.	Honest.
	(2) Larceny	(2) Took property of another to keep.		(2) Thought it was his own.	
	(3) Premeditated Murder	(3) Pointed pistol at another w/intent to kill and fired.		(3) Thought victim was enemy.	
KNOWLEDGE	Disrespect	Told individual to "Shut Up."		Didn't know individual was superior.	Honest
WILLFULNESS	Disobedience of superior's orders	Failed to obey order to get regulation haircut.		Didn't know giver of order was superior.	Honest.

0103 PRINCIPALS. Article 77, UCMJ, and Part IV, para. 1, MCM, 1984. (Key Numbers 806, 811, 812, 816)

A. Parties at common law. At common law, there were four categories of parties to a crime.

1. Principal, first degree: The actual perpetrator of the crime, the chief actor in the commission of a crime.

2. Principal, second degree: One who was not the chief actor, but who participated in the crime by assisting (e.g., the lookout or the driver of the get-away car).

3. Accessory before the fact: One who did not participate in the actual commission of the crime, but who prior to the commission of the crime, did counsel, command, procure or cause the crime to be done (e.g., the mastermind).

4. Accessory after the fact: One who did not participate in the commission of the crime, but who, after the crime was committed, rendered aid to the principals in first or second degree or to the accessory before the fact, by receiving, harboring, comforting, or assisting them with the intent to prevent their punishment.

B. Parties under the UCMJ. There are no "degrees of principals" in military law. There are simply two categories of parties to crimes under the code: principals and accessories after the fact. Each is defined under a separate article, articles 77 and 78, respectively.

1. Principals. Article 77 combines three of the common law parties into one class:

a. Perpetrator;

b. aider and abettor; and

c. accessory before the fact.

2. Accessory after the fact. Article 78 provides that one who is an accessory after the fact has committed an independent crime under the UCMJ.

3. Purpose of Article 77, UCMJ. Congress enacted this statutory scheme in order to eliminate difficulties in pleading due to subtle distinctions among the parties at common law. Although the pleadings have been greatly simplified, it is still necessary to be familiar with the common law background, since the trial counsel must still adopt a particular theory to establish the accused's liability as a principal. The military judge, in turn, will instruct the court members on the law governing the particular theory of liability as a principal. See United States v. Wooten, 1 C.M.A. 358, 3 C.M.R. 92 (1952); United States v. Newman, 14 M.J. 474 (C.M.A. 1983).

C. Accomplice. An accomplice is not a defined party under the UCMJ. The term is, however, used to describe "all persons who participate in the commission of a crime to an associate who knowingly and voluntarily cooperates, aids, or assists in its commission." United States v. Scoles, 14 C.M.A. 14, 18, 19, 33 C.M.R. 226, 230, 231 (1963). One must be "culpably" involved. United States v. McCue, 3 M.J. 509 (A.F.C.M.R. 1977); United States v. McFarlin, 19 M.J. 790 (A.C.M.R. 1985). It is most frequently used in the instructions given by the military judge to court members when individuals falling within the above description testify at trial and their credibility becomes an issue. See United States v. Bey, 4 C.M.A. 665, 16 C.M.R. 239 (1954); United States v. Scoles, supra. The term is to be read broadly, but care must be taken to ensure the witness really is an accomplice. United States v. Garcia, 22 C.M.A. 8, 46 C.M.R. 8 (1972); United States v. Alison, 8 M.J. 143 (C.M.A. 1979). The military judge's instruction which can be found in Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. No. 7-10. "Accomplice" is also relevant to the application of the discussion portion of R.C.M. 918(c), MCM, 1984, concerning the determination of the guilt of an accused based solely on the self-contradictory, improbable, or uncertain testimony of an accomplice.

D. Text of Article 77, UCMJ: "Any person punishable under this chapter who:

1. Commits an offense punishable by this chapter, or aids, abets, counsels, commands or procures its commission; or

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

E. Article 77, a nonpunitive article. Article 77 is not a punitive article, it merely defines the principals to crimes. Each principal, regardless of type, is criminally liable for the acts of the perpetrator in the same degree as the perpetrator, except where the liability requires the formation of a specific intent. In the offenses requiring such specific intent, the principals, regardless of degree, are criminally liable only for the offense for which their own individual intent can be proven by the prosecution. Part IV, para. 1b(4), MCM, 1984. Therefore, once the prosecution proves that a person is a principal in the commission of a crime, and if the crime involves an element of specific intent and that element has been established, that person is liable as a principal; is charged under the appropriate punitive article; and is liable for the same punishment as if he had been the actual perpetrator.

F. Perpetrator (Common Law principal, first degree)

1. Definition: A perpetrator is one who "commits an offense"--that is, who actually commits the crime -- either by his own hand, or "causes an act to be done" that is, by an animate or inanimate agency or by an innocent human agent.

2. Two types of perpetrator. Note that the article 77 concept of perpetrator is split into two parts: "commits" [article 77(1)], and "causes ... to be done" [article 77(2)].

a. "Commits the offense." The accused actually does the deed which constitutes the crime. For example, the accused personally strikes another individual with his fist without that individual's consent and the individual is injured; the accused is guilty of assault and battery.

b. "Causes an act to be done." The accused does the deed which constitutes the crime through an indirect means. In this regard, it is not necessary that the accused do the act by his or her own hand in order to be a perpetrator. Nor is physical presence at the scene of the crime required. United States v. Banks, 20 M.J. 166 (C.M.A. 1985). Two basic means of causing an act to be done are:

(1) Animate or inanimate agency. The individual uses something other than his own body to commit the crime. For example:

(a) Using a bludgeon or firing a weapon;

(b) placing a poisonous snake in victim's bed; or

(c) planting a bomb in an airplane, rigged to explode by decreased air pressure.

(2) Innocent human agent. The accused gets another person to do an act which constitutes a crime. For example, in United States v. Tirado, NCM 68-3284 (15 Aug 1969), petition denied, 19 C.M.A. 597 (1970), a troop handler was found guilty of committing lewd and lascivious acts in violation of Article 134, UCMJ. Two recruits, disenchanted with military life, had falsely claimed to be homosexuals in order to be discharged. The accused punched one of the recruits and ordered him to "prove" his claim, whereupon the recruit performed an act of fellatio on the other recruit. At his trial, the accused, who claimed to have been shocked and surprised by the conduct of the recruits, unsuccessfully requested an instruction that the court would have to find that he specifically intended that fellatio be performed in order to find him guilty. On appeal, the Navy Court of Military Review reasoned that, under article 77(2), the accused could be found guilty as if he had committed the act himself. If he had committed the act himself, no finding of intent would be necessary. Therefore, said the court, it was not necessary to find intent where the accused is charged with causing the act to be done. See United States v. Mayville, 15 C.M.A. 420, 35 C.M.R. 392 (1965); United States v. Piatt, 17 M.J. 442 (C.M.A. 1984).

c. Relationship to Federal statutes. This structure parallels that of the Federal Principals Statute, 18 U.S.C. Sec. 2. The Revisor's Note to 18 U.S.C. Sec. 2 explains that the "causes ... to be done" language was added to express

> ...the legislative intent to punish as a principal not only one who directly commits an offense ... but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense....

> It removes all doubt that one who ... causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.

United States v. Wooten, supra, at 362, 3 C.M.R. at 96.

d. Relationship to common law. Thus, articles 77(1) and 77(2) together restate the common law definition of a principal in the first degree. At least one court has held that this statutory bifurcated handling of the perpetrator concept does not create any criminal liability that did not already exist at common law. United States v. Paglia, 190 F. 2d 445 (2nd Cir. 1951). See United States v. Wooten, supra.

G. Aider and abettor (Common law principal, second degree)

1. Definition: An aider and abettor is one who, although not the perpetrator of the crime, is present, shares the criminal purpose, and participates in its commission, by doing some act in order to render aid to, and which does aid, the perpetrator when the crime is committed. United States v. McCarthy, 11 C.M.A. 758, 29 C.M.R. 574 (1960); United States v. Ford, 12 C.M.A. 31, 30 C.M.R. 31 (1960).

2. Examples:

a. A commits a housebreaking while B waits outside the building acting as lookout. B is "aiding and abetting" and both A and B are "principals." United States v. Cox, 14 C.M.R. 706 (A.B.R. 1954).

b. A robs a bank. B, the driver of the get-away car, never enters the bank. B is guilty of robbery as an "aider and abettor," and both A and B are principals.

c. A takes B as a passenger when he purchases marijuana. Low on cash, he asks B to "pitch in." A then distributes the marijuana. B is an aider and abettor of seller. United States v. Hill, 25 M.J. 411 (C.M.A. 1988).

3. Requirements. To prove an individual guilty on the theory of aiding and abetting, the prosecution "must show that the alleged aider and abettor did in some way associate himself with the venture, that he participated in it as something he wished to bring about, and that he sought by his actions to make it successful. Assisting, encouraging, or inciting may be manifested by acts, words, signs, motions or any conduct which unmistakably evinces a design to encourage, incite or approve of the crime. United States v. Ford, 12 C.M.A. 31, 30 C.M.R. 31 (1960); United States V. McCarthy, 11 C.M.A. 758, 29 C.M.R. 574 (1960); United States v. Knudson, 14 M.J. 13 (C.M.A. 1982). In addition, the aider and abettor must share the criminal intent, or purpose, of the active perpetrator of the crime [United States v. Seberg, 5 M.J. 895 (1977)] and must by his presence aid, encourage, or incite the major actor to commit it. United States v. Jackson, 6 C.M.A. 193, 19 C.M.R. 319

(1955). United States v. Outlaw, 2 M.J. 814, 816 (A.F.C.M.R. 1976), petition denied, 5 M.J. 1104 (C.M.A. 1976). From this, it can be seen that there are three basic requirements which must be met before an individual can be found guilty as a principal to a crime on the theory of aiding and abetting: presence, participation, and intent.

a. Presence. The aider and abettor must be present at the scene of the crime or where he needs to be to aide the perpetrator when the crime is committed; but, more than inactive presence is required. "The aider and abettor must ... encourage, or incite the major actor to commit (the crime)." United States v. Jacobs, 1 C.M.A. 209, 2 C.M.R. 115, 117 (1952); United States v. McCarthy, supra. One who is so situated as to be able to aid the perpetrator and thereby help ensure successful completion of the crime is "present" for purposes of being an aider and abettor. Distance from the exact scene of the crime is not controlling. What is required is that the aider and abettor be located where he or she can assist in some significant way. "The standard of relationship to the offense by which conviction as an aider and abettor must be measured, therefore, lies somewhat between proof of participation as a paramount agent, on the one hand and speculative inference based on mere presence at the scene of the crime, on the other...." United States v. Jacobs, supra, at 211, 2 C.M.R. at 117. Thus, the concept of aiding and abetting does not provide for "a dragnet theory of complicity. Mere inactive presence at the scene of the crime does not establish guilt." United States v. Jackson, supra, at 201, 19 C.M.R. at 327 (1955); United States v. Johnson, 6 C.M.A. 20, 19 C.M.R. 146 (1955). However, in United States v. Dunn, 27 M.J. 624 (A.F.C.M.R. 1988), an accused who accompanied a friend to the Exchange for the purpose of watching a demonstration of how to shoplift was convicted of larceny as an aider and abettor.

b. Participation: An aider and abettor must participate by aiding, inciting, counselling, or encouraging the perpetrator in the commission of the offense. United States v. Outlaw, 2 M.J. 814 (A.F.C.M.R. 1976), petition denied, 5 M.J. 1104 (C.M.A. 1976). The accused was properly convicted of wrongful sale of marijuana, on an aider and abettor theory, where the evidence showed that he had directed the buyer to seller, made change so the deal could be consummated, and received $400 as part of the proceeds. United States v. Burroughs, 12 M.J. 380 (C.M.A. 1982). Mere inactive presence and mental approval are not enough, nor is approval subsequent to the act sufficient to constitute participation. United States v. Jackson, supra. A concert of action is required. United States v. Ford, 12 C.M.A. 31, 30 C.M.R. 31 (1960); see United States v. Buchana, 19 C.M.A. 394, 41 C.M.R. 394 (1970).

(1) Thus, a bystander does not become an aider or abettor merely by being present at the commission of a crime. United States v. Johnson, 6 C.M.A. 20, 19 C.M.R. 146 (1955). Also, it has been held that, where all that was proven was that a guard agreed to "see nothing" in return for a bribe, the evidence was insufficient to hold that guard liable as an aider and abettor. The court reasoned that the guard's agreement to "see nothing" could have been related to any criminal activity and that it would be "no more than sheerest speculation to contend there is sufficient showing that he participated in the venture as something he desired to bring about" when no other evidence of his participation or intent was shown. United States v. Lyons, 11 C.M.A. 68, 71, 28 C.M.R. 292, 29[illegible] (1959). Even knowing presence, a "going along for the ride" situation in a drug transaction, has been without a

showing of more, insufficient to make one an aider and abettor. See United States v. Pope, 3 M.J. 1037 (A.F.C.M.R. 1977). If, however, a person has a legal duty to interfere and fails to do so because of one's specific intent to encourage or protect the perpetrator, that person is an aider and abettor. United States v. Ford, supra. The existence of the duty to interfere, as well as the accused's knowledge that he had this duty, must be clearly established by the evidence. Thus, proving that the accused was the senior occupant in a military vehicle at the time the driver wrongfully appropriated it was not sufficient by itself to establish that the accused aided and abetted the wrongful appropriation. United States v. Shelly, 19 M.J. 325 (C.M.A. 1985).

Even one with special ability (such as a firefighter) is under no legal duty to stop a crime (involving fire) in which he is not criminally involved. United States v. Fuller, 25 M.J. 514 (A.F.C.M.R. 1987). However, it is often difficult to determine whether there is a duty to interfere. United States v. Lomax, 12 M.J. 1001 (A.C.M.R. 1982).

(a) A, a friend of B, walking along with B, but with no special duty with regard to B, and having no prior knowledge of B's intentions, has no legal duty to interfere when B knocks a girl to the ground and assaults her. United States v. Sanders, 14 C.M.A. 524, 34 C.M.R. 304 (1964).

(b) The failure of air policemen to act, in accordance with their duty, to prevent a homicide did not render them aiders and abettors in homicide, but constituted them, at most, only accessories after the fact. See United States v. McCarthy, 11 C.M.A. 758, 29 C.M.R. 574 (1960) citing United States v. Schreiber, 5 C.M.A. 602, 18 C.M.R. 226 (1955) (collateral determination).

(2) Notice that the prosecution will often be forced to prove the participation of the alleged aider and abettor by means of the testimony of the perpetrator, which will often be given under a grant of immunity and therefore subject to impeachment. On such occasions, the presence or absence of evidence to corroborate the perpetrator's testimony can be critical. Where an immunized perpetrator testified that the accused aided and abetted the perpetrator's larceny by accepting some of the stolen goods, the failure of the perpetrator to mention this fact in either of his two pretrial statements to law enforcement authorities, combined with the grant of immunity, effectively impeached his testimony. Since the remaining evidence of participation by the accused was deemed vague and ambiguous, the evidence was insufficient as a matter of law to sustain the accused's conviction for larceny on a theory of aiding and abetting. United States v. Nakamura, 21 M.J. 741 (N.M.C.M.R. 1985).

(3) In the context of larceny, the aiding and abetting may even occur after the taking, so long as it occurs during the asportation phase of the offense. Thus, where a thief took another serviceman's paycheck and several hours later asked the accused to forge the owner's endorsement on the check so the thief would be able to cash it, the accused's forgery of the signature made him an aider and abettor to the larceny of the check even though the taking had occurred hours earlier. United States v. Wright, 22 M.J. 25 (C.M.A. 1986).

c. Intent. It is not enough to show that there was presence, participation, or a duty to interfere in order to support a conviction based on the theory of aiding and abetting. The intent of the aider and abettor must be shown. It must be established that the aider and abettor intended to aid or encourage the perpetrator in the commission of the crime. United States v. Jackson, 6 C.M.A. 193, 19 C.M.R. 319 (1955); United States v. McLeary, 2 M.J. 660 (A.F.C.M.R. 1976), petition denied, 2 M.J. 199 (1977). In United States v. Shelley, 19 M.J. 325 (C.M.A. 1985), the government failed to show the accused had any knowledge that the jeep in which he was a passenger was wrongfully appropriated or that he shared any criminal purpose

(1) Although it may be proved by direct evidence, the intent to aid must ordinarily be proved by circumstantial evidence. Such an intent may be inferred from all the circumstances accompanying the doing of the act and from the accused's conduct subsequent to the act. See United States v. Ford, 12 C.M.A. 31, 30 C.M.R. 31 (1960).

(2) In United States v. Buchana, 19 C.M.A. 394, 41 C.M.R. 394 (1970), C.M.A. held that, on the facts of that case, it was error to instruct the court that evidence of flight from the scene of an assault and robbery would support an inference of a common purpose to rob. Flight is evidence of some consciousness of guilt, though not necessarily evidence of a concert of purpose to rob. See also United States v. Papenheim, 19 C.M.A. 203, 41 C.M.R. 203 (1970), where C.M.A. held that departure from the scene after a crime has been committed, of itself, does not warrant an inference of guilt.

(3) In the case where the guard accepted a $1,000 bribe to ride a truck and "see nothing." Held: The mere acceptance of the bribe was not sufficient to establish a conscious sharing of the alleged intent of the perpetrators to commit larceny where it was not shown that the guard was informed of the purpose of the bribe, nor were any details of the plan brought to his attention. His agreement to "see nothing" could have been related to any criminal activity. United States v. Lyons, 11 C.M.A. 68, 28 C.M.R. 292 (1959).

4. Liability of aider and abettor. As a general rule, the aider and abettor will suffer the same criminal liabilities (including the natural and probable results of the crime committed) as the perpetrator. United States v. Wooten, 1 C.M.A. 358, 3 C.M.R. 92 (1952). One need not agree to or even know all details, minor or otherwise, of the planned crime in order to aid and abet the commission of that crime. United States v. Herrick, 12 M.J. 858 (A.F.C.M.R. 1981). Sometimes, however, the aider and abettor's criminal liability will be quite different because of the circumstances of the case. United States v. Craney, 1 M.J. 142 (C.M.A. 1975). For example, an aider and abettor in an assault may not realize that the perpetrator had a knife and would be inclined to use it rather than his fists; the perpetrator may be guilty of murder, while the aider and abettor may only be guilty of involuntary manslaughter. United States v. Jackson, 6 C.M.A. 193, 19 C.M.R. 319 (1955). In another example, A helps B assault O, who is an officer. B does not know O is an officer, but A does. B is guilty of the LIO of assault; A is guilty of assault upon an officer, which calls for a more severe sentence. On the other hand, where the aider and abettor understands that a certain factor must be fulfilled to accomplish the crime and agrees, then the manner in which that factor is accomplished is irrelevant and the aider and abettor is equally liable

with the perpetrator. For example, A understands that, for B to rob the victim, some kind of force will be required to be used. B, without A's knowledge, hits the victim with a pipe. A is equally guilty with B for the robbery, even though he would not have used any kind of a weapon. United States v. Fullen, 1 M.J. 853 (A.F.C.M.R. 1976).

H. Accessory before the fact

1. Definition. An accessory before the fact is:

a. One who "counsels, commands, or procures" [art. 77(1)], or who "causes" [art. 77(2)] another to commit an offense; and

b. that offense (or one closely related) is committed pursuant to such counselling, commanding, procuring, or causing.

2. Counseling. The accessory before the fact advises that the crime be committed or the manner in which it is to be accomplished. The counseling may include "...any specific contribution of advice, afterwards acted on, constitutes the offense.... The amount of advice or encouragement rendered is not material if it has effect in inducing the commission of the crime." United States v. Wooten, 1 C.M.A. 358, 363, 3 C.M.R. 92, 97 (1952); United States v. Cowan, 12 C.M.R. 374 (A.B.R. 1953).

a. Intent. The advice must be given with the intent to encourage and promote the crime. United States v. Wooten, supra; United States v. Cowan, supra. For example, an ensign asks the chief engineer how to scuttle the ship. The chief engineer tells the ensign how, and the ensign does it. The chief engineer is not an accessory before the fact if he is not aware that the ensign actually intended to scuttle the ship, and did not himself intend that the ensign do so.

b. Manner of commission of the crime. The fact that the crime was actually committed in a manner different from that counseled is not a defense. The counselor is still an accessory before the fact and is "considered equally as guilty as the actual perpetrator of offenses incidental to or in execution of that offense which is counseled, or which are among its probable consequences." United States v. Cowan, supra, at 381; United States v. Wooten, supra. Thus, where instead of administering poison to the victim as planned, the perpetrator changes his mind and shoots the victim, the person who counseled the crime is an accessory before the fact.

3. Commanding. Any demanding of another that an act be done toward the commission of a crime is "commanding." While it is not limited to its technical meaning in the military, "(t)he word 'command', as applied to the case of principal and accessory, is where the person having control over another as a master over a servant, orders a thing to be done." 7A Words and Phrases 396. Furthermore, if the offense commanded is committed, but by different means than those commanded, the one who commanded the crime is still guilty, as an accessory before the fact.

4. Procuring. The accessory before the fact "hires" another to commit a crime. It also means "to obtain, to bring about, and may be synonymous with 'aid' or 'abet'." 34 Words and Phrases 281.

5. Causes another to commit an offense. This language was discussed with respect to perpetrators and incorporates the common law concept of an accessory before the fact as well as that of a perpetrator.

6. The crime about which the accessory before the fact counsels must actually occur, or the accused is only a solicitor and not a principal.

I. Special rules applying to principals

1. Responsibility for other crimes. A principal can be convicted of other crimes committed by another principal if they are the natural and probable consequence of the common design, as long as those offenses are not "purely collateral offenses." United States v. Cowan, 12 C.M.R. 374, 381 (A.B.R. 1953). Part IV, para. 1b(5), MCM, 1984.

a. Example. Rollo, the mastermind, plans a burglary and remains in the hideout waiting to count the loot. Rollo is guilty of murder if Willy, the perpetrator, kills the homeowner while carrying out the burglary. A natural and probable consequence of burglary is violence, which may result in death. Burglary involves an invasion of another's "castle." Even though the conspirators had agreed not to resort to violence in any event, if violence incidentally results, all principals are responsible therefor because it can be reasonably expected to occur, in spite of the "agreement."

b. Contra-example: Rollo and Willy enter into a common purpose for a purse snatching, to be accomplished in the middle of Grand Central Station at midnight. Willy waits outside in a getaway car while Rollo enters to do the job. After snatching the purse, monetary greed gives way to a strong urge and Rollo attempts to rape the victim. Willy may be convicted of larceny, but not of attempted rape. The rape was not an incidental result of the commission of the crime of larceny, nor could it reasonably be expected to occur. In short, it was not a natural and probable consequence.

2. Withdrawal. A principal other than the perpetrator may repent and withdraw from the common venture before commission of a substantive offense, and thus escape responsibility for any further acts committed by the perpetrator. There are three basic factors to which the courts look to determine whether the withdrawal is effective in absolving an accessory before the fact, or an aider and abettor, of guilt of the substantive offense if committed. Part IV, para. 1b(7), MCM, 1984. Those three factors are:

a. Withdrawal must occur before the crime is completed -- that is, it must be a timely withdrawal;

b. the intent to withdraw must be communicated by words or acts to the perpetrator or to law enforcement authorities; and

c. the withdrawal must effectively countermand or negate the prior acts of the accessory before the fact or aider and abettor.

Thus, a mere change of mind, or mere disapproval without further effort to prevent the commission of the substantive offense, will not suffice as a withdrawal. In United States v. Williams, 19 C.M.A. 334, 41 C.M.R. 334

(1970), the Court of Military Appeals indicated that, where the perpetrator refused to abandon the commission of the substantive offense upon the disavowal of the intent to commit the offense by the accused, the accused's requesting assistance from the proper authorities to prevent the offense was an act to prevent the commission of the crime and thus sufficient to constitute an effective withdrawal. Therefore, should a principal other than the perpetrator find it impossible to contact all of the perpetrator(s), whether because of lack of time, lack of availability of the perpetrator(s), or whatever the reason, or if his communication of his withdrawal is ineffective in preventing the perpetrator from committing the substantive offense, the accessory before the fact or the aider and abettor may still be absolved of criminal liability for the substantive offense if he has performed other acts which would tend to prevent the crime, such as going to the proper authorities and disclose the common venture. See Eldredge v. United States, 62 F.2d 449 (10th Cir. 1932).

3. Lesser included offenses. Aiders and abettors and accessories before the fact may be found guilty of lesser included offenses to the same extent as the perpetrator. Of course, the aider and abettor or the accessory before the fact may be found guilty of the lesser included offense while the perpetrator is found guilty of the offense charged, and vice versa. This is particularly true, as previously noted, where an offense requires a specific mental element and the lesser included offense does not. See United States v. Desroe, 6 C.M.A. 681, 21 C.M.R. 3 (1956).

4. Attempts. If the perpetrator commits an attempt, the aider and abettor or accessory before the fact may be charged as a principal to the crime of attempt (article 80), even though the crime contemplated was not in fact committed.

5. Guilt of other principals

a. Common law. Common law requires that the perpetrator be convicted before, or tried simultaneously with, the accessory in order for the accessory before the fact to be tried as a principal. Now, in almost all American jurisdictions, this requirement has been eliminated by statute.

b. Military law. In military law, there is no requirement that the perpetrator be convicted or even tried before trying the accessory. Even though the perpetrator is acquitted, the aider and abettor or accessory before the fact can be convicted. See United States v. Duffy, 47 C.M.R. 658 (A.C.M.R. 1973). Articles 77 and 78 are adopted from 18 U.S.C. §§ 2 and 3 respectively. United States v. Marsh, 13 C.M.A 252, 32 C.M.R. 252 (1962). In 1980, the Supreme Court held that trial of anyone who falls within § 2 (art. 77 for military) is triable as a principal, regardless of the trial or acquittal of the perpetrator. United States v. Standefer, 447 U.S. 10 (1980).

6. Proof of perpetrator's crime at accomplice's trial. In a prosecution of A under a theory that he is guilty as an accessory before the fact, or an aider and abettor, the prosecution must prove that B in fact committed the crime. For this purpose, the prosecution cannot introduce into evidence a record of the prior conviction of B, but would have to prove the fact of B's crime by other evidence, such as testimony by witnesses that B committed the crime. Part IV, para. 3c(5), MCM, 1984. United States v. Nix, 11 C.M.A. 691, 29 C.M.R. 507 (1960).

J. Instructions. The military judge must know the theory of principals under which the prosecution is proceeding in order to instruct the members properly. Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. No. 7-1. United States v. Bretz, 19 M.J. 224 (C.M.A. 1985). Where the state of the evidence is such, however, that the members might reasonably find the accused guilty either as a perpetrator or as an aider and abettor, it is proper for the military judge to instruct the members on both theories. Moreover, the accused may properly be found guilty even though the individual members may themselves disagree on which of the two theories of guilt is the correct one. Thus, one third of the members may vote for a finding of guilty because they are convinced the accused was the perpetrator (and not the aider and abettor), another third of the members may vote for a finding of guilty because they are convinced that the accused was the aider and abettor (and not the perpetrator), and the remaining one third of the members may vote for a finding of not guilty, yet the finding of guilty stands and is perfectly proper since two thirds of the members were convinced beyond a reasonable doubt that the accused is guilty even though they may have disagreed on the theory. United States v. Vidal, 23 M.J. 319 (C.M.A. 1987).

K. Pleading. A person who is not a perpetrator of an offense, but is liable as a principal under article 77, is charged just as though he or she had committed the acts. Indeed, this is the purpose of article 77: To eliminate the difficulties in pleading due to the subtle distinctions among accessory before the fact, aider and abettor, and perpetrator. In drafting the specification, it normally is not necessary to plead the facts which describe the accused as a principal. Where the specification would be contradictory on its face or otherwise misleading, however, the specification should explain the theory which makes the accused a principal. United States v. Petree, 8 C.M.A. 9, 12-13, 23 C.M.R. 233, 236-237 (1957).

1. Example: A and B get into an argument with V. A and B together produce knives and make jabbing motions at V, resulting in two wounds -- one of which proves fatal. Under these circumstances, A may be charged as if he were the perpetrator of the fatal blow. It will not be necessary to determine who actually delivered the fatal blow. If it were A, his guilt as a principal would be clear; and, if it were B, the evidence is sufficient to show A's guilt as an aider and abettor. United States v. Crocker, 35 C.M.R. 725 (A.B.R. 1964), petition denied, 15 C.M.A. 677, 37 C.M.R. 471 (1965).

2. Sample pleading. In the stabbing example discussed immediately above, both A and B would be charged as follows:

> Charge: Violation of the Uniform Code of Military Justice, Article 118.
>
> Specification: In that (A or B), did, at (place), on or about (date), murder V by stabbing him in the back with a knife.

3. Example: A and B get into an argument with V over V's relationship with A's wife. The argument becomes heated and develops into fist-a-cuffs between A and V. When V makes some unsavory remarks about A's wife, A becomes furious. B is standing at the sidelines, sees a metal pipe,

picks it up and hands it to A, shouting, "Kill him! Kill him!" A strikes V with the pipe and kills him. A is guilty of manslaughter, while B is guilty of murder.

4. Sample pleadings. In the death example immediately above, A and B would be charged as follows:

a. Charge: Violation of the Uniform Code of Military Justice, Article 119.

Specification: In that A did, at (place), on or about (date), unlawfully kill V by striking him on the head with a metal pipe.

b. Charge: Violation of the Uniform Code of Military Justice, Article 118.

Specification: In that B did, at (place), on or about (date), murder V by striking him on the head with a metal pipe.

0104 ACCESSORY AFTER THE FACT. Article 78, UCMJ, and Part IV, para. 3, MCM, 1984. (Key Numbers 821-823)

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

B. General concept. "Accessory after the fact" is a separate, distinct crime under the Uniform Code of Military Justice. Note that the accessory after the fact does not help the offender commit the principal offense, but merely aids or assists the principal after the crime has been committed. Mere failure to report a known offense will not make an individual an accessory after the fact [Part IV, para. 3c(2), MCM, 1984; United States v. Smith, 5 M.J. 129 (C.M.A. 1978)], but it may constitute the offense of misprision of a serious offense under article 134. It may also constitute a violation of general orders, such as Article 1139, U.S. Navy Regulations, which requires naval servicemembers to report known offenses to proper authority and, thus, may constitute an offense under article 92(1) of the code.

C. Elements of the offense. The prosecution must prove beyond reasonable doubt that:

1. An offense punishable by the Uniform Code of Military Justice was committed;

2. the accused knew that the person aided had committed the offense;

3. the accused received, comforted, or assisted the offender; and

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

D. An offense punishable by the code was committed (first element)

1. An offense was committed

a. "Trial within a trial." The prosecution must prove beyond reasonable doubt that the alleged principal, the person the alleged accessory aided, did in fact commit the offense. United States v. Nix, 11 C.M.A. 691, 29 C.M.R. 507 (1960). The principal's offense must be a completed offense at the time the accessory after the fact renders the principal assistance.

For example: A shoots B. C knows A shot B and helps A conceal the weapon. B dies shortly thereafter. A is guilty of murder; C is guilty of accessory after the fact to assault with the intent to commit murder. C is not guilty of being an accessory after the fact to murder because B had not yet died at the time C rendered A assistance. See United States v. Wilson, 7 M.J. 997 (A.F.C.M.R.), petition denied, 8 M.J. 181 (1979).

Thus, the trial of an accessory after the fact must encompass proof of:

(1) The principal's crime; and

(2) the accessory's crime of unlawfully assisting the principal. United States v. McConnico, 7 M.J. 302 (C.M.A. 1979); United States v. Cline, 20 C.M.R. 785 (A.B.R.), petition denied, 20 C.M.R. 398 (C.M.A. 1955).

b. Effect of not trying principal. Article 78, as an independent punitive article enacted by Congress, abrogates the common law rule that principals must be tried before the accessory after the fact. United States v. Marsh, 13 C.M.A. 252, 32 C.M.R. 252 (1962). Therefore, regardless of whether any of the principals are tried for the commission of the crime, the accessory after the fact can be tried for his role.

c. Effect of principal's extrajudicial confession. The fact that the principal's confession is an exception to the hearsay rule as an admission against penal interest [Mil.R.Evid. 804(b)(3)] does not permit admission of that confession into evidence at the accessory's court-martial. The confrontation clause of the sixth amendment must first be overcome. United States v. McConnico, 7 M.J. 302 (C.M.A. 1979). This confrontation problem preventing admission of a principal's extrajudicial confession is overcome when the principal testifies in person at the accessory's trial, since the accessory has thus been afforded the opportunity to confront and cross-examine the principal.

d. Effect of principal's conviction. Part IV, para. 3c(5), MCM, 1984, specifically prohibits the use of evidence of the principal's conviction to establish the element of an offense having been committed. Additionally, the prosecution may not elicit testimony from a principal that the principal has been previously convicted for the offense. United States v. Nix, 11 C.M.A. 691, 29 C.M.R. 507 (1960); United States v. Humble, 11 C.M.A. 38, 28 C.M.R. 262 (1959).

e. Effect of principal's acquittal. Despite the fact that the principal was previously tried and acquitted of the alleged crime, the accessory after the fact may still be tried and, if the prosecution can prove the commission of the crime by the alleged principal, can nonetheless be convicted as an accessory after the fact. Part IV, para. 3c(5), MCM, 1984. United States v. Marsh, 13 C.M.A. 252, 32 C.M.R. 252 (1962); Standefer v. United States, 447 U.S. 10 (1980).

2. Offenses "punishable by the code." "Punishable by the code" means any offense "described by the code"; that is, the gravamen is the nature of the offense rather than the status of the principal. Thus, the principal who committed the offense need not be subject to the code. United States v. Michaels, 3 M.J. 846 (A.C.M.R. 1977). Hence, a person subject to the code who hides stolen loot for a civilian violates article 78, since larceny is "described by the code" in article 121.

E. Accused's knowledge (second element). As previously noted, article 78 is the military equivalent to 18 U.S.C. § 3. The elements of both offenses are the same. There has been no military court decision interpreting the knowledge element of article 78. There have been, however, Federal cases holding that the knowledge that the government must prove is actual knowledge. United States v. Rux, 412 F.2d 331 (9th Cir. 1969); Hiram v. United States, 354 F.2d 4 (9th Cir. 1965). These decisions, as well as the decision in United States v. Bissonette, 586 F.2d 73 (8th Cir. 1978), hold that actual knowledge can be proven by circumstantial evidence since it is most unlikely that the government would have direct evidence of actual knowledge of an accused. Because the United States Court of Military Appeals has previously analogized the Federal statute with the military law on accessory after the fact (United States v. Marsh, supra), it can be assumed that the knowledge required for accessory after the fact in military law is also actual knowledge.

Another issue relating to the knowledge of the accused for this offense should be addressed. In United States v. Foushee, 13 M.J. 833 (A.C.M.R. 1982), the accused was convicted as an accessory after the fact to assault with intent to commit murder. The perpetrator of the crime had stabbed the victim with a knife, and the accused did assist the perpetrator by concealing him in the former's room. The court concluded that the accused could only be found guilty of being an accessory after the fact to assault with a dangerous weapon because the evidence did not establish that the accused knew that the perpetrator had intended to kill the victim or even to inflict grievous bodily harm on him. Thus, it appears that the knowledge of an accused must include knowledge of the intent of the perpetrators.

F. Accused's assistance to principal (third element). Assistance to the principal includes direct or indirect assistance. United States v. Wilson, 7 M.J. 997 (A.C.M.R. 1979). It is not limited to concealing or harboring the principal to effect his personal escape. United States v. Tamas, 6 C.M.A. 502, 20 C.M.R. 218 (1955). Examples of such direct and indirect unlawful assistance include:

1. Hiding the offender;

2. giving the principal clothing, money, or a means of transportation to escape;

3. suppressing evidence;

4. tampering with evidence;

5. giving false information at an investigation or inquest to mislead the authorities; and

6. manufacturing an alibi or defense for the offender.

There must be a person to be assisted, however, in order for the offense of accessory after the fact to be committed. Where the assistance cannot be rendered because the person to be assisted died prior to the rendering of assistance, the accessory after the fact charge was not viable although an attempted accessoryship under article 80 was. United States v. Wilson, supra.

G. Accused's intent (fourth element)

1. Specific intent. The accessory after the fact must specifically intend to assist the principal to avoid apprehension, prosecution, or punishment. United States v. Tamas, 6 C.M.A. 502, 20 C.M.R. 218 (1955). Merely receiving stolen goods, therefore, would not, by itself, make one an accessory after the fact of larceny. United States v. Blevins, 34 C.M.R. 967 (A.B.R. 1964); United States v. Burke, 16 C.M.R. 703 (A.F.B.R. 1954). If the goods are concealed by the receiver, however, for the purpose of hindering the apprehension or prosecution of the thief, then the receiver would also become an accessory after the fact. See United States v. Tamas, supra. Likewise, giving first aid at the scene of a crime, knowing full well that the one aided had just violated the code, is not a violation of article 78 unless the first aid was rendered for the purpose of hindering apprehension, trial, or punishment. The key issue in determining when aid within the meaning of article 78 is rendered, therefore, is the intent of the person furnishing the assistance.

2. Effectiveness. It is not necessary that the aid rendered actually accomplish its purpose. All that is required is that the accused, with the requisite knowledge, aided the offender with the requisite intent. For example, Willy steals a typewriter from Classroom B. He advises Joe, a good friend, of the theft. Joe immediately destroys the plant property account card and alters the command's typewriter inventory record in order to conceal the crime and aid Willy. Willy, however, is caught going through the gate with the typewriter. Joe is still guilty of being an accessory after the fact.

H. Principals as accessories after the fact. While an accessory before the fact may also, under certain circumstances, appear to be an accessory after the fact to the same crime, it is generally recognized that a principal cannot also be an accessory after the fact. United States v. McCrea, 50 C.M.R. 194 (A.F.C.M.R. 1975); United States v. Smith, 17 C.M.R. 458 (N.B.R. 1954); United States v. Contreras NMCM 85-3133 (24 March 1986); United States v. Lampani, 14 M.J. 22 (C.M.A. 1982).

I. Accessory after the fact as a lesser included offense. The offense of being an accessory after the fact to an offense is not a lesser included offense of the primary offense. United States v. London, 4 C.M.A. 90, 15 C.M.R. 90 (1954).

J. Pleading

1. General considerations. See sample specification Part IV, para. 3f, MCM, 1984. The specification must allege both the principal's offense and the manner in which the accused aided, received, comforted, or assisted the principal. This offense is always alleged under article 78, regardless of what offense to which the accused was an accessory after the fact.

2. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 78.

Specification: In that Seaman John Doe, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, knowing that at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, Fireman William K. Felonious, U.S. Navy, had committed an offense punishable by the Uniform Code of Military Justice, to wit: Larceny of a radio from Jonas Panasonic, of a value of about $52.00, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, in order to prevent the apprehension of the said Felonious, assist the said Felonious by hiding him under a lifeboat cover.

K. Instructions. See Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. No. 3-1.

L. Providency Inquiry. On a plea of guilty, the military judge must explain to the accused and must question the accused on the elements of article 78 and the elements of the principal offense. United States v. Williams, 6 M.J. 611 (A.C.M.R. 1978), petition denied, 6 M.J. 290 (1979).

M. Punishment: Part IV, para. 3e, MCM, 1984, provides in part, that:

> Any person subject to the code who is found guilty as an accessory after the fact to an offense punishable by the code shall be subject to the maximum punishment authorized for the principal offense, except that in no case shall the death penalty nor more than one-half of the maximum confinement authorized for that offense be adjudged, nor shall the period of confinement exceed 10 years in any case, including offenses for which life imprisonment may be adjudged.

0105 REQUESTING COMMISSION OF AN OFFENSE. Article 134, UCMJ, and Part IV, para. 101, MCM, 1984. (Key Number 754)

A. Background. In its list of offenses under article 134, the 1984 Manual lists an offense known as "requesting the commission of an offense." This offense has its origins in the case of United States v. Benton, 7 M.J. 606 (N.C.M.R. 1979), petition denied, 8 M.J. 227 (C.M.A. 1980), wherein N.C.M.R. was able to find this offense under article 134 as a lesser included

offense of solicitation (also an article 134 offense). Solicitation, of course, is a specific intent offense (see section 0106, infra) and the major distinction between that offense and "requesting the commission of an offense" was thought to be the absence of any such specific intent element in the case of the latter offense.

B. Current law. Notwithstanding its earlier denial of the petition in Benton, C.M.A. has since held that the creation of a lesser included offense under solicitation not requiring specific intent that the offense solicited be committed is barred by the preemption doctrine applicable to article 134. United States v. Taylor, 23 M.J. 314 (C.M.A. 1987). It seems clear, therefore, that the offense of "requesting the commission of an offense" does not exist under article 134 despite the provisions of Part IV, para. 101, MCM, 1984. Notice, however, that Taylor also stands for the proposition that, in officer cases at least, such conduct as is described in that paragraph may constitute an offense under article 133 since the preemption doctrine does not apply to that article. See sections 0507 and 0508, infra, for a discussion of the preemption doctrine as it applies to the general articles of the UCMJ.

0106 SOLICITATION. Article 82, UCMJ, and Part IV, paras. 6 and 105, MCM, 1984. (Key Numbers 765-770)

A. Article 82 solicitations. Article 82 provides that a person who requests another to commit desertion, mutiny, an act of misbehavior before the enemy, or sedition is guilty of the offense of solicitation.

1. Form of solicitation. Solicitation may be accomplished by a verbal request, letter, or other means; and the accused may act alone or in concert with others. Any act or conduct which reasonably may be construed as a serious request or advice to commit one of the offenses listed in article 82 constitutes solicitation in violation of article 82. Part IV, para. 6, MCM, 1984.

2. Instantaneous offense. The offense is complete the moment the request is made or the advice given. It is not necessary that the person solicited act upon the advice. Indeed, it is not even necessary that the person solicited agree to the request. United States v. Morris, 21 C.M.R. 535 (N.B.R. 1956). But, the request made or the advice given must be a serious request or advice. United States v. Bachman, 20 C.M.R. 700 (A.B.R. 1955); United States v. Linnear, 16 M.J. 628 (A.F.C.M.R. 1983), in which the conviction to solicit another to commit prostitution was overturned because the accused's act was considered to be a suggestion, and not a serious request to commit a crime.

3. Punishment. The maximum punishment for solicitation under article 82 varies depending on the act solicited and whether the act was attempted or committed. Art. 82, UCMJ; Part IV, para. 6e, MCM, 1984.

B. Article 134 solicitations. Solicitations to commit offenses other than the violation of the articles enumerated in article 82, may be charged as violations of article 134. Part IV, para. 105, MCM, 1984. United States v. Oakley, 7 C.M.A. 733, 23 C.M.R. 197 (1957). United States v. Taylor, 23 M.J. 314 (C.M.A. 1987).

1. Form of solicitation. Same as for article 82. See above.

2. Instantaneous offense. Same as for article 82. See above.

3. Example of article 134 solicitation. A requests B to permit A to perform an act of sodomy upon him. Sodomy is a violation of article 125. The request is a solicitation to commit sodomy, in violation of article 134. See United States v. Walker, 8 C.M.A. 38, 23 C.M.R. 262 (1957).

4. Punishment. Part IV, para. 105e, MCM, 1984, provides that article 134 solicitations carry the same punishment as is provided for the offense solicited except that in no case can the punishment extend to death or confinement in excess of five years. Note, however, that the maximum punishment for solicitation to commit espionage is any punishment other than death which a court-martial may direct. For example, a person found guilty of soliciting another to commit larceny is subject to the punishment imposable for the offense of larceny. Additionally, where soliciting is charged, but the offense is really a separate and distinct substantive offense, the maximum punishment is that imposable for the closely related offense. United States v. Brown, 8 C.M.A. 255, 24 C.M.R. 65 (1957), wherein the court found that the solicitation of others to engage in sexual intercourse with prostitutes was really pandering, a separate offense already provided for in article 134, and therefore, the solicitation for which the accused was found guilty was punishable in accordance with the closely-related offense of pandering.

C. Specific intent offenses. Solicitation is a specific intent offense. United States v. Benton, 7 M.J. 606 (N.C.M.R. 1979), petition denied, 8 M.J. 227 (1980); United States v. Mitchell, 15 M.J. 214 (C.M.A. 1983) (instruction in error where there was a failure to require a finding of specific intent in soliciting another to violate a lawful general regulation). See also United States v. Kauble, 15 M.J. 591 (A.C.M.R. 1983). United States v. Taylor, supra. Interestingly, should an accused not have made the solicitation with the specific intent that the solicited offense be committed, he still may be convicted and punished for a lesser included offense requiring only general intent, which amounts to a simple disorder and which the Navy Court of Military Review has called wrongfully requesting another to commit an offense. See United States v. Benton, supra, Part IV, para. 101, MCM, 1984.

D. Related offenses. Some crimes require, as an element of proof, some act of solicitation by the accused. These offenses are separate and distinct from solicitations under articles 82 and 134. For example, in United States v. Wysong, 9 C.M.A. 249, 26 C.M.R. 29 (1958), the court held that soliciting another to wrongfully refuse to testify was a separate and distinct substantive offense of obstruction of justice See also United States v. Irving, 3 M.J. 6 (C.M.A. 1977) (solicitation to sell heroin was separate and distinct from the subsequent sale). Solicitation, however, is a substantive offense which is different from the offense of attempt. United States v. Oakley, 7 C.M.A. 733, 23 C.M.R. 197 (1957).

E. Pleading

1. General considerations. Pleading formats under articles 82 and 134 are essentially similar. See Part IV, paras. 6f and 105f, MCM, 1984. In article 82 pleadings, the intended offense is merely cited; in article 134 pleadings, the intended offense is described more specifically.

2. Sample pleadings

a. Charge: Violation of the Uniform Code of Military Justice, Article 134.

Specification: In that Seaman John Q. Requestor, U.S. Navy, Naval Education and Training Center, Newport, Rhode Island, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, wrongfully solicit Seaman Innocent Dupe, U.S. Navy, to steal one 1951 Hudson sedan, of a value of about $200.00, the property of Ensign Andrew Teek, U.S. Navy, by saying to said Seaman Dupe, "If you'll steal Teek's old Hudson for me, I'll give you fifty bucks," or words to that effect.

b. Charge: Violation of the Uniform Code of Military Justice, Article 82.

Specification: In that Private First Class John Defect, U.S. Marine Corps, Headquarters Company, Headquarters Battalion, Marine Corps Base, Camp Lejeune, North Carolina, on active duty, did, in the Republic of Vietnam, on several occasions during the period from about March 1968 until about October 1969, by approaching the perimeter of front lines near American fire support bases in an area then known as the "I" Corps Area, and speaking though a bullhorn/ megaphone requesting United States combat forces to throw down the weapons and to refuse to fight during combat operations against a hostile force, and by appealing to United States troops in the field urging them to defect; solicit those forces to commit an act of misbehavior before the enemy in violation of Article 99, Uniform Code of Military Justice.

F. Instructions See generally Military Judges' Benchbook, DA Pam 27-9 (1982) Inst. No. 3-178 (article 134); Inst. No. 3-34 (article 82).

0107 CONSPIRACY. Article 81, UCMJ, and Part IV, para. 5, MCM, 1984. (Key Numbers 826, 831)

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

Note: Conspiracy as defined by article 81 differs from the conspiracy defined by common law in that the element requiring proof of an overt act has been added by Congress. "The only exceptions to this rule are those conspiracies in Title 18 of the United States Code which do not require any overt act and which may be charged under article 134 ...." United States v. Chapman, 10 C.M.R. 306, 308 (A.B.R. 1953). The purpose of requiring an overt act is to ensure that a criminal undertaking is in fact being pursued.

B. Elements of the offense:

1. That the accused entered into an agreement with one or more persons;

2. that the object of the agreement was to commit an offense under the code, and

3. that, thereafter, the accused or at least one of the co-conspirators performed an overt act to effect the object of the conspiracy.

C. Agreement with two or more persons (first element). For general discussion of law of conspiracy, see New Developments in the Law of Conspiracy, 72 Harv. L. Rev. 920 (1959).

1. Agreement. Agreement refers to a meeting of the minds by the parties involved. Once there is a meeting of the minds as to a scheme, the agreement exists. There is not an agreement in existence where there is conversation "directed solely toward the formation of the alleged conspiracy." United States v. LaBossiere, 13 C.M.A. 337, 340, 32 C.M.R. 337, 340 (1962).

2. Form of the agreement. The agreement in a conspiracy need not be in any particular form. The agreement may be formal or informal, written or oral, expressed or implied. "Acts of the parties, a consent of conduct speaks louder than words." United States v. Coker, 13 C.M.R. 459, 464 (A.B.R. 1953); Part IV, para. 5c(2), MCM, 1984.

3. Co-conspirators

a. Who can conspire? The accused must be subject to the code, but the co-conspirators need not be. Thus, an accused can conspire with a civilian not subject to the code as long as the object offense is a substantive offense punishable by the code. The fact that an accused may even be physically or legally incapable of perpetrating the intended substantive offense does not limit his liability for conspiracy. For example, a bedridden conspirator, who knowingly furnished an automobile to be used in a robbery, and a prison guard who agrees with prisoners he is guarding to effect their escape from confinement are both guilty of conspiracy. Part IV, para. 5c(1), MCM, 1984.

b. Two conspirators required. By definition, two or more people must participate. United States v. Kidd, 13 C.M.A. 184, 32 C.M.R. 184 (1962). Thus:

(1) Where the only other "conspirator" is a government informer, there is no conspiracy. The informer is not in fact agreeing to commit the offense. United States v. LaBossiere, 13 C.M.A. 337, 32 C.M.R. 337 (1962); United States v. Cascio, 16 C.M.R. 799 (A.B.R. 1954), petition denied, 18 C.M.R. 333 (C.M.A. 1955).

(2) Where the only other conspirator is insane at the time of the alleged agreement, there is no conspiracy. See United States v. Cascio, supra.

(3) The previous "rule of consistency," where, if one of two conspirators is acquitted, the other must be acquitted [para. 160, MCM, 1969 (Rev.)] is no longer valid. See App. 21, para. 5, MCM, 1984. If a conspirator is convicted in a separate trial, the evidence will be carefully scrutinized to determine that it supports his complicity; an acquittal of a co-conspirator, however, will not in itself serve to overturn conviction of the other conspirator, absent some compelling evidentiary reason. United States v. Garcia, 16 M.J. 52 (C.M.A. 1983).

c. Adoption of the conspiracy. One may join a conspiracy after its formulation, as well as participate in its formation, with the same legal consequences. One who knows of the agreement between the others and cooperates in affecting the object of the conspiracy, such as by committing an overt act, can be found guilty as a co-conspirator. United States v. Jackson, 20 M.J. 68 (C.M.A. 1985); United States v. LaBossiere, 13 C.M.A. 337, 32 C.M.R. 337 (1962); and United States v. Kinder, 14 C.M.R. 742 (A.B.R. 1954).

d. Mere presence insufficient. The mere presence of a person at the time an agreement is reached by other parties is not sufficient, standing alone, to establish participation in a conspiracy. See United States v. Downs, 46 C.M.R. 1227 (N.C.M.R. 1973). In United States v. Mahoney, 19 C.M.A. 495, 42 C.M.R. 97 (1970), for example, the accused was charged inter alia with conspiracy with A to wrongfully transfer marijuana. The evidence showed that the accused, in A's presence, told B that he (the accused) would take B to the supplier's house, where the accused, again in A's presence, took money from B and gave it to the supplier. The supplier thereafter delivered marijuana directly to B. It was held that the evidence was insufficient to establish a conspiracy between A and the accused.

4. Contents of agreement. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy by concerted action. United States v. Downs, supra; United States v. Graalum, 19 C.M.R. 667 (N.B.R. 1955), petition denied, 19 C.M.R. 413 (1955); United States v. Kinder, 14 C.M.R. 742 (A.B.R. 1954). The agreement need not:

a. Be in detail;

b. state the means by which the conspiracy is to be accomplished;

c. identify all co-conspirators; or

d. state what part each conspirator is to play.

Additionally, the prosecution is not required to prove that the accused conspirator participated in or had knowledge of all of the details of the execution of the conspiracy (United States v. Graalum, supra, at 698) nor must it establish that the accused conspirator knew the identity of all co-conspirators and their particular connection with the criminal purpose. United States v. Rhodes, 11 C.M.A. 735, 29 C.M.R. 551 (1960).

5. Proving the agreement. The agreement can seldom be proved by direct evidence. The agreement or common understanding to accomplish the object of the conspiracy may be inferred from "the conduct of the parties, or from their declarations to each other or in the presence of each other, or

from other circumstantial evidence." United States v. Graalum, supra, at 697. For example: A, B, and C approached V as a group and, in unison, assault V. Held: Readily inferable that an agreement existed among them to accomplish, by concerted action, the assault. United States v. Perry, 20 C.M.R. 638 (A.B.R. 1955). See United States v. Downs, 46 C.M.R. 1227 (N.C.M.R. 1973). "The conduct and attitudes of known conspirators in an established conspiracy toward a third person have probative value in determining whether the latter is connected with the conspiracy." United States v. Rhodes, 11 C.M.A. 735, 740, 29 C.M.R. 551, 556 (1960).

D. Object of the agreement (second element)

1. Object offense. The object of the agreement must, at least in part, involve the commission of some offense under the code. Thus, any given offense of conspiracy will involve at least one other offense under the code, and may include more than one. Counsel must be aware of the elements of the object offenses and the court must be instructed on the elements of such object offenses. United States v. Gentry, 8 C.M.A. 14, 23 C.M.R. 238 (1957). To establish the providency of the plea, both the elements of conspiracy and the elements of object offense must be explained to the accused. United States v. Pretlow, 13 M.J. 85 (C.M.A. 1982).

a. A separate offense. Conspiracy and the substantive offense which is the object of the agreement are separate offenses and are separately punishable. United States v. Washington, 1 M.J. 473 (C.M.A. 1976); United States v. Yarborough, 1 C.M.A. 678, 5 C.M.R. 106 (1952); Part IV, para. 5c(8), MCM, 1984. The completed offense and the conspiracy to commit it should, therefore, be charged separately.

b. Conspiracy to commit several offenses. An agreement to commit several offenses is but a single conspiracy. United States v. Kidd, 13 C.M.A. 184, 32 C.M.R. 184 (1962) (wherein the Court of Military Appeals held that there was only one conspiracy even though it was a conspiracy to extort from several persons, with each victim the object of a different specification); United States v. Crusoe, 3 C.M.A. 793, 14 C.M.R. 211 (1954) (wherein the Court of Military Appeals held that a conspiracy to commit several different offenses against the code was still only one conspiracy); United States v. Curry, 15 M.J. 701 (A.C.M.R. 1983) (wherein it was determined that only one conspiracy existed in a drug scheme, even though two different drugs were involved and there were several overt acts over a period of time).

2. Offenses requiring a concert of action

a. Not prosecuted as conspiracy. "A charge of conspiracy will not lie where the substantive offense itself involves concert of action." United States v. Yarborough, 1 C.M.A. 678, 688, 5 C.M.R. 106, 116 (1952). This rule, known as Wharton's Rule (The Supreme Court has called it an exception to the general rule in Iannelli v. United States, 420 U.S. 770 (1975)), has been consistently applied to such offenses as dueling, bigamy, incest, and adultery with bribery also being added more recently. Hence, if only the principal actors are involved, there is no conspiracy in such offenses. Where, however, the offense is capable of commission by a single individual, this rule, or exception to the rule, does not apply. United States v. Yarborough, supra. An exception to Wharton's Rule was announced in United States v. Osthoff, 8

M.J. 629 (A.C.M.R. 1979), petition denied, 8 M.J. 250 (1980) wherein the Army Court of Military Review held that the offense of conspiracy to transfer marijuana did not merge with the substantive offense of transfer of marijuana even though the latter required a duality of action between the transferer and the transferee. The rationale given for the decision was similar to that announced by the Supreme Court in Iannelli v. United States, supra, in that transfer of marijuana and the conspiracy to transfer pose a potentially greater threat to the public than do the crimes excepted by Wharton's Rule, and therefore should not merge, and should be separately punished. See United States v. Bommarito, 524 F.2d 140 (2d Cir. 1975) and United States v. Earhart, 14 M.J. 511 (A.F.C.M.R. 1982). More recently, in United States v. Crocker, 18 M.J. 33 (C.M.A. 1984), the Court of Military Appeals specifically refused to apply Wharton's Rule to a charge of conspiracy to possess and transfer cocaine, since possession did not require concerted action. Dicta in the decision indicated that prosecutors should not use this exception to the Wharton Rule as a way to unreasonably multiply charges. Id. at 40. United States v. Sorrell, 20 M.J. 684 (A.C.M.R. 1985) demonstrates how drugs could be distributed without the recipient being criminally involved.

b. Conspiracy with a third party. Where a substantive crime requires a concert of action (such as bribery), a third party, not necessary to the concert of action, can be found to have conspired with one of the principal actors. For example, A and B conspire to accept bribes from C. B is guilty of conspiracy to commit bribery even though the offense of bribery only requires the participation of A and C, and, under Wharton's Rule, conspiracy to commit bribery and the substantive offense of bribery would merge. United States v. Crocker, Id. at 39.

E. Overt act (third element)

1. Requirement of overt act. At some time after the agreement or understanding, the accused, or at least one of the other parties to the agreement, must have performed some act which tended to effect the object of the conspiracy or agreement. United States v. Kidd, 13 C.M.A. 184, 32 C.M.R. 184 (1962); United States v. Thomas, 13 C.M.A. 278, 32 C.M.R. 278 (1962). Therefore, without the occurrence of an overt act in furtherance of accomplishing the substantive offense, the offense of conspiracy is not complete, and no criminal liability for conspiracy is available. United States v. Black, 1 M.J. 340 (C.M.A. 1976).

a. Nature of act

(1) The "overt act" is "an open, manifest act"; "an outward act done in pursuance and manifestation of intent or design". Black's Law Dictionary 1955 (5th ed. 1979).

(2) It must be an act that is independent of the agreement itself. United States v. Kauffman, 14 C.M.A. 283, 34 C.M.R. 63 (1963), para. 5c(4), MCM, 1984.

(3) It must follow the agreement or take place at the time of the agreement. United States v. Kauffman, supra.

(4) It must be done by one or more of the conspirators (i.e., parties to the agreement), but not necessarily the accused. United States v. Graalum, 19 C.M.R. 667 (N.B.R. 1955).

(5) The accused does not have to consent to, or participate in, the overt act, nor even have knowledge of the overt act or any other detail of the execution of the agreement. United States v. Graalum, supra.

(6) "The offense of conspiracy is continuous so long as overt acts in furtherance of its purpose are done, as every overt act is deemed to be a renewal of the unlawful agreement. United States v. Mixson, 3 M.J. 886 (A.C.M.R. 1977).

(7) As long as the conspiracy continues, an overt act in furtherance of the agreement committed by one conspirator becomes the act of all without any new agreement specifically directed to that act [United States v. Rhodes, 11 C.M.A. 735, 29 C.M.R. 551 (1960)]; and, each conspirator is equally guilty although he does not participate in or have knowledge of all of the details of the execution of the conspiracy. United States v. Graalum, supra. As long as the acts done by the co-conspirators are acts "which follow incidentally as probable and natural consequences of the execution of the common scheme," all of the conspirators are guilty of those acts as well as the substantive offense, if committed. United States v. Seberg, 5 M.J. 895, 900 n. 4 (A.F.C.M.R. 1978), petition denied, 6 M.J. 282 (1979); United States v. Rhodes, supra; United States v. Salisbury, 14 C.M.A. 171, 33 C.M.R. 383 (1963). Such continuing criminal liability does not apply, however, to a conspirator who has effectively withdrawn from the conspiracy. (See discussion on "Withdrawal (abandonment)," infra.)

(8) The overt act must be done to effectuate the object of the agreement. United States v. Choate, 7 C.M.A. 187, 21 C.M.R. 313 (1956).

(9) It must be a manifestation that the agreement is being executed, that the conspiracy is at work. United States v. Kauffman, supra; United States v. Choate, supra.

(10) The overt act need not be in itself criminal. United States v. Choate, supra; United States v. Rhodes, supra. It can be as innocent as a telephone call, mailing a letter, or simply standing in a location favorable to committing the intended or object offense. These innocent acts may under the circumstances manifest that the conspiracy has proceeded beyond mere agreement. Part IV, para. 5c(4), MCM, 1984; United States v. Choate, supra. See United States v. Collier, 14 M.J. 377 (C.M.A. 1983), where the court upheld a conspiracy conviction when the overt act consisted of the accused's departure from a squad bay with his co-conspirators. The crime of conspiracy to possess and distribute cocaine was complete once the three co-conspirators pooled their money to purchase the cocaine which was to be divided among themselves. United States v. Figueroa, 28 M.J. 570 (N.M.C.R. 1989).

(11) But the overt act may well be a criminal act and can be the commission of the intended offense itself. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough. United States v. Choate, supra.

(12) "...(o)ne need not share in the original formation of a conspiracy, but if he joins the conspiracy after its formation and prior to its consummation with knowledge of the agreement or assent of minds between the original parties to accomplish by concerted action an unlawful purpose and commits an overt act to effect the unlawful purpose of the conspiracy, he is guilty as a co-conspirator. . . ." United States v. Kinder, 14 C.M.R. 742, 780 (A.B.R. 1954). Entrance of a new member, therefore, does not create a new conspiracy. See Marino v. United States, 91 F.2d 691 (9th Cir. 1937), cert. denied, 302 U.S. 764 (1938).

(13) Can the overt act be a failure to act? Possibly, depending on the nature of the object offense. In a prosecution for violation of article 133 by conspiracy to commit extortion, a specification sufficiently stated an offense where it alleged that the overt act done to effect the object of the conspiracy was the act of withholding the possession of a diamond ring from its owner. United States v. Farkas, 21 M.J. 458 (C.M.A. 1986) (the nature of the extortion being a threat to sell the ring if a specified sum of money was not paid for it).

(14) The overt act must be alleged and proved [United States v. Kauffman, 14 C.M.A. 283, 34 C.M.R. 63 (1963)] although, where more than one overt act is alleged, all of the alleged overt acts need not be proved. United States v. Reid, 12 C.M.A. 497, 31 C.M.R. 83 (1961); United States v. v. Yarborough, 1 C.M.A. 678, 5 C.M.R. 106 (1952); see United States v. Moore, 22 C.M.R. 756 (A.B.R. 1956), petition denied, 22 C.M.R. 331 (1956), wherein the Army Board of Review found that failure to allege the date of an overt act was not fatal because the gravamen of the offense of conspiracy is (1) an unlawful agreement to accomplish an offense, and (2) commission of an overt act to effect the purpose of the agreement and the specification was "complete, clear, and unambiguous in all regards."

(a) Yarborough cites no authority for the proposition that the overt act alleged in the specification must be the one proved at trial in order to establish the conspiracy. Reid, in reiterating this proposition, relies on Yarborough and the 9th Circuit case of Fredericks v. United States, 292 F 856 (9th Cir. 1923). See United States v. Reid, supra, at 91. In Brulay v. United States, 383 F.2d 345 (9th Cir.), cert. denied, 389 U.S. 986, 88 S.Ct. 469 (1967), however, the 9th Circuit rejected the rule of Fredericks and adopted the general Federal rule that a conspiracy conviction may rest on proof of an overt act not charged in the indictment, with the provision that such proof of an unalleged overt act must not come as a surprise to the defendant. See Armone v. United States, 363 F.2d 385 (2nd Cir. 1966), cert. denied, 385 U.S. 957, 87 S.Ct. 398 (1966), and cases cited therein.

(b) Although United States v. Reid still appears to control, it is difficult to predict how C.M.A. would rule if the question were presented again. Thus, if the trial counsel has doubts as to what overt act can be established, as many acts as are necessary in order to meet the contingencies of proof should be alleged.

(c) "It is not necessary that the overt act or acts should appear on their face to have been acts which would necessarily have aided in the commission of the crime." United States v. Kauffman, supra, at 282, 34 C.M.R. at 72.

b. The "overt act" is generally a question of fact, which may be proven by circumstantial evidence. See United States v. Salisbury, 14 C.M.A. 171, 33 C.M.R. 383 (1963). What is sufficient to constitute an overt act is a question of fact to be determined by the factfinder. See United States v. Salisbury, supra, and United States v. Kauffman, 33 C.M.R. 748 (A.F.B.R.), aff'd and rev'd in part, 14 C.M.A. 283, 34 C.M.R. 63 (1963).

c. Distinguishing "overt acts" in attempts

(1) Unfortunately the law has adopted the same term "overt act" for the act required in both the offenses of attempt (article 80) and conspiracy (article 81). These acts, however, are different in degree. (See the discussion of attempts, section 0108, this study guide).

(2) In attempts, the overt act must directly tend to effectuate the intended crime and must be more than mere preparation to commit the offense. Part IV, para. 4c, MCM, 1984.

(3) In conspiracy, it matters not how preliminary or preparatory in nature the overt act is, as long as it is a manifestation that the agreement is being executed. United States v. Collier, 14 M.J. 377 (C.M.A. 1983) (wherein the act of the co-conspirators to the robbery was leaving the squad bay after discussing where to look for victims). For another example, suppose a conspirator calls the intended victim and invites him to the scene of a planned robbery. The call would constitute the overt act necessary to complete the offense of conspiracy, even though it is clearly not sufficient to support attempted robbery.

2. Withdrawal (abandonment)

a. Continuing nature of conspiracy. A conspiracy, once established, may be inferred to continue until the contrary is established. United States v. Graalum, 19 C.M.R. 667 (N.B.R.), petition denied, 19 C.M.R. 413 (1955). A conspiracy continues over into a subsequent enlistment only if the commission of one or more overt acts occurs during that subsequent enlistment; the fact of discharge and reenlistment does not constitute a withdrawal nor eliminate an accused's criminal liability. United States v. Gladue, 4 M.J. 1 (C.M.A. 1977); United States v. Rhodes, 11 C.M.A. 735, 29 C.M.R. 551 (1960).

b. Time of withdrawal. One or all of the parties to a conspiracy may, before the performance of an overt act to effect the object of the conspiracy, abandon the design and withdraw from the conspiracy and thereby escape conviction for conspiracy. A conspirator who abandons or withdraws from the conspiracy after the overt act has been performed, remains guilty of conspiracy and all offenses committed pursuant thereto occurring prior to the withdrawal, but not for offenses committed thereafter. United States v. Salisbury, supra.

c. Status of remaining conspirators. Neither the withdrawal from a conspiracy nor the joining of a conspiracy by a new person creates a new conspiracy, nor affects the status of the remaining members. Part IV, para. 5c(6), MCM, 1984.

d. What constitutes withdrawal. Part IV, para. 5c(6), MCM, 1984, states that, in order for a withdrawal to be effective, it must consist of affirmative conduct which is "wholly inconsistent with adherence to the unlawful agreement and which shows that the party has severed all connections with the conspiracy." The Manual does not, however, provide any examples to illustrate what would constitute affirmative conduct adequate to constitute an effective withdrawal.

e. Factors constituting withdrawal. In 1978, the Supreme Court announced its decision in United States v. United States Gypsum Co., 438 U.S. 465 (1978), in which it suggested at least three factors which should be considered in determining whether or not withdrawal from a conspiracy had been effective. Those factors were (1) accused's affirmative notification to each other member of the conspiracy that he will no longer participate in the undertaking such that they understand that they can no longer expect his participation or acquiescence; (2) accused's disclosures of the illegal scheme to law enforcement officials; or, (3) accused does affirmative acts inconsistent with the object of the conspiracy and communicates in a manner reasonably calculated to reach co-conspirators. While disclosure to a government agent of the existence of a continuing conspiracy by a co-conspirator may be sufficient to constitute effective withdrawal, such disclosure must be complete. There must be no acquiescence to subsequent acts of the remaining co-conspirators by the co-conspirator desiring to have an effective withdrawal. See Hyde v. United States, 225 U.S. 347 (1911).

(1) In United States v. Miasel, 8 C.M.A. 374, 24 C.M.R. 184 (1957), C.M.A. found conduct "wholly inconsistent with the theory of continuing adherence" to a conspiracy to commit sodomy where the accused (before acts of sodomy were committed on the victim) walked away from the group and stated he was unable to continue.

(2) Two Boards of Review have indicated that there must be (1) an abandonment of the design to commit the substantive offense, and (2) communication of that abandonment to the co-conspirators before an effective withdrawal can be found. United States v. Erven, 9 C.M.R. 759 (A.B.R. 1953) and United States v. Graalum, supra. For example, in Erven, the court found that there had not been an effective withdrawal from the conspiracy by the accused where the extrajudicial admission of the accused revealed that "he and the other two airmen 'walked up to the Base Exchange at about 11:30 or 12:00 o'clock with the idea of breaking into the Base Exchange' and then 'talked about going into the Base Exchange' ... (this) clearly evidences the existence of an agreement between the accused and the other two airmen to accomplish by concerted action, the larceny from the Exchange." The fact that the extrajudicial admission further stated that, at the time the substantive offense was to be committed, he (the accused) "was ready to forget about breaking into the Base Exchange that night because several fellows from the 77th Maintenance Squadron had seen us when we went to look for McGrath" and that this decision was made just before he separated

from the other two who perpetrated the offense, was not sufficient evidence of abandonment of design or an affirmative act of withdrawal from the conspiracy, but ... (was) nothing more than a desire or willingness on accused's part to postpone the planned offense. Furthermore, there is nothing in the record that shows he communicated his thoughts in this respect to the other two parties to the conspiracy." In fact, their subsequent actions of seeking out the accused, placing the fruits of the crime in his custody, enlisting his aid in disposing of the fruit of the crime, and sharing the proceeds negated any finding of his communicating his intent to withdraw to them. Id. at 762-763.

(3) In United States v. Kelly, 38 C.M.R. 722 (N.B.R. 1967), the conviction of conspiracy to assault with intent to commit robbery based upon a plea of guilty was affirmed. While a group was standing around the victim, the accused told the member of the group who was to strike the victim to "Okay, let's forget it. Drop the stick." There was no evidence that the accused communicated his intent to abandon the scheme to the other members of the group, nor did he attempt to leave the scene; and, within about 30 seconds, another member of the group struck the victim. The law officer, after an extensive providency examination of the accused on the issue of withdrawal, determined, and the Board of Review agreed, that the accused's statement to the originally intended perpetrator was no more than a suggestion to abandon the scheme. The suggestion without more was insufficient to constitute an effective withdrawal.

F. Duration of conspiracy. It is generally difficult to establish precisely when a conspiracy begins or ends. It becomes important to establish the beginning and ending of a conspiracy when a determination must be made as to the admissibility of statements and acts of an alleged co-conspirator of the accused at the accused's court-martial. Under the present rules of evidence [Mil.R.Evid. 801(d)(2)(E)], it appears that, for purposes of determining the admissibility of statements and acts of co-conspirators at the accused's court-martial, it is solely a determination for the military judge as to whether a conspiracy existed at the time the statement or act was made. Thus, extreme care must be taken, both by the prosecution to prevent reversal and by the defense to prevent prejudice to the accused, in determining the inception, duration, and termination of a conspiracy because the case law interpreting military application of the new rule has not yet developed. See Naval Justice School Evidence Study Guide, section 0803.B.2(e) .

1. Rule. Acts and declarations of a conspirator or co-actor, pursuant to, and in furtherance of, an unlawful combination or crime, are admissible against all co-conspirators or co-actors during the existence of the conspiracy and as such are not hearsay. Mil.R.Evid. 801(d)(2)(E); United States v. Miasel, supra.

2. Inception of conspiracy. Before the acts or declarations of a conspirator are admissible, the prosecution must prove that a conspiracy existed. United States v. LaBossiere, 13 C.M.A. 337, 32 C.M.R. 337 (1962).

3. "During the course of the conspiracy." Mil.R.Evid. 801(d)(2)(E) states that, before a co-conspirator's statement is admissible against an accused at the accused's court-martial, it must be made during the course ...

of the conspiracy. This seems to mean that the statement was made while the plan was in existence and before its complete execution or other termination. United States v. Hooper, 4 M.J. 830 (A.F.C.M.R. 1978).

4. "In furtherance of the conspiracy." Under the furtherance requirement, the declaration not only must occur before the termination of the conspiracy and after the formation of the agreement, and relate in content to the conspiracy, but also must be made with the intent to advance the objects of the conspiracy. If the government fails to show that the statement of the co-conspirator was made in furtherance of the conspiracy, the statement could still be admissible if the government could establish that the statement was made in the presence of the accused or was authorized to be made by the accused. United States v. Beverly, 14 C.M.A. 468, 34 C.M.R. 248 (1964).

5. Termination of conspiracy. Once the joint enterprise underlying the conspiracy is ended, either as a result of the accomplishment of the objective, abandonment, or withdrawal of members of the groups, subsequent acts and declarations can only affect the actor or declarant. United States v. LaBossiere, 13 C.M.A. 337, 32 C.M.R. 337 (1962); United States v. Miasel, 8 C.M.A. 374, 24 C.M.R. 184 (1957).

G. Corroboration of the co-conspirator's statement. Unlike the old military rule of evidence [para. 140b, MCM, 1969 (Rev.)] upon which all military case law prior to 1 September 1980 was based, the present military rules of evidence do not appear to require corroboration of the co-conspirator's statement prior to its admission into evidence. Mil.R.Evid. 801(d)(2)(E). This is consistent with Federal practice. Whether the military courts will interpret silence on this issue by the Military Rules of Evidence as meaning corroboration is not required is still to be decided. Until the issue is resolved, the case law interpreting the old military corroboration requirement can be described by the case of United States v. Beverly, 14 C.M.A. 468, 34 C.M.R. 248 (1964).

H. Statute of limitations. Because it is difficult to determine when the conspiracy was initiated with regard to each co-conspirator, it has been held that the last overt act establishes the time for the running of the statute of limitations. United States v. Rhodes, 11 C.M.A. 735, 742, 29 C.M.R. 551, 558 (1960). The "last overt act" is the most recent act alleged and proved committed during the conspiracy. United States v. Rhodes, supra.

I. Single conspiracy to commit several different offenses. "The object of the conspiracy may be a number of wrongful acts, rather than a single wrongful act. Still the conspiracy remains the same unlawful combination. Even though the allegations charge different overt acts to different defendants, the question remains whether there was a single agreement to combine to commit all of the overt acts. If there is but one agreement to combine there is only one conspiracy even though there may be many objects thereof." United States v. Kidd, 13 C.M.A. 184, 190, 32 C.M.R. 184, 190 (1962); see United States v. Crusoe, 3 C.M.A. 793, 14 C.M.R. 211 (1954); and United States v. Thompson, 21 M.J. 94 (C.M.A. 1985) (summary disposition).

J. Special conspiracies under article 134. The U.S. Code, Title 18, prohibits certain specific conspiracies which require no proof of an overt act. Such conspiracies should be prosecuted in military courts under Article 134, UCMJ, but only if there is no similar offense under the code. Part IV, para. 5c(9), MCM, 1984; see Chapter V of this study guide for further discussion. For example:

1. Conspiracy to impede or injure any Federal officer in the discharge of his duties. 18 U.S.C. § 372. A specification under this provision was held sufficient without an overt act being alleged in United States v. Chapman, 10 C.M.R. 306 (A.B.R. 1953).

2. Conspiracies against civil rights. Conspiracy to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured him by the Constitution or laws of the United States is prohibited by 18 U.S.C. § 241.

K. Pleading. When there is one agreement to commit several different offenses, a separate conspiracy specification may be pleaded for each offense. Where there is "sufficient doubt as to the facts or the law . . . to warrant making one transaction the basis for charging two or more offenses." United States v. Crusoe, supra, at 719, 14 C.M.R. at 214. For example, in Crusoe, the accused conspired with four other persons to unlawfully enter the PX and commit larceny therein. The accused was charged with one charge and two separate specifications of conspiracy: one specification being conspiracy to commit unlawful entry, and the other alleging conspiracy to commit larceny. Held: Such pleading was proper to allow for the contingencies of proof. The separate specifications will be treated as one crime for purposes of sentencing. See the sample specification, Part IV, para. 5f, MCM, 1984.

> Charge: Violation of the Uniform Code of Military Justice, Article 81.
>
> Specification: In that Fireman Apprentice Slip Ree Finger, U.S. Navy, USS Danger, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 5 November 19CY, conspire with Seaman Constantine Spirator, U.S. Navy, to commit an offense under the Uniform Code of Military Justice, to wit: larceny of one rubber duck, of a value of $3.00, the property of Commander Tyrus Phoon, U.S. Navy, and, in order to effect the object of the conspiracy, the said Seaman Spirator did make a wax impression of the key to said Commander Phoon's quarters.

L. Instructions. See Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. No. 3-3. The military judge is required to instruct the members on the elements of conspiracy as well as those of the contemplated offense. During providency, the military judge must also lay out on the record both sets of elements. United States v. Pretlow, 13 M.J. 85 (C.M.A. 1982).

0108 ATTEMPTS: Article 80, UCMJ, and Part IV, para. 4, MCM, 1984. (Key Numbers 795-800)

A. Text of article 80

> (a) An act, done with specific intent to commit an offense under this chapter amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.
>
> (b) Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.
>
> (c) Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears at the trial that the offense was consummated.

B. Scope. Art. 80 provides for the substantive offense of attempt, and all attempts to commit various offenses under the code, other than the exceptions noted hereafter, should be charged as violations of article 80. Each of the exceptions has an attempt to commit the offense provided for within the body of the article itself. Hence, attempted desertion, mutiny, etc., are charged as violations of article 85 or 94, etc., rather than under article 80. The exceptions are:

1. Article 85 - desertion;

2. article 94 - mutiny of sedition;

3. article 100 - subordinate compelling surrender;

4. article 104 - aiding the enemy;

5. article 106a - espionage; and

6. article 128 - assault.

C. Elements of the offense:

1. That the accused did a certain overt act;

2. that the act was done with the specific intent to commit a certain offense under the code, and;

3. that the act amounted to more than mere preparation and apparently tended to effect the commission of the intended offense.

In United States v. Thomas and McClellan, 13 C.M.A. 278, 286, 32 C.M.R. 278, 286 (1962), the Court of Military Appeals reduced these elements to simplified language. "The elements of the offense denounced are: (1) An overt act, (2) specific intent, (3) more than mere preparation, (4) tending to effect the commission of the offense, and (5) failure to effect its commission."

D. Accused's act (first element). An overt act is an outward act done in pursuance and manifestation of an intent or desire. Black's Law Dictionary, supra, at 995.

E. Accused's intent (second element)

1. Specific intent offense. The accused must specifically intend to commit the offense he is charged with attempting. United States v. Carroll, 10 C.M.A. 16, 27 C.M.R. 90 (1958). This is not an "intent to attempt," but rather an intent to commit the object of one's criminal purpose or, simply stated, to commit the object, the substantive, crime. United States v. Gonzalez-Rodriguez, 7 M.J. 633 (A.C.M.R.), petition denied, 7 M.J. 263 (1979); United States v. Schreiner, 40 C.M.R. 379 (A.B.R. 1968). Thus, the offense of attempt is a specific intent crime. While crimes sounding in negligence are ruled out -- there are no such crimes as attempted negligent homicide, attempted missing movement through neglect, attempted involuntary manslaughter, or attempted reckless driving -- one can attempt to commit a general intent crime. General intent crimes can be, and often are, specifically intended. For example, unauthorized absence is a general intent crime. If the accused specifically intended to "go UA" and committed the required overt act, he would be guilty of attempted unauthorized absence. In United States v. Foster, 14 M.J. 246 (C.M.A. 1982), the accused was charged with an attempted violation of a general regulation (prohibiting drug sales). The accused contended that he would have to have actual knowledge of the regulation before he could be found guilty. The court disagreed, and held that the specific intent that must be proved is an intent to commit the criminal act, and not an intent to violate a particular regulation. See also United States v. Davis, 16 M.J. 225 (C.M.A. 1983). The accused need not know exactly what criminal act he is attempting to be guilty of an attempt. In United States v. Guevara, 26 M.J. 779 (A.F.C.M.R. 1988), the accused snorted a white powder that he thought was an illegal substance although he didn't know which one. Although the identification of the powder was never determined, the court held that the accused's intent to commit a crime, coupled with his belief that his actions are achieving that intent, will suffice.

2. Proving intent. Quite often, there may be no direct evidence of the accused's intent. The intent must then be inferred from the available circumstantial evidence. This evidence must be such that, according to common human experience, it is reasonable to draw such an inference. United States v. Stewart, 19 C.M.A. 417, 42 C.M.R. 19 (1970). Evidently, common human experience did not permit drawing an inference that the accused had a specific intent to commit rape where the accused, at 0240 hours, undressed outside the victim's home, crept into her house in the nude, entered the victim's bathroom where she was standing nude after taking a shower, looked at her with a leering smile, and then leaned toward her, reaching in the direction of her neck and shoulder with his hand, and only stopped and ran away when the victim began screaming. United States v. Sampson, 7 M.J. 513 (A.C.M.R. 1979).

F. Nature of the overt act (third element). The overt act must be an act which goes beyond mere preparation and tends to effect the commission of the intended offense regardless of whether it is or is not successful. United States v. Johnson, 7 C.M.A. 488, 22 C.M.R. 278 (1957); United States v. Cascio, 16 C.M.R. 799 (A.B.R. 1954), petition denied, 18 C.M.R. 333 (1955).

1. More than mere preparation. In Cascio, the Army Board of Review stated:

> The rule is that: "Mere acts of preparation, not proximately leading to the consummation of the intended crime, will not suffice to establish an attempt to commit it..., for there must be some act moving directly toward the commission of the offense after the preparations are made...." It seems obvious that there will always be an area between mere acts of preparation and the final step in its commission which cannot be delineated.
>
> ...
>
> ... Holmes, J. said: "Preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a locus poenitentiae, in the need of a further exertion of the will to complete the crime."...

United States v. Cascio, supra, at 821. "The line of demarcation between preparation and a direct movement toward the offense ... is one of fact, not of law." United States v. Choate, 7 C.M.A. 187, 191, 21 C.M.R. 313, 317 (1956). The Manual for Courts-Martial defines preparation as the "devising or arranging the means or measures necessary for the commission of the offense." Part IV, para. 4c(2), MCM, 1984. For example, in United States v. Gonzalez-Rodriguez, 7 M.J. 633 (A.C.M.R. 1979), the accused was convicted of wrongfully possessing cocaine and attempting to sell the drug. He appealed, asserting that his acts amounted at most to mere preparation and did not constitute an attempt. The Army Court of Military Review, having reaffirmed the rule that "(a)n act does not constitute an attempt unless it is accompanied by the specific intent to complete the ultimate offense -- in this case, the sale of cocaine," stated:

> Possessing a small quantity of cocaine does not alone manifest an intent to sell it. Each successive act, however, (becomes) increasingly indicative of an intent to sell and (moves) closer to exceeding the bounds of mere preparation We (now) focus on the final act (returning to the car, still in possession of cocaine, where the buyer was waiting as instructed), calling it the overt act, safe in the knowledge that we (are) not inferring intent from the overt act alone, but from the entire sequence of events.

Id. at 636.

The sequence of events which the court was referring to, and which the court found as acts going beyond mere preparation and constituting a direct movement towards the sale of cocaine, were: That the appellant

> ... possessed the drug in question; Nelms (the informant) was introduced to him as a prospective buyer; in reaching agreement with Nelms, appellant resolved significant details such as quantity, price, and the time and place of the sale; appellant waited for Nelms, who ostensibly had gone to the car, appellant joined him there still possessing the cocaine.

Id. at 635.

These events the court found to be directed toward completion of the ultimate offense and near to the consummation of the intended offense. Restating the rule "in terms of its factual context," the court concluded that

> ... the greater the specificity of intent required for an attempt, the more unequivocal must be the acts alleged to constitute the attempt. In the present case, acknowledging the presence of a marketable quantity of cocaine to begin with, there is nothing the least bit equivocal about the series of acts that were leading inexorably to the completed sale only to be prevented, so the appellant thought, by the police.

Id. at 637.

The "overt act need not be the last act essential to the consummation of the offense." Part IV, para. 4c(2), MCM, 1984. For example, X intends to burn down his neighbor's house. With this intent in mind, he buys a box of matches and gasoline for use in igniting the blaze. The act of buying the gas and matches is mere preparation. If X goes further and pours gasoline on the house and lights the match, this is certainly more than preparation. See United States v. Choate, 7 C.M.A. 187, 21 C.M.R. 313 (1956). If a match is thrown onto the gasoline, attempted arson has clearly occurred, even though the match immediately goes out without igniting any of the house. Thus, while mere preparation does not constitute the offense of attempt, what evidence is sufficient to support a finding of more than mere preparation and sufficient to support an attempt is a matter of degree and a factual issue to be resolved in each case by the factfinder. United States v. Reid, 12 C.M.A. 497, 31 C.M.R. 83 (1961). Two cases which appear to be inapposite, but which provide prime examples of factfinder latitude, are the Army Court of Military Review decisions of United States v. Goff, 5 M.J. 817 (A.C.M.R. 1978) and United States v. Williams, 4 M.J. 507 (A.C.M.R. 1977). Both cases were faced with "near identical factual situation(s)." The facts were essentially as follows: Accused, acting on behalf of a third party, took money from the third party to purchase heroin. He went off-base to a civilian source, was unsuccessful in obtaining the heroin, returned to base empty-handed and gave the money back to the third party. In Williams, the court held that the accused's actions "did not go beyond mere preparation and therefore did not constitute an attempt to sell heroin." United States v. Goff, supra, at 819. In Goff, the court held

that "the appellant's culpable comments and actions clearly evidence willing and knowing participation in a criminal venture. His acts of receiving money from the intended deliveree and driving off-post to his drug source constitute,... a vital and substantial step in his effort to deliver heroin. The fact that the appellant's actions were thwarted by conditions over which he had no control does not change the quality of his wrongful acts. Those overt acts leave no doubt concerning the firmness of appellant's criminal intent to complete the crime." United States v. Goff, supra, at 820. The Goff court adopted the judicial analysis of attempt set forth in United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114, 95 S.Ct. 792, 42 L.Ed.2d 812 (1975). In Mandujano, the court offered two factors to be applied to a factual situation which will determine the existence of attempt. "First, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting. (Citation omitted).... Second, the defendant must have engaged in conduct that constitutes a substantial step toward commission of the crime." United States v. Mandujano, supra, at 376 and United States v. Goff, supra, at 819. It seems clear, however, that, where an undercover informant approaches a suspected drug dealer with a view towards purchasing drugs from him and the dealer does nothing more than phone his supplier to see if he can obtain the drugs, no attempt to sell drugs has occurred since the act did not amount to more than mere preparation. United States v. Presto, 24 M.J. 350 (C.M.A. 1987).

Where there is only mere preparation, there may be, in certain circumstances, sufficient evidence to sustain a violation of solicitation (article 134). United States v. Jackson, 5 M.J. 765 (A.C.M.R. 1978), petition denied, 6 M.J. 27 (C.M.A. 1978). (Accused was charged with attempted sale of marijuana in violation of article 80. The court found that his soliciting buyers for the marijuana was mere preparation not amounting to attempt, but that such was sufficient to be a violation of the solicitation article.) Assault with intent to commit the subject offense under article 134 may also be plead when the act fails to go beyond mere preparation. Part IV, para. 64, MCM, 1984.

The Navy-Marine Corps Court of Military Review decided, sua sponte, whether mere words could constitute the overt act required to sustain a conviction for attempt. United States v. Brantner, ___ M.J. ___, No. 88 0534 (N.M.C.M.R. 30 May 1989). At trial, appellant was convicted of, among other offenses, attempt to commit an indecent assault. Appellant, a recruiter in rural Oregon, sought to fondle the genitals of a recruit. Appellant had asked the recruit to submit to a hernia examination as a requirement for enlistment. The recruit refused. NMCMR found "appellant's request, made under the color of authority, . . . sufficient to constitute the overt act necessary for appellant to plead providently to an attempt to commit an indecent assault." Brantner, slip op. at 3.

In arriving at the decision, the court had to decide "whether appellant's request of the recruit to submit to a hernia examination was a direct movement toward the commission of an indecent assault." Id. at 4. In answering that question affirmatively, the court recognized two prevailing views on whether solicitation could constitute an attempt under certain circumstances.

The court took note of Professor Perkins' view "recognizing solicitation as an attempt only if the overt acts have proceeded beyond what would constitute preparation if the solicitor himself planned to commit the offense." Id. at 4 (citing LaFave & Scott, Criminal Law at 405 (2d ed. 1982). Another view says a solicitor may never be guilty of an attempt since he has no intention of committing the offense himself. Id. at 4.

The court, of course, adopted the former view and the reasoning applied in State v. Otto, 102 Idaho 250, 629 P.2d 646 (1981). The Otto court distinguished between acts of preparation and perpetration. The difference is based on the nearness of the act, "both spatially and temporally," to the culmination of the criminal design. One must also recognize, the court said, that solicitation involves inciting or encouraging another to commit a crime in the future. In distinguishing between solicitation and attempt," when there is a dangerous proximity to success, the line of solicitation ends, and an attempt begins because there exists a direct movement toward the commission of the offense." Brantner, slip op. at 4.

The court, in concluding, pointed out that a verbal request is not a necessary element to indecent assault; and, under certain circumstances, words would not amount to an attempt to commit that crime. Here, however, there was a dangerous proximity between the request to commit the crime and the completion of the crime, such that the solicitation amounted to an attempt.

This proximity standard should provide prosecutors with a workable method by which to determine whether to charge a solicitation or an attempt. For instance, had appellant's request of the recruit occurred over the telephone, the entreaty would lack the "dangerous proximity" required between request and commission necessary to support an attempt conviction.

2. Apparently tended to effect the commission of the intended offense. Note the language of Part IV, para. 4b, MCM, 1984, on this aspect: "an act [which] apparently tended to effect commission of the intended offense." The act tends to effect commission of the intended crime "if a reasonable [person] in the same circumstances as the defendant might expect the intended criminal consequences to result from the defendant's acts." Sayre, Criminal Attempts, 41 Harv. L. Rev. 821, 859 (1928); see generally, United States v. Thomas and McClellan, 13 C.M.A. 278, 32 C.M.R. 278 (1962).

a. Substantial step toward the intended crime. It is not necessary that every act essential to consummation of the object crime be performed. Stated otherwise, it is not necessary that the last act in the chain be accomplished. United States v. Johnson, 7 C.M.A. 488, 22 C.M.R. 278 (1957); United States v. Choate, 7 C.M.A. 187, 21 C.M.R. 313 (1956); United States v. LeProwse, 26 M.J. 652 (A.C.M.R. 1988). In Choate, the court offered one indication for testing whether the overt act in question was sufficient to constitute more than mere preparation; under the circumstances, an accused goes beyond mere preparation when the offense would have been committed but for some intervening event. For example, A and B agree to burglarize a house. They wear sneakers and gloves and have a crowbar for gaining entry. Just prior to entry, they are apprehended by the police. But for the intervention of the police they would have committed the offense of burglary. They are guilty of attempted burglary. See United States v. Choate, supra; United States v. Schreiner, 40 C.M.R. 379 (A.C.M.R. 1968).

b. Accused's absurd belief. Where it would be patently absurd for the accused to consider that the act would tend to effect the commission of the intended offense, then, despite the accused's belief, there is no attempt. It would not be an act which "apparently would result" in commission of the offense. It obviously could not succeed. For example, an accused believes that, by invoking the rites of witchcraft, he can cause his division officer's death. Distinguish this situation, however, from a reasonable mistake of fact by the accused, which is discussed in section 0108.F.4 ("Defense of impossibility"), below.

3. Factors in determining whether a sufficient overt act has been committed. In United States v. Johnson, 7 C.M.A. 488, 22 C.M.R. 278 (1957), the United States Court of Military Appeals has listed the following factors for consideration in determining whether an attempt has been committed, even though the object offense is not consummated:

a. The character of the interruption;

b. the nearness of the consummation of the offense; and

c. the nature of the intended offense.

4. Defense of Impossibility. In United States v. Thomas and McClellan, supra, at 283, 32 C.M.R. at 283, the leading military case on attempts, the Court of Military Appeals stated the following with regard to the defense of impossibility:

> The two reasons for "impossibility" are ... (1) If the intended act is not criminal, there can be no criminal liability for an attempt to commit the act. This is sometimes described as "legal impossibility". (2) If the intended substantive crime is impossible of accomplishment because of some physical impossibility unknown to the accused, the elements of a criminal attempt are present. This is sometimes described as "impossibility in fact".

a. Factual impossibility. Short of the patently absurd limitation already discussed, it generally is not a defense that the intended offense, though proscribed by law, was, under the circumstances, factually impossible to commit. The American Law Institute's Model Penal Code, § 5.01, adopted by C.M.A. in Thomas and McClellan, states that a person is guilty of criminal attempt if he "... purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believed them to be...."

(1) United States v. Thomas and McClellan, in which the accused believed that they were raping an unconscious woman; in fact, she was dead. The court held that the accused could not be convicted of rape, because a corpse cannot be the victim of a rape. Because Thomas and McClellan reasonably believed that their victim was alive, however, their conviction for attempted rape was affirmed. See United States v. Gray, 41 C.M.R. 756 (N.C.M.R. 1969), rev'd on other grounds, 20 C.M.A. 63, 42 C.M.R. 255 (1970).

(2) Counterfeit drugs. The issue of factual impossibility or mistake of fact frequently comes up where the accused has been charged with possession or distribution of a controlled substance. In United States v. Davis, 16 M.J. 225 (C.M.A. 1983), an airman first class was charged with distributing what he honestly believed to be Quaaludes. The substance actually was glycerin suppositories. The court held the true nature of the substance is no defense to attempted distribution or possession. United States v. Henderson, 20 M.J. 87 (C.M.A. 1985) is in agreement. It is recommended, however, that, if the government is uncertain whether the accused knew the drug was fake, that attempt be charged in the alternative with larceny (by false pretenses) in violation of Article 121, UCMJ.

(3) Other examples

(a) X reaches into Y's pocket with intent to steal Y's wallet. Unknown to X, the pocket is empty. Attempted larceny has occurred. Part IV, para. 4c(3), MCM, 1984.

(b) X fires a pistol at Y with intent to kill Y. X is not aware that Y wears a bullet-proof vest and the bullets bounce off harmlessly. X is guilty of attempted murder.

(c) At night, X fires into an empty bed in a dark tent, thinking his sergeant is in it. X is guilty of attempted murder.

(d) Using a substance which is intended and believed to be a habit-forming narcotic drug, but which turned out to be white talcum powder, is attempted use of a narcotic. In United States v. Dominguez, 7 C.M.A. 485, 22 C.M.R. 275 (1957), C.M.A. stated:

> ...[W]hether the accused attempted to use a narcotic drug does not depend upon the true nature of the substance which he used intravenously. It is clear that he intended to commit the crime of using a habit-forming drug, that he did an overt act toward its commission, that the crime was apparently possible of commission, in that the substance used seemed apparently adaptable to that end....

Id. at 487, 22 C.M.R. at 277.

(e) A finding of attempted abortion is not precluded by the fact that the principal offense (abortion) was impossible of consummation because of nonpregnancy. United States v. Woodard, 17 C.M.R. 813 (A.B.R. 1954).

(f) Y is apparently asleep; X stabs him in the heart, intending to kill him. Later, it appears that Y was dead before X stabbed him. Although not murder, it is attempted murder, if X's belief that the victim was still living was, under all the circumstances, a natural and reasonable one. Accord, United States v. Thomas and McClellan, supra.

b. Legal impossibility. If what the accused believed to be a substantive offense is actually no crime at all, the accused cannot be convicted of a criminal attempt. United States v. Clark, 19 C.M.A. 82, 41 C.M.R. 82 (1969). For a scholarly discussion of legal impossibility and the occasional conceptual difficulties distinguishing it from factual impossibility, read Judge Kilday's opinion in United States v. Thomas and McClellan, supra, at 282-92, 32 C.M.R. at 282-92. Examples of cases of legal impossibility include:

(1) United States v. Keenan, 18 C.M.A. 108, 39 C.M.R. 108 (1969), wherein the accused saw the victim being shot for the third time. Several seconds later, the accused "finished off" the victim, but believed that the victim was dead already. The lower court had specifically refused to find that the victim was alive when the accused shot. Therefore, C.M.A. held that the accused was guilty of neither murder nor attempted murder.

(2) United States v. Clark, 19 C.M.A. 82, 41 C.M.R. 82 (1969), wherein the specification alleged that the accused: "...did, at DaNang Air Base, DaNang, Republic of Vietnam, on or about 9 February 1968, attempt by threats of force and violence and with wrongful intent, to exercise control of an aircraft in flight in air commerce to wit: A Pan American Airways DC-6B aircraft transporting United States Military Personnel to R&R leave in Hong Kong, British Crown Colony."

The specification was intended to state the offense of air piracy as prohibited by 49 U.S.C. § 1472(i). The evidence showed that the accused attempted to take over the aircraft while it was still on the ground waiting to take on passengers. Held: Conviction reversed: In the absence of 49 U.S.C. § 1472(i), there was no offense of air piracy. Section 1472(i) described an offense only for aircraft in flight. It was therefore legally impossible to attempt to commit air piracy on an aircraft not in flight. Note: Section 1472(i) has been subsequently amended to delete the "in-flight" provision.

G. Effect of completion of attempted crime. Article 80(c), UCMJ, provides that a person subject to the code may be "convicted of an attempt to commit an offense although it appears at the trial that the offense was consummated." For example, suppose an accused is charged with attempted larceny. At trial, it is proved the larceny was actually committed. The accused may still be convicted of attempted larceny. The accused may not be convicted of larceny unless a larceny charge was preferred and referred for trial. See United States v. Gray, 41 C.M.R. 756 (N.C.M.R. 1969), rev'd on other grounds, 20 C.M.A. 63, 42 C.M.R. 255 (1970). The accused may not be convicted of both the attempt and the completed crime. In United States v. Hyska, 29 M.J. 122 (C.M.A. 1989), the accused's attempt to distribute marijuana on one day merged into the actual distribution which occurred the following day.

H. Voluntary abandonment. If an accused performs some act with the intent to commit an offense under the code, and the act amounted to more than mere preparation and was in fact a substantial step toward the commission of the intended offense such that it would have apparently tended to effect its commission, and yet the accused at some point before the offense is actually committed repents and voluntarily abandons his efforts to commit the offense, may he nevertheless be convicted of an attempt to commit the offense? In a major departure from prior law, C.M.A. has held that voluntary

abandonment is an affirmative defense to an attempt charge. United States v. Byrd, 24 M.J. 286 (C.M.A. 1987). In Byrd, an accused's plea of guilty to attempted distribution of marijuana was held to be improvident where, during the providency inquiry, the accused indicated that a prospective buyer of marijuana (who later, of course, turned out to be an undercover informant) approached the accused and asked the accused if he could get some marijuana for him. The accused indicated that he thereupon made two attempts on successive days to meet with a cab driver who was his regular supplier. The first effort failed, but the second succeeded. The accused then took the money provided by the buyer for the purchase and rode with the cab driver to an off-base liquor store where he was to obtain the marijuana. The accused further indicated in the providency inquiry that, when he arrived at the liquor store, he decided not to go through with it because he was afraid he would be caught bringing the marijuana back on post. Held: The accused's account reasonably raised the affirmative defense of voluntary abandonment and his plea of guilty was improvident. Notice that Byrd also stands for the proposition that voluntary abandonment will not be a defense when the abandonment occurs because of a fear of immediate detection or apprehension. Of course, whether the accused ceased his efforts to commit an offense because of a sincere change of heart or because of a fear of immediate detection or apprehension is a matter which may be the focus of a good deal of litigation in a given case.

I. Lesser included offense. Article 80 is always a lesser included offense of a substantive offense charged [Article 79, UCMJ], except where the offense cannot be specifically intended (e.g., negligent homicide).

J. Pleading

1. General considerations. See form specifications 2 at para. 4f (article 80 attempts), 9f (attempted desertion), 18f (attempted sedition and attempted mutiny), 24f (attempting to compel surrender), 28f (attempting to aid the enemy), and 54f (attempt-type assaults), MCM, 1984. With the exception of the attempt-type assault pleadings (see Chapter VI of this study guide), attempt pleadings follow the general format illustrated below in the sample article 80 pleading. Note that, unlike article 81 (conspiracy), the overt act is not alleged. United States v. Garner, 28 M.J. 634 (A.F.C.M.R. 1989).

2. Sample pleading

Charge: Violation of the Uniform Code of Military Justice, Article 80.

Specification: In that Seaman John M. Ovey, U.S. Navy, USS Neversail, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, attempt to steal a wristwatch, of a value of about $150.00, the property of Seaman E. Z. Marque, U.S. Navy.

K. Instructions. See Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. No. 3-2. Notice that, similar to the situation with conspiracy, the military judge must instruct on two sets of elements; those of attempt as well as the elements of the attempted offense.

L. Punishment. Part IV, para. 4e, MCM, 1984, provides that an attempt to commit an offense carries a punishment exactly the same as if the offense intended had been consummated, except that death or confinement in excess of 20 years may not be adjudged.

0109 REVIEW OF RELATIONSHIP BETWEEN CRIMINAL CONDUCT AND PARTIES TO CRIMES

A. In general. From previous discussion it can be seen that, in any given set of circumstances, elements of solicitation, conspiracy, principals and attempts may coexist. These concepts do not always stand alone, but are frequently intermingled. In assessing what offenses are involved in a given set of facts, never forget that in addition to, or in lieu of, a completed object offense, solicitation, conspiracy and attempts may also be charged. Likewise, careful thought must be given to the relationship of "parties" (i.e., principals and accessories after the fact).

B. The spectrum of crime. The various levels of criminal conduct range from conspiring to commit a crime, through the actual commission of the crime, to being an accessory after the fact to the crime. Criminal activity may therefore be envisioned as a spectrum of progression through time.

THE SPECTRUM OF CRIME

Solicitation	Conspiracy	Attempt	Object Crime	Accessory After The Fact

1. Solicitation. If committed, solicitation occurs at the very outset of a criminal venture. It is the first criminal step after the birth of the venture in the accused's mind (i.e., the first act of putting the evil scheme to work). It consists simply of requesting, seriously and in any manner, another person to commit an offense. Nothing more is needed. Note that the solicitor is also "counselling" the commission of an offense and thus may become a principal and a conspirator if the object offense is committed or attempted.

2. Conspiracy. If committed, conspiracy is the second criminal step outside the sanctuary of the mind and upon the stairway to completion of the object offense. When the person solicited agrees to participate in a concerted action with the "solicitor" to commit a crime, then a conspiracy agreement is formed. When an overt act is committed by any of the conspirators, the crime of conspiracy is complete. The overt act need only manifest that the conspiracy is at work. A conspirator, like a solicitor, may become a principal to the commission or attempted commission of the object crime.

3. Attempt. If committed, an attempt occurs on the very threshold of completion of the object crime. When an overt act amounting to more than mere preparation, and which apparently tends to effect the object offense, is committed, an attempt has been committed, provided that the person intended to commit a crime.

a. Overt act. An overt act for an attempt would constitute an overt act for conspiracy. The overt act in conspiracy, however, can be far removed from the threshold of the object crime; it can be simply a preparatory act, which would not be sufficient for an attempt.

b. Specific intent. The overt act must be done with the specific intent to commit the object offense. Therefore, one cannot be guilty of an "attempt" to commit a crime based solely on negligence (e.g., negligent homicide).

4. Relationship between preparatory offenses and object offenses

a. Negligent offenses. It should be apparent that purely negligent crimes are completed without any accompanying offenses of solicitation, conspiracy, or attempt.

b General intent offenses. It should also be apparent that, although some crimes involving "general intent" can be specifically intended, and hence attempted, they can be committed without an intervening "attempt" (e.g., unauthorized absence caused by over-sleeping).

c. Specific intent offenses. Crimes requiring a specific intent always involve an attempt. For example, larceny is a wrongful taking with intent permanently to deprive another of personal property of some value. It always includes an overt act with specific intent, the act being more than mere preparation and apparently tending to effect commission of the larceny. The only difference between the completed larceny and the defined attempted larceny is that, in the "attempt," the overt act failed. Article 80 permits conviction of such an "attempt," however, even though the evidence shows that it in fact did not fail. Even in crimes involving a required specific intent, it should be apparent that they can be and frequently are committed without the crimes of solicitation and conspiracy having also been committed. Thus, larceny can be committed by an individual working alone; no solicitation or conspiracy need occur.

5. Accessory after the fact. If committed, this crime occurs after a preceding offense has been committed. So long as some offense is committed, it is not necessary that an intended offense actually be committed, although that probably is the usual case. Thus, one may be guilty of being an accessory after the fact to an attempt.

C. The spectrum of criminals. Each of the levels of criminal conduct corresponds to a specific type of criminal party. When the object crime is attempted or committed, all parties to that crime or its attempt are divided into two categories: principals and accessories after the fact. For example, one who solicits a crime becomes an accessory before the fact (and therefore a principal) if the crime is attempted or committed pursuant to the solicitation.

Likewise, one who attempts a crime becomes a perpetrator (and therefore a principal) of a criminal attempt.

THE SPECTRUM OF CRIMINALS

Solicitor	Conspirator	Attemptor*	Accessory Before The Fact	Aider And Abettor	Perpetrator	Accessory After The Fact

*Note: Solicitors, conspirators, and attemptors may become principals if the object crime is attempted or committed

1. Principal

a. Included parties. Under article 77, a principal is one who:

(1) Commits the object offense;

(2) aids in its commission;

(3) abets (encourages) its commission;

(4) counsels (advises) its commission;

(5) commands (requests) its commission;

(6) procures (hires) its commission; or

(7) causes an act to be done which, if directly performed, would be punishable by the code.

b. Relationship of parties to conduct short of the completed crime. Any one of the seven specific acts which make one a principal can also be committed by a solicitor, conspirator, or attemptor. For example, one who conspires with others to commit a crime is guilty as a principal if the crime is committed pursuant to the unlawful agreement. The conspirator becomes at least an accessory before the fact, and, depending on the role the conspirator played in the actual commission of the crime, may also be an aider and abettor or the actual perpetrator.

2. Accessory after the fact. The accessory after the fact aids or assists a person known to have committed a crime, with the intent of assisting the criminal to evade apprehension, prosecution, or punishment. A perpetrator and an aider and abettor cannot also be accessories after the fact to their own crimes.

CHAPTER II

PLEADING

0201 CHARGE AND SPECIFICATION. R.C.M. 307, 601-604; Part IV, MCM, 1984. (Key Numbers 552, 950-971)

A. General format of military pleading. Pleadings in military criminal cases follow a traditional format of charge and specification. Together, the charge and specification, much like criminal informations in civilian prosecutions, set forth the statutory authority for the prosecution and the specific factual averments which constitute the alleged offense. Military pleadings tend to be shorter than most civilian informations or indictments.

B. The charge. The charge portion of the military pleading is merely a citation of the article of the Uniform Code of Military Justice which the accused allegedly violated. Corresponding citations to the U.S. Code are not used; the article of the code is sufficient. For example, in a larceny case, the charge would be as follows:

> Charge: Violation of the Uniform Code of Military Justice, Article 121

C. The specification. The specification contains allegations of facts constituting the offense charged. Part IV, subparagraph (f) of each punitive article, MCM, 1984, contains sample formats for specifications for most of the common offenses under the code. Care is necessary when using the MCM samples, however. Each sample must be tailored to the facts in each case. Although the samples in the MCM, 1984, appear to be correct, subsequent cases must be constantly examined to ensure that any case-law modifications are followed.

D. Each specification a separate offense. Each specification alleges a distinct, separate offense. Thus, each specification is similar to a count in civilian criminal pleadings to which pleas must be entered and for which findings must be returned.

0202 NUMBERING OF CHARGES AND SPECIFICATIONS

A. Terms

1. Charge. An "original" charge (i.e., one alleged when the charge sheet was prepared) is simply labeled "Charge." Where other allegations arise subsequent to the preferral of the initial charge, an "additional" charge (i.e., one preferred at a later time and added to the original charge sheet) is labeled "Additional Charge."

2. Specification. All specifications, whether original or additional, are simply labeled "Specification" and, if necessary, given a number; there is no such thing as "Additional Specification."

B. Numbering

1. One only. If there is only one charge, it is referred to simply as "the charge" and is not numbered. Likewise, if there is only one specification under a particular charge, it is called "the specification" and is not numbered.

2. Multiple

a. Charge. If there is more than one charge, number the first one with a Roman numeral "I," the second "II," etc. It is traditional and customary to list the charges in the order of their normal numerical sequence in the UCMJ (i.e., an article 86 is listed before an article 121 charge); the trial counsel may, however, desire charges to be arranged in a different sequence in order to make the order of proof more logical or for other actual reasons.

b. Specification. If there is more than one specification under a particular charge, number the first one with an Arabic numeral "1," the second "2," etc.

c. Additional charges and specifications. Use the same numbering and listing system (i.e., Roman numerals for the charges (if more than one) and Arabic numerals for the specifications (if more than one under that charge)). List additional charges in sequence set forth above, but after all original charges.

3. Multiple specifications under one charge. All specifications alleging violations of a particular article of the code are listed as separate specifications under a single charge. See the examples immediately below. An additional charge, however, must be pleaded separately from original specifications alleging violations of the same code article.

4. Example:

Charge I: Violation of the Uniform Code of Military Justice, Article 85

Specification 1: - - - (words alleging desertion)
Specification 2: - - - (words alleging another offense of desertion)

Charge II: Violation of the Uniform Code of Military Justice, Article 86

Specification 1: - - - (words alleging an unauthorized absence)
Specification 2: - - - (words alleging another unauthorized absence)
Specification 3: - - - (words alleging a third unauthorized absence)

Charge III: Violation of the Uniform Code of Military Justice, Article 121

Specification: - - - (words alleging a larceny)

Additional Charge I: Violation of the Uniform Code of Military Justice, Article 86

Specification 1: - - - (words alleging yet another unauthorized absence)

Specification 2: - - - (words alleging still another unauthorized absence)

Additional Charge II: Violation of the Uniform Code of Military Justice, Article 108

Specification: - - - (words alleging an offense of wrongful disposition of government property).

5. Article subdivisions. The particular subdivision of an article of the code is not cited in the charge. For example:

a. "Article 86," not 86(2) nor 86(3).

b. "Article 85," not 85(a), nor 85(b), nor 85(c), nor 85(a)(1).

c. The only exceptions are articles 106a (espionage), 112a (drugs), and 123a (bad checks).

0203 SPECIFIC CONTENTS OF SPECIFICATIONS (Key Numbers 552-853)

A. Overview. The purpose of this section is to provide a detailed guide to drafting specifications. Specifications contain factual allegations about two matters: (1) The alleged offense; and (2) jurisdiction. Much of the material in this section is relevant when ascertaining if a specification adequately informs the accused of the allegations which he must defend against. Also relevant is the doctrine of variance which is more fully discussed in section 0205.E of this chapter. Also, consult the discussion to R.C.M. 307c.

1. Allegations about the alleged offense. The specification must allege, either expressly or by fair implication, all the elements of the alleged offense and all necessary words importing criminality (e.g., "wrongfully," "unlawfully," "without authority"). Part IV, MCM, 1984,, is a generally reliable guide to pleading the offense, subject to the caveats discussed in section 0201.C of this chapter.

2. Jurisdictional allegations. In United States v. Alef, 3 M.J. 414 (C.M.A. 1977), the Court of Military Appeals mandated that the prosecution must "affirmatively ... demonstrate through sworn charges/indictment the jurisdictional basis for trial of the accused ...." Id. at 419. Thus, each specification was required not only to allege an offense under the code, it

was also necessary to recite the facts upon which court-martial jurisdiction over the offense was predicated. This is no longer necessary. In the U.S. Supreme Court decision in Solorio v. United States, 483 U.S. ___, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), the Court held that court-martial jurisdiction exists over every offense committed by military personnel simply by virtue of their status as members of the military. It therefore no longer matters whether the offense is "service connected." It should also be noted at least one court has held that Solorio applies to offenses committed prior to the date of that decision. United States v. Starks, 24 M.J. 857 (A.C.M.R. 1987).

B. Description of the accused

1. Identification

a. Name. Recite the accused's full name: first name, middle name or initial, last name. If the accused is known by an alias, the accused should be charged under his or her true name. If the accused does not admit which name is his or her true name, the accused should be charged under the name appearing on his or her enlistment contract, with the alias also recited (e.g., "Seaman John P. Jones, U.S. Navy, USS Neversail, alias Rear Admiral Raymond P. Johnson, U.S. Navy, Fourth Naval District....").

b. Military association. The specification should recite the accused's rank or grade, armed force, and unit or organization. If the accused's rank or grade has changed since the date of the alleged offense, the accused should be identified by his or her present grade, followed by his or her grade at the time of the offense (e.g., "Seaman John P. Jones, U.S. Navy, then Seaman Apprentice, U.S. Navy, USS Neversail....").

c. Examples:

(1) "In that Seaman Waldo Thurdgrinder Smeen, U.S. Navy, USS Woonsocket,..."

(2) "In that Yeoman Third Class Vincent R. Lightning-typer, U.S. Navy, Naval Justice School, Newport, Rhode Island,..."

(3) "In that Staff Sergeant John X. Ropeadope, U.S. Marine Corps, Marine Fighter Attack Squadron 314, Marine Aircraft Group 11, Third Marine Aircraft Wing, Fleet Marine Force Pacific,..."

2. Pleading jurisdiction over the accused

a. Basic format. A court-martial generally has jurisdiction to try only military members on active duty. Therefore, each specification should clearly recite the accused's active duty status. One way of pleading jurisdiction over the accused is to use the words "on active duty" immediately after the description of the accused. For example:

> "In that Ensign Bertha D. Blooze, U.S. Navy, USS Vulcan, on active duty, did,..."

It should be noted, however, that in United States v. Hatley, 14 M.J. 890 (N.M.C.M.R. 1982), the court held that the omission of the words "on active duty" from a specification did not prevent it from stating an offense. It is still recommended that "on active duty" be alleged in every specification.

b. Special problems. Sometimes more than just "on active duty" will be necessary. When special circumstances cause court-martial jurisdiction to be asserted or retained over one who would not normally be subject to such jurisdiction, those circumstances should be pleaded. For example:

(1) Jurisdiction retained after expiration of enlistment. Suppose that the accused is not tried until after the expiration of his or her current enlistment, but charges were preferred before the expiration. The specification should recite:

> "In that Seaman Fritz D. Katz, U.S. Navy, Naval Air Station, Willow Grove, Pennsylvania, on active duty, over whom court-martial jurisdiction is asserted by virtue of the preferral of this specification, on 29 December 19CY (-1), before the expiration of his enlistment on 1 January 19CY, did..."

(2) Reservist failing to report for active duty. Suppose that a reservist failed to report for active duty for training. The resulting unauthorized absence specification should allege the facts surrounding the activation:

> "In that Boatswain's Mate Third Class Jacob D. Snake, U.S. Naval Reserve, Naval Support Activity, Philadelphia, Pennsylvania, on active duty, who was lawfully ordered on 11 January 19CY to a period of forty-five days active duty for training to commence on 2 February 19CY, did..."

C. Description of time of offense. The time and place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand the particular act or omission alleged. United States v. Sell, 3 C.M.A. 202, 11 C.M.R. 202 (1953).

1. Use of "on or about." In alleging the time of an offense, it is proper and usually advisable to allege it as "on or about" a specified day. This phrase must be construed reasonably in the light of the circumstances of the particular case. United States v. Nunn, 5 C.M.R. 334 (N.B.R. 1952) (within narrow limits); United States v. Squirrell, 2 C.M.A. 146, 7 C.M.R. 22 (1953); and United States v. Brown, 4 C.M.A. 683, 16 C.M.R. 257 (1954). Where time is of the essence of the crime, an allegation concerning the date of the offense becomes a matter of substance. For example, the date of the offense would doubtless be of substance in a prosecution for violating a Sunday Blue Law, or possibly a prosecution for statutory rape. Otherwise, allegation of the time is not a matter of substance, and an approximation of the date of occurrence is sufficient, unless it is so inaccurate or vague as to prevent the accused from preparing a defense. United States v. Brown, supra, (three-month variation held not fatal).

2. Hour: The exact hour of the offense is ordinarily not alleged except in certain absence offenses (e.g., failure to go to appointed place of duty, Article 86(1), UCMJ). However, if the exact hour of the offense is alleged, use the 24-hour clock system.

3. Extended periods. When the accused's alleged conduct extends over a period of time, or when the exact date of the alleged conduct cannot be precisely stated, it is proper to allege that the offense occurred over a period of time (e.g., from about 15 January 19CY to about 22 February 19CY). When the accused has committed a series of acts which are parts of a continuous course of action, such as conspiracy, such may be alleged as a single continuing offense over a period of time. Other examples of such continuous courses of action would include:

a. Embezzlement -- United States v. Maynazarian, 12 C.M.A. 484, 31 C.M.R. 70 (1961);

b. continuing adultery with one woman -- United States v. Frayer, 11 C.M.A. 600, 29 C.M.R. 416 (1960); and

c. several acts of sodomy -- United States v. Lovejoy, 20 C.M.A. 18, 42 C.M.R. 210 (1970).

4. Practical suggestions. As a general rule, it is wiser to allege "on or about" a specific date rather than pleading that a single offense occurred sometime during an extended period. Should the date proven at trial vary from that alleged, fatal variance will result only if the discrepancy in dates has misled the accused. Pleading an extended period of time is useful, however, when the offense consisted of separate acts committed over a period of time, such as conspiracy or embezzlement. Combining several instances of use of marijuana into only one specification alleging wrongful use of marijuana over a period of time is permissible, so long as the accused is not misled. United States v. Means, 12 C.M.A. 290, 30 C.M.R. 290 (1961). Instead of being liable for punishment for several separate, distinct offenses, the accused is subject to punishment as if he or she had committed only one offense. Accordingly, attempts to combine separate, distinct crimes into a single continuing offense are generally unwise.

D. Description of the place of offense. It is usually unnecessary to go into such details as the name of the street or the number of the building, if any, in which the offense takes place. United States v. Means, supra. However, some acts are offenses only if committed in a particular place. In that event, it may be necessary in a given case to identify the street, building, or location. For example, a specification alleged that the accused violated a lawful general order by appearing "at Frankfurt am Main, Germany ... in a public establishment in a field uniform." The order prohibited wearing of such a uniform "outside military installations." C.M.A. held that the specification did not contain sufficient averment that the public establishment was outside of a military installation and concluded that the specification did not show sufficient facts to show an order violation. United States v. Crooks, 12 C.M.A. 667, 31 C.M.R. 263 (1962). See also United States v. Rowe, 13 C.M.A. 302, 32 C.M.R. 302 (1962); United States v. Van Valkenberg, 42 C.M.R. 403 (A.C.M.R. 1970); and United States v. Williams, 17 M.J. 207 (C.M.A. 1984).

E. Description of type of principal

1. Article 77 rule. All principals are charged as if each was the actual perpetrator. For example, if A is an accessory before the fact to B's larceny, the specification against A would nonetheless allege: "In that A ... did steal..."

2. Exception. Notwithstanding the provisions of article 77, it occasionally may be wise to specify the role the accused played in the criminal enterprise. An example of such a rare exception is United States v. Petree, 8 C.M.A. 9, 23 C.M.R. 233 (1957), wherein the specification did not charge the accused as the driver but merely as a passenger. "Thus, in the absence of any allegation that the accused was the driver of the vehicle, or that as a passenger he aided and abetted the driver in unlawfully fleeing the scene of an accident, the specification wholly fails to allege an offense." The court also held the specification to be "fatally defective" under the doctrine of the military superior-subordinate relationship "because of the failure to allege that the accused as a passenger was senior in rank and command under conditions which would permit him to issue orders to the driver." Id. at 13, 23 C.M.R. at 237.

F. Description of victim

1. General rule. If the offense alleged constitutes an offense against the person or property of an individual, that person should be described as follows: i.e., first name, middle initial, and last name. If a military person, the victim's rank or grade and armed force should also be alleged. This will identify that individual more specifically.

2. Rank-related offenses. Some offenses require that the rank or grade of a victim be alleged in order to set forth an offense. For example, in disobedience of a superior officer, in violation of article 90, rank may be essential to establish the element of "superiority."

3. Status-related offenses. Some offenses require that the victim's status as a person subject to the code be alleged and proven. For example, using provoking words (article 117) is an offense only if the person toward whom the words were used is one subject to the Uniform Code of Military Justice. See sample specification, Part IV, para. 42f, MCM, 1984, which identifies the victim as: "... towards Sergeant _____, U.S. Air Force..." If the victim were a reservist, it would be necessary to add active duty status (e.g.: " ... towards Lieutenant Junior Grade Harold R. Brown, U.S. Naval Reserve, on active duty").

4. Name unknown. Occasionally the exact identity of the victim may be uncertain. For example, in United States v. Suggs, 20 C.M.A. 196, 43 C.M.R. 36 (1970), assault victims were described merely as "armed forces policemen." C.M.A. held that, under the circumstances, such pleading was sufficiently particular. The court noted that the specification provided further identifying information in its allegations of date, time, and place. Moreover, the accused had pleaded guilty and had not moved for appropriate relief in the nature of a bill of particulars. There was no risk that the allegation of the victims' identity was so vague as to risk misleading the accused. See also United States v. Calley, 46 C.M.R. 1131 (A.C.M.R.), aff'd, 22 C.M.A. 534, 48

C.M.R. 19 (1973), in which murder specifications alleging numbers of "Oriental human beings whose names are unknown" formed the basis of conviction. Vague descriptions of the victim are unwise, because they invite defense assertions that the pleading is fatally defective. Thus, when the exact identity of the victim is unknown, he or she should be described as accurately as possible, such as by any alias or by a general physical description (e.g., "a Caucasian adult male of unknown identity").

G. Description of value. In property offenses, such as larceny, the value of the property determines the authorized maximum punishment. Whenever value is an aggravating matter, it must be specifically alleged. Exact value should be alleged if known. If only an approximate value is known, it may be alleged as "of a value of about...." If several items are the subject of the offense, the value of each item should be stated, followed by a statement of aggregate value: e.g., "... one shirt, value $3.50; one pair of shoes, value $14.00; one camera, value $220.00; one package of chewing gum, value $0.20; of a total value of $337.70."

H. Description of property

1. Generic terms. In describing property, generic terms should be used, such as "a watch" or "a knife," and descriptive details such as make, color and serial number usually should be omitted. However, in some instances, details may be essential to the offense. For example, the length of a knife may be important in prosecuting a violation of a general regulation or in a carrying concealed weapons case, in order to establish its dangerous nature.

2. Sufficient identity. Specifications should sufficiently identify property in order to inform the accused of what he/she must defend against and in order to protect the accused from a second prosecution for the same offense. The courts are usually tolerant of somewhat vague descriptions of property when the record clearly establishes that the accused was not misled by the lack of specificity in pleading. Thus, in United States v. Krebs, 20 C.M.A. 487, 43 C.M.R. 327 (1971), C.M.A. upheld a larceny specification which alleged "goods, of a value of about $1,678.00...." C.M.A. noted that the accused had pleaded guilty to the specification. Moreover, the military judge specifically inquired into the defense's understanding of what specific property was involved. On the record, the defense counsel stated the various items that comprised the alleged "goods," and also stated that there was no possibility that the accused had been misled. In United States v. Alacantara, 18 C.M.A. 372, 40 C.M.R. 84 (1969), C.M.A. reluctantly upheld a larceny specification which alleged that the accused stole "foodstuffs." C.M.A. held that there was no risk of the accused having been misled, but that the individual items were known and, for sake of precision, should have been alleged. In United States v. Kinard, 15 M.J. 1052 (N.M.C.M.R. 1982), the Court of Review determined that a specification which, in describing the subject of a larceny, did not contain the words "property of the U.S. Navy" was not fatally defective.

I. Description of written instruments, orders, and oral expressions

1. Written instruments. When a written instrument or a part of it forms the gist of the offense, the specification should set forth the writing, preferably verbatim. R.C.M. 307, MCM, 1984 (discussion).

a. Example: A is charged with forgery of a check. A verbatim copy of the check (photocopy if possible) should be inserted in the specification. See sample specification, Part IV, para. 49f, MCM, 1984.

b. Example: A is charged with wrongful possession of a pass. A copy of the pass should be inserted in the specification. See sample specification, Part IV, para. 77f, MCM, 1984.

2. Orders

a. General orders (Article 92(1), UCMJ). A specification alleging a violation of a general order or regulation, under Article 92(1), UCMJ, must clearly identify the specific order or regulation allegedly violated. The general order or regulation should be cited by its identifying title or number, section or paragraph, and effective date. It is not necessary to recite the text of the general order or regulation verbatim. For example, a specification alleging a violation of the general regulation prohibiting possession of alcoholic beverages aboard a ship will cite the applicable general regulation as "... Article 1150, U.S. Navy Regulations, dated 26 February 1973...." It is necessary, however, to set forth in the specification the specific acts which constitute the violation. United States v. Bunch, 3 C.M.A. 186, 11 C.M.R. 186 (1953); United States v. Crooks, 12 C.M.A. 677, 31 C.M.R. 263 (1962); see sample specification, Part IV, para. 16f, MCM, 1984, e.g., "by wrongfully possessing beer aboard ship...."

b. Other orders (Article 92(2), UCMJ). When the order allegedly violated is other than a general order or regulation, such an "other lawful order" (Art. 92(2), UCMJ) should be quoted verbatim or described exactly in the specification. This fully apprises the accused of the specific misconduct allegedly committed. When the order is an oral order, not only should it be quoted verbatim, but the phrase "or words to that effect" should be added after the quotation. "Or words to that effect" will provide for the possibility of a minor variance in proof of the exact words used in the order. See sample specification, Part IV, para. 16f, MCM, 1984. Where the written order is not quoted verbatim or may be violated in more than one way, the specification must also allege the manner in which it was violated.

c. Negating exceptions. If the order contains exceptions, it is generally not necessary that the specification contain an allegation negating the exceptions. For example, in United States v. Gohagen, 2 C.M.A. 175, 7 C.M.R. 51 (1953), the accused was charged with violation of a Far Eastern Command regulation by wrongfully possessing a hypodermic needle and syringe. The regulation prohibited possession of hypodermic needles and syringes except for treatment of disease or household use; but the specification did not allege that the accused's possession was not for treatment of disease or household use. C.M.A. held that such a negation of the regulation's exceptions was unnecessary in the pleadings. See also United States v. Blau, 5 C.M.A. 232, 17 C.M.R. 232 (1954); United States v. Tee, 20 C.M.A. 406, 43 C.M.R. 246 (1971).

J. Amendments to specifications: R.C.M. 603

1. Prior to arraignment. R.C.M. 603, MCM, 1984, permits minor changes to the charges and specifications prior to arraignment by "Any person forwarding, acting upon or prosecuting charges on behalf of the United States

except an [Article 32] investigating officer..." This would allow a legal/discipline officer, legal clerk, or trial counsel to make appropriate pen-and-ink changes.

2. After arraignment. The military judge may, under R.C.M. 603, grant motions to permit minor changes in the charges and specifications at any time after arraignment, but prior to findings. Accord, United States v. Krutsinger, 15 C.M.A. 235, 35 C.M.R. 207 (1965).

3. Minor changes defined. "... [A] specification may be amended if the change does not result (1) in a different offense or in the allegation of an additional or more serious offense, or (2) in raising a substantial question as to the statute of limitations, or (3) in misleading the accused." United States v. Johnson, 12 C.M.A. 710, 711, 31 C.M.R. 296, 297 (1962); United States v. Brown, 4 C.M.A. 683, 16 C.M.R. 257 (1954). Minor changes include those necessary to correct inartfully drafted specifications or those which reduce the seriousness of the offense. Additionally, should the defense object to the sufficiency of the jurisdictional language alleged, there is authority for the proposition that the specification can be amended at any time prior to the announcement of findings. See United States v. Graham, 9 M.J. 556 (N.C.M.R. 1980) (Dunbar, J., concurring).

0204 SUFFICIENCY OF A SPECIFICATION (Key Number 552)

A. Sufficiency. Each specification must usually include, either expressly or by fair implication, allegations of all the facts that constitute elements of the offense charged, as well as all necessary words importing criminality. Thus, when the specification is read, it must describe acts that are clearly and unequivocally an offense. United States v. McCollum, 13 M.J. 127 (C.M.A. 1982).

1. Pleading elements. As a general rule, all of the elements of the offense alleged must be pleaded, either expressly or by fair implication, or it is fatally defective. United States v. Fleig, 16 C.M.A. 444, 37 C.M.R. 64 (1966); United States v. Petree, 8 C.M.A. 9, 23 C.M.R. 233 (1957). The sample specifications in Part IV, MCM, 1984, are generally reliable forms that include all the elements of each offense. If a specific intent or state of mind is an element of the offense, it must be alleged. See, e.g., United States v. Wade, 14 C.M.A. 507, 34 C.M.R. 287 (1964), which held that "intent to defraud" and "intent to deceive" under Article 123A, UCMJ (bad check law) are separate and distinct elements. Pleading "intent to deceive" does not adequately allege the requisite "intent to defraud."

2. Words importing criminality. If the alleged act is not itself an offense, but is made an offense either by applicable statute (including articles 133 and 134) or regulation or custom having the effect of law, then words importing criminality such as "wrongfully," "unlawfully," "without authority," or "dishonorably" (depending upon the nature of the particular offense involved), should be used to describe the accused's acts. United States v. Hoskins, 17 M.J. 134 (C.M.A. 1984) ("burglariously enter" fatally insufficient); compare United States v. Lee, 19 M.J. 587 (N.M.C.M.R. 1984) ("without authority" not essential to desertion specification).

a. Example: Assaults. Sample specification, Part IV, para. 54f(2), MCM, 1984, alleges assault consummated by a battery, describing the accused's acts as " ... did ... unlawfully strike...." "Unlawfully" is a necessary word importing criminality; without it, the specification would describe an act (i.e., " ... did ... strike ...") which might or might not be an offense. Not all strikings of another person are criminal; the accused, for example, may have struck in self-defense. Without "unlawfully," the battery sample specification would be fatally defective for failure to state an offense. Compare, however, sample specification, Part IV, para. 54f(1), MCM, 1984, which alleges simple assault and describes the accused's conduct as " ... did ... assault...." The word "assault" itself denotes a criminal act; therefore, other words such as "unlawfully" are unnecessary.

b. Example: Possession of marijuana. A specification which alleged that the accused "... did ... have in his possession marijuana... " was held in United States v. Brice, 17 C.M.A. 336, 38 C.M.R. 134 (1967), to be fatally defective for failure to allege an offense. Under some circumstances, possession of marijuana can be lawful; therefore, a word importing criminality, such as "wrongfully" or "unlawfully," is necessary. See also United States v. Showers, 45 C.M.R. 647 (A.C.M.R. 1972) (attempted sale of heroin) and United States v. DeStefano, 5 M.J. 824 (A.C.M.R. 1978) (possession and use of marijuana as conduct unbecoming an officer). However, in United States v. Breechen, 27 M.J. 67 (C.M.A. 1988), the court held that, although a specification alleging attempted distribution of LSD did not allege that the attempt was "wrongful," the specification could be reasonably construed to fairly embrace an element of wrongfulness since the LSD was alleged to be a controlled substance. See also United States v. Bryant, 28 M.J. 504 (A.C.M.R. 1989).

c. Example: Jumping from a ship. A specification that the accused "did, wrongfully and unlawfully,... through design jump from USS Intrepid (CVS 11) into the sea," is sufficient to state an offense in violation of article 134 since the pleading eliminates any possibility that the accused was pushed or slipped, or that the incident otherwise resulted from misfortune, accident, or negligence. It also makes clear that the accused did not jump overboard in the course of his legitimate duties or for some purpose which might be completely innocent. Such conduct could not possibly have any result other than the disruption of good order and discipline. United States v. Sadinsky, 14 C.M.A. 563, 34 C.M.R. 343 (1964).

d. Example: Striking noncommissioned officer. A specification alleging that the accused did strike his superior noncommissioned officer who was then in the execution of his office stated an offense despite the lack of a specific averment of wrongfulness or unlawfulness, as a striking properly alleged as a violation, of an article relating to striking a noncommissioned officer is implicity unlawful. United States v. Jones, 12 M.J. 893 (A.C.M.R. 1982).

e. Caveat: The mere addition of a word, or many words "importing criminality," however, will not always result in alleging an offense. If the alleged act of the accused would not under any circumstances be an offense, the mere addition to the specification of words importing criminality will not convert the act into an offense. For example: "... Rollo ... did, with deliberate premeditation unlawfully, wrongfully, maliciously and willfully entertain thoughts with intent to rape Sophia Doren," alleges no offense. Thought alone, no matter how evil, is no crime.

3. Matters in aggravation. Aggravating circumstances which increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. Other matters in aggravation may be pleaded to a reasonable extent, but extensive recitations of aggravating circumstances is usually unwise. Thus, failure to allege matters in aggravation does not render the specification fatally defective because of insufficiency, but it does prevent imposition of more severe punishment. United States v. Beninate, 4 C.M.A. 98, 15 C.M.R. 98 (1954); United States v. May, 3 C.M.A. 703, 14 C.M.R. 121 (1954).

a. Required matters in aggravation. If the maximum punishment authorized is based upon a particular aggravating fact or circumstance, that aggravating matter must be pleaded in order to permit use of the increased maximum punishment.

(1) Example: Unauthorized absence. The maximum authorized punishment for unauthorized absence depends upon the length of the absence. Thus, the duration of the unauthorized absence must be pleaded. See United States v. Lovell, 7 C.M.A. 445, 22 C.M.R. 235 (1956) and United States v. Crumley, 40 C.M.R. 912 (N.B.R. 1969).

(2) Example: Drunken driving. A drunken driving specification did not allege that the accident resulted in personal injury. Although the evidence established that a personal injury did result, the aggravated punishment for drunken driving resulting in personal injury was not authorized because the aggravated circumstances were not pleaded. United States v. Grossman, 2 C.M.A. 406, 9 C.M.R. 36 (1953).

(3) Example: Desertion. In order to trigger the increased maximum confinement sentence (three years vice two) for desertion terminated by apprehension, the apprehension must be pleaded. United States v. Nickaboine, 3 C.M.A. 152, 11 C.M.R. 152 (1953); United States v. Beninate, 4 C.M.A. 98, 15 C.M.R. 98 (1954).

b. Nonessential matters in aggravation. There is no legal prohibition against including aggravating facts which do not affect the authorized maximum punishment. For example, the quantity of drugs is frequently alleged in a specification alleging distribution of drugs. Quantity does not affect the authorized maximum punishment in most drug offenses, but it is a factor which may be important in determining an appropriate sentence in each case. Value does not have to be alleged in a robbery specification, but it is a good idea. Extensive additions to specifications are usually unwise, however. Although not impermissible, such additional nonessential aggravating matters are not favored. For example, C.M.A. allowed the addition of the words "... as a result of said absence missed said ship when she sailed ..." to an unauthorized absence specification, but clearly indicated a strong disapproval of such pleading. United States v. Venerable, 19 C.M.A. 174, 41 C.M.R. 174 (1970). In United States v. Bobadilla, 19 C.M.A. 178, 41 C.M.R. 178 (1970), C.M.A. indicated that the only correct matter to be pled in aggravation is that which is functional in determining the maximum punishment. However, C.M.A. declined to disapprove the conviction because the accused was not misled by the pleadings.

4. Specificity. The specification must be sufficiently specific, detailed, and precise to notify the accused of the specific conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy. Specificity must not be confused with elaborate detail. Only the basic operative facts that make the accused's conduct criminal should be pleaded. Specific evidence supporting the factual allegations should not be included in the specification. Detailed pleading of evidence only invites confusion and variance at trial.

a. Example: Proper pleading. "... did ... steal one camera, of a value of $350.00, the property of the Navy Exchange, Naval Education and Training Center, Newport, Rhode Island...."

b. Example: Improper pleading. " ... did ... wrongfully take, with intent to deprive the owner permanently thereof, one Bigbux CV-8E camera, serial number 8E-9018787, of a value of $350.00, the property of the Navy Exchange, Naval Education and Training Center, Newport, Rhode Island, by entering said Navy Exchange, removing said camera from its shelf, and concealing said camera under said accused's coat, and thereby removing said camera from the premises of said Navy Exchange."

5. Duplicity

a. Rule. One specification should not allege more than one offense, either conjunctively or in the alternative. R.C.M. 307 (discussion G), MCM, 1984. In United States v. Harris, 4 C.M.R. 444, 447 (N.B.R. 1952), the Navy Board of Review defined duplicity as "the joining in one count of two or more distinct offenses."

-- Example: A specification should not allege that the accused "lost and destroyed" or "lost or destroyed" certain property.

b. Apparent exceptions

(1) If two acts or a series of acts constitute one offense, they may, of course, be alleged conjunctively.

(2) Example: Burglary requires two acts -- breaking and entering -- to constitute the one offense. See United States v. Hoskins, 17 M.J. 134 (C.M.A. 1984).

(3) Series of acts constituting a continuing course of conduct. United States v. Means, 12 C.M.A. 290, 30 C.M.R. 290 (1961); United States v. Voudren, 33 C.M.R. 722 (A.F.B.R. 1963).

(a) Example: Wrongful use of marijuana over a period of time. United States v. Means, supra.

(b) Example: Commission of adultery on several occasions. United States v. Frayer, 11 C.M.A. 600, 29 C.M.R. 416 (1960).

(c) Example: Negotiating a series of bad checks. United States v. Carter, 21 M.J. 665 (A.C.M.R. 1985).

c. Liberal application. Case law has been quite liberal in permitting duplicity (i.e., pleading several offenses in one specification).

(1) Example: In United States v. Means, supra, the specification alleged use of marijuana at two different places during a period of six months. Upon arraignment, the accused unsuccessfully moved for relief for several reasons, including duplicity. C.M.A. expressly approved "... the practice of pleading a series of acts of the same kind which can be considered part of a course of action, because 'where but a single statutory prohibition is involved ... the effect of joining several violations as one, redounds to the benefit of the accused.'" 12 C.M.A. at 293, 30 C.M.R. at 293. (Quoting Korholz v. United States, 269 F.2d 897 (10th Cir. 1959), with approval). Cf. United States v. Paulk, 13 C.M.A. 456, 32 C.M.R. 456 (1963).

(2) Example: In United States v. Lovejoy, 20 C.M.A. 18, 42 C.M.R. 210 (1970), one specification alleged several acts of sodomy. The court used the following language in upholding the pleading: "... a continuous series of acts extending over a period of time and motivated by a single impulse may properly be alleged as a single offense.... In these circumstances it was both reasonable and fair for the Government to forgo measurement of the separateness of each act to charge all as a single offense." 42 C.M.R. at 212. See also United States v. Hall, 6 C.M.A. 562, 20 C.M.R. 278 (1955).

B. The test for legal sufficiency of a specification

1. The test. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Furthermore, when the pleadings have not been attacked prior to findings and sentence, it is enough to withstand a broadside charge that they do not state an offense, if the necessary facts appear in any form or by fair construction can be found within the terms of the specification. United States v. Sell, 3 C.M.A. 202, 11 C.M.R. 202, 206 (1953); United States v. Petree, 8 C.M.A. 9, 23 C.M.R. 233 (1957); see also United States v. Suggs, 20 C.M.A. 196, 43 C.M.R. 36 (1970); United States v. McCollum, 13 M.J. 127 (C.M.A. 1982); United States v. Ermitano, 19 M.J. 629 (N.M.C.M.R. 1984).

2. Flexible application

a. Liberal application where unquestioned. If the accused does not question the sufficiency of the specification prior to completion of the trial (e.g., by a motion for appropriate relief), this test is liberally applied: Do "... the necessary facts appear in any form, or by fair construction ... within the terms of the specification?" United States v. Sell, supra. If the specification is not attacked until after trial, it is clearly not enough for the accused to argue that the specification could have been made more definite and certain. In fact, absent a showing of prejudice, the specification must be so defective that "it cannot within reason be construed to charge a crime." United States v. Watkins, 21 M.J. 208, 210 (C.M.A. 1986).

b. Strict scrutiny where challenged. On the other hand, if the accused asks for clarification or further particularity at the trial, reviewing authorities will be much more exacting in testing the sufficiency of the specification.

3. Three-pronged test

a. Are all of the elements stated?

b. Does it adequately inform the accused of what allegations must be met?

c. Will the specification and the record protect the accused against double jeopardy?

4. Application of the three-pronged test

a. All elements stated. As a general rule, all the elements of the alleged offense must be stated, expressly or by fair implication, in the specification. Failure to allege the essential elements of the offense can result in the specification being found fatally defective as can be seen by some of the examples below. Military appellate courts, applying the three-pronged test, have occasionally permitted variations and exceptions to the "all elements stated" rule. It must be remembered, however, that such deviations were allowed only after many months of appellate litigation of such a basic issue, and, in many cases, only because of the factual or procedural context of each specific case. The best practice is to follow the format in the sample pleadings in this study guide and the MCM sample specifications and to stay abreast of any changes mandated by new appellate decisions.

(1) Unauthorized absence. Previously, C.M.A. held that a specification which alleged absence but failed to allege without authority was so defective that it could not withstand even post-trial attack. United States v. Fout, 3 C.M.A. 565, 568, 13 C.M.R. 121, 124 (1953). However, this portion of the Fout holding was recently overruled by United States v. Watkins, supra. See also United States v. Miller, 48 C.M.R. 446 (N.C.M.R. 1973), where the judge permitted inclusion of "without authority" by amendment with the express consent of the defense after arraignment. Accord, United States v. Lee, 19 M.J. 587 (N.M.C.M.R. 1984). The Navy-Marine Corps Court of Military Review has recently held that the element "without authority" is necessarily implied in a specification alleging all the remaining elements of desertion (article 85). United States v. Ermitano, 19 M.J. 629 (N.M.C.M.R. 1984).

(2) Robbery. A specification alleged an offense of robbery, except that it failed to allege that the property was stolen from the person or in the presence of the victim, an essential element of robbery. Held: Robbery was not alleged. The government argued that it was implied by several parts of the specification, and especially since the offense was charged as a violation of article 122. C.M.A. stated: "... mention of the Article which forms the statutory basis for the imposition of criminal liability can assist at times in relieving possible ambiguities in the statement of an offense.... Constantly, however, this Court has looked primarily to the words of the specification, rather than to the designation of the article alleged to have been violated, in determining what offense, if any, has been alleged." United States v. Rios, 4 C.M.A. 203, 206, 15 C.M.R. 203, 206 (1954).

(3) Disrespect. The specification alleged disrespect towards an NCO in violation of article 91, but failed to allege that the NCO was then in the execution of his office. Held: The specification was fatally defective. United States v. Tucker, 9 C.M.A. 587, 26 C.M.R. 367 (1958).

(4) Document alteration. The specification alleged that accused "knowingly and willfully" attempted to alter an official correspondence by attempting to erase certain words. Held: No offense. C.M.A. stated:

> The absence of an allegation of criminality in the above specification is immediately apparent.... The act ... does not constitute criminal conduct without an allegation that the attempt was made without authority or was otherwise wrongful.... While a plea of guilt admits the facts alleged, that does not cure a specification which does not exclude all hypotheses of innocence. Since within the terms of the specification there is room to find that the accused was acting under proper authority -- and this would be consistent with innocence ... the facts set forth are not sufficient in and of themselves to state an offense.

United States v. Julius, 8 C.M.A. 523, 524, 25 C.M.R. 27, 28 (1957).

(5) Mail tampering. A specification alleged that the accused wrongfully opened a package addressed to another person before it was received by the other person, in violation of article 134. Held: No offense, due to failure to allege it was "mail matter." United States v. Lorenzen, 6 C.M.A. 512, 20 C.M.R. 228 (1955).

(6) Forgery. A "forgery" specification alleging an "intent to deceive" instead of an "intent to defraud" was fatally defective. These intents are not the same. The same specification also fatally failed to allege that the forgery would apparently operate to the legal prejudice of another. United States v. Wilson, 13 C.M.A. 670, 33 C.M.R. 202 (1963).

(7) Forgery. A specification alleging a forgery of a check omitted the customary words "which check would, if genuine, apparently operate to the legal prejudice of another." However, a photographic copy of the check was contained within the specification. Held: This fairly implied that he had forged an instrument "which would, if genuine, apparently operate to the legal prejudice of another." C.M.A. distinguished United States v. Wilson, supra, in that Wilson involved forgery of a credit reference, not a check. C.M.A. cited 23 Am. Jur. Forgery sec. 46: "If the instrument on its face shows its legal efficacy, there is no necessity for an allegation of any extrinsic matter to give the instrument alleged to have been forged any force and effect beyond what appears on its face." Nonetheless, C.M.A. admonished prosecutors to observe approved forms and thus not imperil the prosecution by raising avoidable questions about the sufficiency of the pleadings. United States v. Granberry, 14 C.M.A. 512, 34 C.M.R. 292 (1964). See also United States v. Schwarz, 15 M.J. 109 (C.M.A. 1983).

(8) Misbehavior before enemy. Under a charge of violating article 99, misbehavior before the enemy, the specification failed to expressly allege "before" or "in the presence of the enemy," an essential element of this offense, but it did allege that he was cowardly "while being

transported from the rear area to the front lines." Held: This did adequately allege an offense in violation of article 99. C.M.A. stated: "The charge and specification, by alleging the act, the cowardice, and the article charged, informed the accused of the precise offense involved. The use of the words 'to the front lines' in the specification certainly carry some connotation of the presence of enemy units.... While not condoning the carelessness with which the specification was drafted, we hold it to be sufficient as a matter of law." United States v. Smith, 2 C.M.A. 197, 7 C.M.R. 73 (1953).

(9) General order. In United States v. Bunch, 3 C.M.A. 186, 11 C.M.R. 186 (1953), a specification alleging that the accused did "violate a lawful order ...", previously held fatally defective because it did not contain words importing criminality (i.e., that he "wrongfully" violated the order), was held by C.M.A. to state an offense. The Court of Military Appeals stated that "(a)n allegation charging the violation of a lawful general order implicitly contains a charge that the act committed by the accused was itself an offense and therefore unlawful. Further words ... would be repetitious...." Id. at 188. (Note also that C.M.A. also held that the order involved was not a general order). Additionally, the fact that the order allegedly violated was promulgated by one with the authority to issue a general regulation does not cure the pleading defect of failure to allege that the order violated was a general order. Also, since the specification failed to allege knowledge of the order on the part of the accused, it failed to state an offense under article 92(2), another lawful regulation. United States v. Koepke, 18 C.M.A. 100, 39 C.M.R. 100 (1969). The Koepke decision reaffirmed the decision in United States v. Baker, 17 C.M.A. 346, 38 C.M.R. 144 (1967), wherein the court stated:

> The court in question purports to allege the accused failed to obey a lawful order, set forth as "Division Order 5050.4".... It, however, fails to state the essential element of knowledge. United States v. Tinker, 10 U.S.C.M.A. 292, 27 C.M.R. 366. The staff legal officer and board of review,... opined that characterization of the order as a "Division" order was sufficient to imply the order was a "general" directive and, hence, to eliminate the requirement for allegation and proof of knowledge. See United States v. Tinker, supra. We disagree, for it is obvious that divisions publish many kinds of orders which may or may not be general in nature....

Id. at 345, 38 C.M.R. at 145.

(10) Article 85a(2) desertion. A specification alleged unauthorized absence with intent to prevent completion of basic training and useful service in violation of article 134. Held: This adequately alleged the offense of "desertion with intent to shirk important service" under article 85a(2), even though these words were not expressly alleged. "Desertion is desertion by whatever name described if its factual ingredients are specified on the charge sheet." The accused could not have possibly been misled. United States v. Deller, 3 C.M.A. 409, 414, 12 C.M.R. 165, 170 (1953).

(11) Accused as person to whom order applies. A specification alleged that the accused violated a brig order which order applied only to prisoners. The specification failed to expressly allege that the accused was a prisoner. Held: The specification implied that the accused was a prisoner by quoting him as telling a chaser on duty that he was not performing his duty and, hence, it stated an offense. United States v. Sell, 3 C.M.A. 202, 11 C.M.R. 202 (1953).

(12) Article 134 - lewd acts. A specification alleged that the accused "wrongfully committed an indecent, lewd and lascivious act with Lee Kap Yong by forcefully grabbing Lee and trying to embrace him." Held: This alleged an offense under article 134. The word "embrace" could mean an innocent act or one of the intimacies of love. "What meaning was intended by the pleader is apparent from the further allegation that the act charged was 'indecent, lewd and lascivious,' in other words, what was done by the accused was done in a manner repugnant to common propriety, and in a way which was designated to excite lust or sexual impurity. The additional allegation defines the character of the accused's act and excludes the possibility that the act was innocent. United States v. Annal, 13 C.M.A. 427, 429, 32 C.M.R. 427, 429 (1963).

(13) Article 133 - indecent acts. A specification alleged that the accused (an officer) did "wrongfully and indecently induce an enlisted man to disrobe in his presence and to pose in various stages of undress." A Board of Review held that this averment was insufficient to show "how or in what manner" the act charged was indecent. C.M.A. reversed. The specification stated an offense under article 133. "(T)he allegation actually defines the character of the accused's act." It properly alleged conduct unbecoming an officer and a gentleman. United States v. Holland, 12 C.M.A. 444, 445, 31 C.M.R. 30, 31 (1961).

(14) Mere blank-filling insufficient. While the drafters of the 1984 Manual took great pains to ensure the correctness of sample specifications, merely completing the blanks in a particular form of a specification set out in the Manual for Courts-Martial, 1984 does not guarantee a legally unassailable charge. The specification must set out every essential element of the offense, either directly or by necessary implication. United States v. Strand, 6 C.M.A. 297, 20 C.M.R. 13 (1955); United States v. Fout, 3 C.M.A. 565, 13 C.M.R. 121 (1953). In Strand, the specification alleged that the accused caused to be issued a naval speedletter which informed the accused's wife of his death and which was signed by a false signature. Held: The specification failed to allege an offense, even though the MCM sample specification for forgery had been carefully followed. The instrument allegedly forged was not the proper subject of a forgery. It did not have apparent legal efficacy. See also United States v. Brice, 48 C.M.R. 368 (N.C.M.R. 1973) and United States v. Randolph, 49 C.M.R. 336 (N.C.M.R. 1974) for a discussion of the fatally defective use of the sample specification for riot.

(15) Pleading violations of Federal statutes. Even following precisely the words of a statute may not suffice if the language quoted from the statute fails to allege all the elements of the offense prohibited by the statute. United States v. Doyle, 3 C.M.A. 585, 14 C.M.R. 3 (1954), wherein the accused was prosecuted under Article 134, UCMJ, for a violation of 18 U.S.C. § 643, failure of a government custodian to account for funds.

The specification cited the Federal statute and used its language to describe the accused's conduct. Nonetheless, C.M.A. held that the specification failed to state an offense because it did not allege that the failure to account was willful. Although the statute did not use the word "willful," willfulness was found by the court to be an element of the offense. In another case, the court held that the specification was defective because it failed to allege the use of a telephone or other instrument of commerce in communicating a bomb threat, an allegation essential to the legal sufficiency of a specification charging a violation of a Federal statute proscribing such threats [18 U.S.C. § 844(e)]. United States v. Mayo, 12 M.J. 286 (C.M.A 1982).

(16) Article 129 - burglary. In United States v. Hoskins, 17 M.J. 134 (C.M.A. 1984), a burglary specification failed to include the word "break," substituting instead the word "burglariously." C.M.A. held that the specification was fatally defective. The words "break and enter" are essential and cannot be replaced by the word "burglariously" which is used to imply the intent with which a breaking and entering is committed.

b. Adequately informs the accused of what allegations must be met. The specification must be specific enough to identify the particular incident or conduct giving rise to the charge against the accused. After reviewing all the factual and procedural circumstances of the case, appellate courts will evaluate the specification in terms of whether it contains sufficient information about the alleged offense not to mislead the accused and thus enable him to prepare a defense. See United States v. Karl, 3 C.M.A. 427, 12 C.M.R. 183 (1953).

(1) Specific dates. Failure to allege the specific date of an offense is ordinarily not prejudicial, unless it misleads the accused. In United States v. Marker, 1 C.M.A. 393, 3 C.M.R. 127 (1952), a specification alleged that the accused wrongfully constructed and unlawfully occupied a house from August 1950 to about March 1951. This was held to be specific enough not to mislead the accused. An exception to this general rule is the offense of unauthorized absence. Failure to allege the specific duration of the offense may affect the permissible maximum punishment authorized to be imposed. United States v. Krutsinger, 15 C.M.A. 235, 35 C.M.R. 207 (1965).

(2) Failure to name purchasers. A specification alleged "... did ... wrongfully sell to four military personnel on board. . certain instruments (described)...." At trial, the accused pleaded guilty and made no request for further information. The Board of Review held it not to be specific enough to apprise the accused of what he must defend against because the purchasers were not identified. C.M.A. reversed. "... An insertion of the names of the individuals to whom the sales were made would have rendered the specification more definite and certain ... " but, ".. (t)he period was identified, the place of sales was mentioned, and every necessary ingredient was included except the names of the four purchasers. These could have been identified readily had the Government been required to prove the allegations and had the accused wanted more specific information, a motion could have been made." United States v. Karl, 3 C.M.A. 427, 12 C.M.R. 183 (1953).

(3) Description of stolen property. A specification alleged "... did ... attempt to steal personal property of some value, the property of Kenneth R. Clowdus." Upon arraignment, the defense counsel requested further particularity of the specification as to the nature of the personal property involved. The law officer denied the request. Held: This was prejudicial error. C.M.A. stated: "The modern tendency has been toward allowing the pleading of legal conclusions and the elimination of detailed factual allegations from counts charging misconduct. The phrase 'personal property' may well suffice to allege the subject of an attempted larceny.... But resort to such pleading is always subject to a motion for further particularization.... It was well within its (the Government's) power to allege that the accused had sought to steal a footlocker, a locker and its contents, or the contents of a footlocker." United States v. Williams, 12 C.M.A. 683, 31 C.M.R. 269 (1962). But see United States v. Krebs, 20 C.M.A. 487, 43 C.M.R. 327 (1971), in which C.M.A. upheld a specification which alleged "goods of a value of about $1,768.00," and United States v. Alcantara, 18 C.M.A. 372, 40 C.M.R. 84 (1969) (larceny of "foodstuffs").

(4) Disjunctive pleading. A specification alleged "did ... wrongfully appropriate, lawful money and/or property of a value of about $755.51...." Held: Even though accused pleaded guilty, this disjunctive specification is too vague as to permit affirming a conviction. United States v. Autrey, 12 C.M.A. 252, 30 C.M.R. 252 (1961).

c. Will the specification and record protect the accused against former jeopardy? A person has the right to refuse to be tried a second time for the same offense. For example, unless the specification and record are sufficiently detailed to identify a particular theft, an accused could be tried a second time for the same theft, without being able to establish that he or she had already been tried for that theft. Thus, by specifically identifying the incident or conduct with which the accused has been charged, the specification protects against former jeopardy.

(1) Example. A specification alleged that the accused did at "... Austin, Texas, and Bergstrom Air Force Base, Texas, from on or about 1 April 1959 to on or about 30 September 1959, wrongfully use marijuana...." Held: Sufficient. "The allegations of place and time are general, but they can be considered with the evidence in the record of trial; together they would be entirely sufficient to protect the accused against another prosecution for the same acts." Furthermore, the court found that denial of the defense motion for relief in the nature of a bill of particulars lacked merit because the defense presumably had a copy of the article 32 investigation and the substance of the evidence recorded therein provided the defense with the information it requested on the motion. United States v. Means, 12 C.M.A. 290, 294, 30 C.M.R. 290, 294 (1961). Of course, such a general allegation of time is usually unwise. Means could probably have successfully asserted former jeopardy against a subsequent prosecution for any marijuana use at Austin, Texas, or Bergstrom Air Force Base during the period of 1 April 1959 to 30 September 1959.

(2) Example. A specification alleged, "... did ... during the period from 11 August 1952 to 11 September 1952, wrongfully sell to four military persons on board ... certain ... military permits (described) ...." Held: Sufficient. There is "... no substantial reason to hold that the record would

not prevent a second prosecution for the same offense. If perchance there were other sales between the two dates, the accused does not stand to be prejudiced as his conduct in selling unauthorized passes is the source of the disorder and the sales during the particular period involved are grouped into one offense. Any other sales not mentioned could not be the predicate for another disorder as a plea of once in jeopardy would bar any prosecution for similar acts during the same period." United States v. Karl, supra, at 430, 12 C.M.R. at 186.

0205 DEFECTS IN PLEADING (Key Numbers 953-964, 971)

A. Misdesignation

1. Ordinarily harmless error. Ordinarily, a misdesignation in the charge of the article of the code violated constitutes harmless error. See United States v. Hutcheson, 312 U.S. 219, 85 L.Ed. 788, 61 S.Ct. 463 (1941). For example, in United States v. Deller, 3 C.M.A. 409, 12 C.M.R. 165 (1953), a specification actually alleged an offense of desertion with intent to shirk important service, but was charged as a violation of Article 134, UCMJ, instead of Article 85, UCMJ. Held: Harmless error. Reviewing authorities could correct the error by approving the conviction as a violation of article 85. C.M.A. stated: "The offense alleged at trial depends not primarily on the particular statute under which it is laid, but on the facts which are alleged. This is true despite the perfectly sound assertion that in unusual cases a statutory reference may be necessary to a proper understanding of the charge." Id. at 413, 12 C.M.R. at 169.

2. Governed by the specification. Thus, criminality is governed by the contents of the specification and not by the article under which it is charged. United States v. Fout, 3 C.M.A. 565, 13 C.M.R. 121 (1953); United States v. Deller, supra; United States v. Rios, 4 C.M.A. 203, 15 C.M.R. 203 (1954); United States v. Julius, 8 C.M.A. 523, 25 C.M.R. 27 (1957). In United States v. Olson, 7 C.M.A. 460, 22 C.M.R. 250 (1957), a violation of Article 104, UCMJ, was charged when a violation of Article of War 81 should have been charged, since the offense occurred prior to the effective date of the UCMJ (although it was tried after the UCMJ was effective). Held: The two articles were quite similar and the accused was not misled by this misdesignation in the charge. Hence, the error was not prejudicial.

3. Incorrect citations of statutes, orders, or regulations. If the specification incorrectly cites a statute, order, or regulation allegedly violated by the accused, such misdesignation is harmless error unless the accused has been misled. See, e.g., United States v. Ekenstam, 7 C.M.A. 168, 171, 21 C.M.R. 294, 297 (1956), in which C.M.A. stated:

> . . . (A)n incorrect designation of a statute or regulation violated by the accused does not invalidate the specification of a charge. If the conduct is proscribed by another regulation and "no additional or different principle of law is required to support the conviction and the accused has no burden of defense which he did not have at trial," he is not harmed by the incorrect designation.

In Ekenstam, C.M.A. held that the conduct alleged in the specification might have violated two different regulations (a statute and a Navy custom) and the defenses available to the accused would vary depending on the statute, regulation, or custom in issue. Accordingly, the court held that the lack of specificity was misleading to the accused and fatal.

B. Failure to state an offense. A court-martial has no jurisdiction to try a specification which fails to allege an offense. The proceedings are a nullity with respect to such a defective specification. Regardless of plea, evidence, failure to move for appropriate relief or to dismiss, or attempted waiver at trial, a specification which fails to state an offense can be attacked for the first time on appeal. United States v. Karl, 3 C.M.A. 427, 12 C.M.R. 183 (1953); United States v. Julius, 8 C.M.A. 523, 25 C.M.R. 27 (1957). However, when a specification is attacked for the first time on appeal, construction is extremely liberal. See United States v. Watkins, 21 C.M.R. 208 (C.M.A. 1986).

C. Lack of specificity. A specification lacks specificity when, even though it sufficiently alleges an offense, it is vague or ambiguous in a material allegation. The extent of appellate relief will be largely determined by whether or not relief was requested at trial and whether the specification states an offense. United States v. Steele, 2 C.M.A. 379, 9 C.M.R. 9 (1953).

1. Relief requested at trial. If the accused requests further particularity at trial and it is not granted, it may be held that prejudicial error was committed.

a. Example: A specification alleged that the accused did " ... attempt to steal personal property of some value, the property of ... Clowdus." Upon arraignment, the accused requested, but was denied, further particularity as to the nature of the "personal property" allegedly stolen. Held: Denial of the request for further particularity was prejudicial error and C.M.A. reversed the conviction, stating: "A rehearing may be held upon a properly amended specification...." United States v. Williams, 12 C.M.A. 683, 686, 31 C.M.R. 269, 272 (1962) (emphasis from case).

b. Contra-example. In United States v. Means, 12 C.M.A. 290, 30 C.M.R. 290 (1961), the specification alleged wrongful use of marijuana at two different places and during a six-month period, and the accused requested, but was denied, further particularity upon arraignment. C.M.A. held the defect to be harmless error since the record of the article 32 investigation showed the circumstances of the charge, including the dates and places of the separate acts by the accused. Hence, "denial of the motion did not deprive the accused of any information required to assist him in preparation of his defense." In United States v. Paulk, 13 C.M.A. 456, 32 C.M.R. 456 (1963), however, the specification on its face was sufficient, but the defense counsel was aware that it might be duplicitous and requested clarification at trial. The accused was denied particularization and was

> ... merely informed orally that the Government intended to rely on one or all of the various theories which it had embodied in the count. A generalized reply of this nature, under the circumstances depicted in this record, does not discharge the burden of the United States to

> particularize a general averment of criminal conduct, especially when the count in question is so phrased as to permit the prosecution to range widely through proof of different offenses in order to satisfy the fact finders of accused's guilt. In short, the purpose of a bill of particulars is to narrow the scope of the pleadings and not to enlarge it.

Id. at 458. Denial of the defense's motion for appropriate relief was deemed prejudicial error.

2. No request at trial for relief. If the accused does not request further particularity at trial, the deficiency will ordinarily be deemed waived and nonprejudicial. See United States v. Sell, 3 C.M.A. 202, 11 C.M.R. 202 1953); United States v. Reid, 12 C.M.A. 497, 31 C.M.R. 83 (1961); United States v. Simpson, 2 C.M.A. 493, 9 C.M.R. 123 (1953); United States v. Steele, 2 C.M.A. 379, 9 C.M.R. 9 (1953); United States v. Marker, 1 C.M.A. 393, 3 C.M.R. 127 (1952); United States v. Lawrence, 3 C.M.A. 628, 14 C.M.R. 46 (1954); United States v. Schumacher, 2 C.M.A. 134, 7 C.M.R. 10 (1953); and United States v. Karl, 3 C.M.A. 427, 12 C.M.R. 183 (1953).

D. Duplicity. If the specification is duplicious, but the accused does not move at trial for appropriate relief, it usually will not be deemed prejudicial error.

1. Continuing course of similar conduct. If the duplicity is merely a continuing course of similar conduct [e.g., repeated use of marijuana as in United States v. Means, 12 C.M.A. 290, 30 C.M.R. 290 (1961)], denial of relief at trial will usually be held nonprejudicial. The duplicity redounds to the accused's benefit because, instead of being prosecuted for several separate specifications, the accused is criminally liable for only one.

2. Distinct offenses. When the duplicity consists of different types of offenses (e.g., housebreaking and larceny), denial of appropriate relief, such as election, will usually be held to have been prejudicial. United States v. Luckey, 18 C.M.R. 604 (A.B.R. 1954). See United States v. Harris, 4 C.M.R. 444 (1952). Denial of relief may also be prejudicial when the specification alleges several distinct, but similar, crimes which are not part of a continuing course of conduct (e.g., larceny of a watch from A, a radio from B, and money from C at separate times). See United States v. Paulk, 13 C.M.A. 456, 32 C.M.R. 456 (1963).

E. Variance

1. Defined. A variance consists of a difference between the pleadings and the proof, and may be fatal or immaterial. A variance is fatal if the evidence establishes a different offense than that which was pleaded, or if the accused was misled by the variance from the pleading, or if it disables the accused from later effectively asserting former jeopardy. United States v. Hopf, 1 C.M.A. 584, 5 C.M.R. 12 (1952). Thus, C M.A. has established a dual test to determine whether the accused has suffered substantial prejudice such that the variance is fatal: "(1) has the accused been mislead to the extent that he has been unable to prepare for trial, and (2) is the accused fully protected against another prosecution for the same crime. Id. at 586, 5 C.M.R. at 14.

2. Examples:

a. Identity of victim. In United States v. Hopf, supra, the specification alleged that the accused did, at a certain place and date, with intent to do bodily harm, commit an assault on Han Sun U, a Korean male, by striking him on the body with a dangerous weapon, to wit: a .30 caliber carbine. The accused was found guilty, except for the words "Han Sun U," substituting therefor the words "an unknown." Held: Variance not fatal. This was the same offense, the accused was not misled, and the evidence in the record was sufficiently descriptive of the victim to protect the accused against being tried again for the same offense. A variance is fatal only when it operates to substantially prejudice the accused's rights.

b. Identity of owners of property. In United States v. Craig, 8 C.M.A. 281, 24 C.M.R. 28 (1957), the specification stated that accused stole certain sums of money alleged to be the property of certain individuals. Evidence showed that the property belonged to the U.S. Government. Accused was Unit Savings Officer (Army) and the individuals named were owners in the Army Savings Plan. But the sums of money became government property on delivery to accused. Held: The variance was not fatal since the accused, under the circumstances, could not have been surprised by the evidence at trial and was adequately protected by the record against double jeopardy. See also United States v. Lee, 23 C.M.A. 384, 50 C.M.R. 161, 1 M.J. 15 (1975). In United States v. Turner, 27 M.J. 217 (C.M.A. 1988), the court held that nonfatal variance may occur when the government proves that a person other than the one alleged in the specification owned or possessed the property which was stolen.

c. Identity of authority issuing order. In United States v. Marsh, 3 C.M.A. 48, 11 C.M.R. 48 (1953), the specification alleged that accused willfully disobeyed an order of Captain S. Evidence showed that the order violated was issued "by command of LtGen H." Held: This constituted a fatal variance between the pleading and the proof. C.M.A. stated: "Undoubtedly, under a proper factual situation an intermediate may, by placing his authority behind the order, become the one whose order is violated. But to do this, the intermediate officer must have authority to issue such an order in his own name and it must be issued as his, not as representative of the superior." Id. at 51. Compare United States v. Johnson, 12 C.M.A. 710, 31 C.M.R. 296 (1962), where accused agreed to the amendment of the specification and "stipulated" to the change.

d. Substance of accused's statement. In United States v. Dotson, 17 C.M.A. 352, 38 C.M.R. 150 (1968), the accused was charged with perjury for allegedly falsely saying he never had a tool in his hand when A and B were in his room. At trial, the proof established that his false testimony was to the effect that he did not use a tool in the fight with C (while A and B were present). Held: Fatal variance. C.M.A. stated: "It is fundamental ... that the allegation of criminality and proof must correspond; that regardless of what is disclosed by the evidence, proof, in order to be effectual, must correspond substantially with the allegations of the pleadings." Id. at 354, 38 C.M.R. at 152.

e. Unit in unauthorized absence cases. Specification alleged accused was unauthorized absentee from his assigned unit. Evidence showed he was absent from place of confinement in another location. Held: Not a fatal

variance because an individual can be temporarily assigned to another activity for administrative reasons and still be absent from parent unit if absent from temporary unit. Additionally, the defense failed to object or move for relief, and there was no evidence that the accused was misled. United States v. Mitchell, 7 C.M.A. 238, 22 C.M.R. 28 (1956). Compare United States v. Ivory, 9 C.M.A. 516, 26 C.M.R. 296 (1958), where accused was charged with desertion from 5th Regiment, Overseas Replacement Draft. The trial counsel moved to amend the unit but the defense objected, arguing it was a fatal variance, and that it could not be amended at trial, but that the charge could be dismissed and the accused retried on a different specification. The convening authority withdrew the charges, had them redrafted, and referred them to another court for trial. At second trial, same defense counsel moved to dismiss because of former jeopardy. Held: No former jeopardy. Whatever error occurred was deliberately induced by the defense. (See opinion of Judge Ferguson dealing witl fatal variance). But cf. United States v. Pounds, 23 C.M.A. 153, 48 C.M.R. 769 (1974), which distinguished Ivory.

0206 LESSER INCLUDED OFFENSES (LIO). Article 79, UCMJ; Part IV, para. 2, MCM, 1984. (Key Numbers 551, 950, 957-961, 965, 966)

A. Text of article 79: "An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein."

B. Manual definition of lesser included offense. A lesser included offense is:

1. An offense necessarily included in the offense charged;

2. an attempt to commit the offense charged; or

3. an attempt to commit an LIO of the offense charged.

4. Example. The accused is charged with desertion, but may be found guilty of the following lesser included offenses:

a. Unauthorized absence (article 86);

b. attempted desertion (article 85); or

c. attempted unauthorized absence (article 80).

C. Test for lesser included offenses. C.M.A. has adopted the following test to determine whether one offense is lesser included within another:

> The basic test to determine whether the court-martial may properly find the accused guilty of an offense other than that charged is whether the specification of the offense on which the accused was arraigned alleges fairly, and the proof raises reasonably, all elements of both crimes so that they stand in relationship of greater and lesser offenses.... Both aspects of the basic test of allegation and proof must be satisfied.

United States v. Thacker, 16 C.M.A. 408, 410, 37 C.M.R. 28, 30 (1966).

1. The "basic test" adopted by C.M.A. is similar to, if not the same as, the fact-based test adopted by the Ninth Circuit Court of Appeals in United States v. Johnson, 637 F.2d 1224, 1239 (9th Cir. 1980), wherein that court stated:

> There must also be an inherent relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.... The requirement that an "inherent relationship" exist between the greater and lesser offenses is intended to preclude abuse of the lesser included offense doctrine by defense counsel seeking to appeal to the jury's sense of mercy by requesting instructions on every lesser offense arguably established by the evidence.

Id. at 2060.

2. The Court of Military Appeals has also devised the concept of "fairly embraced" as an additional test to determine whether offenses may stand in the relationship of greater to lesser. In the leading case, United States v. Baker, 14 M.J. 361 (C.M.A. 1983), the accused was charged with, among other things, aggravated assault and communicating a threat. While these offenses would appear to be separate for both findings and sentencing, the court said:

> Assuming both offenses arise out of one transaction, one offense may be a lesser-included offense of another offense in two situations: First, when one offense contains only elements of, but not all the elements of the other offense; second, where one offense contains different elements as a matter of law from the other offense, but these different elements are fairly embraced in the factual allegations of the other offense and established by evidence introduced at trial. (Emphasis added.)

Though this fairly embraced test exists nowhere in the 1984 Manual, except in the discussion to R.C.M. 1003(c)(1)(C), with which it is in conflict, the court has continued to use it to determine the existence of lesser included offenses in a wide variety of cases. See United States v. McKinnie, summary disposition, 15 M.J. 176 (C.M.A. 1983) (aggravated assault and communicating a threat fairly embraced); United States v. Doss, 15 M.J. 409 (C.M.A. 1983) (breach of restriction and unauthorized absence fairly embraced); United States v. Hollimon, 16 M.J. 164 (C.M.A. 1983) (communication of a threat and rape fairly embraced because of overlapping wording in specification); and United States v. Zubko, 18 M.J. 378 (C.M.A. 1984) (possession and use are fairly embraced). Other examples of cases decided using the concept of fairly embraced may be found in subsequent chapters of this study guide.

D. "Necessarily included" doctrine. A lesser offense is necessarily included in a greater offense, if all of the elements of the lesser offense are necessary elements of the greater offense. In other words,

> (i)f the specification neither expressly contains an averment of the element of an offense nor fairly implies its existence, it cannot be said to be included within the actual crime charged, for, although proven by the evidence, it is not then "stated." ... Put differently, the standard for determining if one violation of the code is included in another is whether, considering the allegations and the proof, "each requires proof of an element not required to prove the other." United States v. Maginley, 13 U.S.C.M.A. 445, 447, 32 C.M.R. 445, 447 (1963).

1. Restated. If offense "A" is composed of necessary elements 1, 2, 3, 4, and 5, and if elements 1, 3, and 5 also by themselves constitute offense "B," then offense "B" is an LIO of the greater offense "A." For example, desertion includes the following elements:

a. Absence from unit, organization or place of duty;

b. without proper authority;

c. with intent to remain away therefrom permanently.

Inasmuch as elements (a) and (b) fully describe the offense of unauthorized absence [Art. 86(3)], unauthorized absence is an LIO of desertion.

2. Converse. If a lesser offense includes any necessary element not required of the greater offense (and not fairly alleged in the specification) (see para. C., infra.), the lesser offense would not be an LIO. Therefore, if offense "A" is composed of necessary elements #1, #2, #3 and #4, and offense "B" is composed of necessary elements #3, #5, #6 and #7, then "B" is not an LIO of "A" because "B" requires proof of elements not necessary to "A." See United States v. Oakes, 12 C.M.A. 406, 30 C.M.R. 406 (1961) (larceny is not a lesser included offense of wrongful sale of government property).

3. General v. specific intent. In United States v. Douglas, 2 M.J. 470 (A.C.M.R. 1975), the Army Court of Military Review reaffirmed the position taken by the Court of Military Appeals in 1959 in finding that a specific intent offense may be a lesser included offense of a general intent offense. United States v. King, 10 C.M.A. 465, 28 C.M.R. 31 (1959). For example, assault with the intent to inflict grievous bodily harm is a specific intent offense which can be a lesser included offense of the general intent offense of rape.

E. Four patterns of LIO's

1. Elements of lesser offense identical. In this situation, all of the elements of the lesser offense are included and necessary parts of the greater offense, and the elements are identical. In such a situation, the LIO is missing at least one element contained in the greater offense. For example:

ROBBERY	LARCENY
(a) Wrongfully taking personal property of another,	(a) Wrongfully taking personal property of another,
(b) With intent to permanently deprive,	(b) With intent to deprive permanently,
(c) Property has value,	(c) Property has value.
(d) Taking from the person or in the presence of victim,	
(e) Against his will by force and violence or by putting him in fear.	

2. LIO contains all elements of the greater offense - but one or more of the LIO elements is factually less serious. For example, each of the elements of housebreaking is factually less serious than similar elements of burglary.

BURGLARY	HOUSEBREAKING
(a) Breaking and entering,	(a) Unlawful entering; no breaking required,
(b) Into the dwelling house of another,	(b) Into any building or structure of another,
(c) In the nighttime.	(c) At any time.
(d) With intent to commit felony-type offense (articles 118 through 128) therein.	(d) With intent to commit any criminal offense therein.

3. LIO contains all elements of the greater offense - but mental element is lesser. For example:

LARCENY	WRONGFUL APPROPRIATION
(a) Wrongfully taking personal property of another,	(a) Wrongfully taking personal property of another,
(b) With intent to deprive permanently,	(b) With intent to deprive temporarily,
(c) Property has value.	(c) Property has value.

4. LIO is fairly embraced within the greater offense. In this situation, the lesser included is factually included within the greater offense. For example:

BREAKING RESTRICTIONS	UNAUTHORIZED ABSENCE
(a) Restricted to limits of unit	(a) Absents self from unit,
(b) Restricted by one with authority,	(b) Without authority,
(c) Accused knew limits,	(c) For a certain period.
(d) Accused went beyond limits without authority,	
(e) C to P; SD	

F. Significance of the LIO determination. R.C.M. 307c(4) says what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges. Therefore, lesser included offenses should not be plead when the greater offense is also charged. R.C.M. 907(b)(3)(B) indicates that the proper remedy for pleading an LIO is the dismissal before pleas are entered unless it is necessary to enable the prosecution to meet contingencies of proof through trial, review and appellate action. United States v. Jennings, 20 M.J. 223 (C.M.A. 1985). See section 0207 of this study guide.

1. Identification of lesser included offenses within a charged offense allows defense counsel to plead an accused guilty by exceptions and substitutions. Naval Justice School Aids to Practice IV-5. R.C.M. 910(a)(1). The government still has the option of proceeding on the greater offense.

2. A military judge or members may find an accused guilty of any lesser included offense reasonably raised by the evidence admitted on the greater offense (see section 0206.G.2 below). This is accomplished by exceptions and substitutions. R.C.M. 918(a)(1) and (2); Appendix 10-1, MCM, 1984. Where members are involved, findings of a lesser included offense requires a carefully tailored findings worksheet. Military Judges' Benchbook, DA Pam 27-9 (1982), appendix B-1.

3. Distinguishing which LIO's are raised by evidence on the greater offense impacts on both instructions and defenses, such as the statute of limitations. See section 0206.G below.

G. Instructions on LIO's. The military judge must sua sponte instruct on elements of any lesser included offense that is reasonably raised by the evidence. This sua sponte obligation exists even in the absence of a request by the defense counsel for such instructions. United States v. Moore, 12 C.M.A. 696, 31 C.M.R. 282 (1962); United States v. Jackson, 6 M.J. 261 (C.M.A. 1979); United States v. Staten, 6 M.J. 275 (C.M.A. 1979).

1. Instructions on elements of LIO's. The judge must not only mention lesser included offenses, but must also give complete instructions on the elements of each LIO raised by the evidence. United States v. Clark, 1 C.M.A. 201, 2 C.M.R. 107 (1952) (Law officer mentioned that negligent homicide was LIO of voluntary manslaughter, but did not instruct on elements of negligent homicide. Held: Prejudicial error). See also United States v. Richardson, 2 C.M.A. 88, 6 C.M.R. 88 (1952); United States v. Moore, 12 C.M.A. 696, 31 C.M.R. 282 (1962); and United States v. Jackson, 6 M.J. 261 (C.M.A. 1979). R.C.M. 920(e)(2), MCM, 1984; DA Pam 27-9 (1982), para. 2-28 Note 2 and preceding paragraph.

2. "Reasonably" raised by the evidence. The military judge does not judge the credibility of the evidence raising the LIO, since that is the province of the court members. For example, the accused, during the Dominican Republic intervention of 1965, allegedly murdered a civilian. At his trial, the accused testified that he believed the victim was a "rebel" and that he fired in front of the victim to prevent his escape, not meaning to hit him. The law officer refused to instruct the members on the LIO of involuntary manslaughter, although he did instruct on voluntary manslaughter. C.M.A. held that failure to instruct on involuntary manslaughter was prejudicial error. Although the accused's theory was, in light of the other evidence, at best implausible, C.M.A. stated that it was up to the triers of fact to make that determination upon properly drawn instructions. United States v. Moore, 16 C.M.A. 375, 36 C.M.R. 531 (1966); United States v. Rodwell, 20 M.J. 265 (C.M.A. 1985). The possibility of an LIO may be raised by the testimony of prosecution or defense witnesses, including solely the testimony of the accused. United States v. Staten, 6 M.J. 275 (C.M.A. 1979); United States v. McCray, 19 M.J. 528 (A.C.M.R. 1984) (credibility of witnesses does not raise LIO's).

3. Express defense waiver of LIO instruction. The Court of Military Appeals has indicated that "[t]he doctrine of waiver would be invoked if the record demonstrated 'an affirmative, calculated, and designed course of action by a defense counsel before a general court-martial' to the end that he led the presiding law officer to believe he did not desire instructions on lesser included offenses." The court went on to state that "only the rare case will fall into the exceptional class ... (which) discloses ... an express request for lack of instructions regarding lesser degrees ... (or) "deluding" tactics which might (lead) the law officer to conclude that the defense counsel consented to such an omission." United States v. Moore, supra, at 700 and 701, 31 C.M.R. at 286 and 287 citing United States v. Mundy, 2 C.M.A. 500, 9 C.M.R. 130 (1953). It is, however, uncertain whether the defense can expressly waive an LIO instruction when the LIO is nonetheless reasonably raised by the evidence. United States v. Staten, 6 M.J. 275 (C.M.A. 1979). In fact, the court ruled in United States v. Jackson, 6 M.J. 261 (C.M.A. 1979), that a military judge had a sua sponte obligation to instruct and, at footnote 5, the court reemphasized the importance of the trial judge instructing on "all factual issues and offenses raised ... in the evidence" out of a "desire that the factfinding function be exercised to the fullest by the jury -- the essence of a fair trial. See United States v. McGee, 1 M.J. 193 (C.M.A. 1975)." When Jackson is read in conjunction with Staten, the court appears to be saying that the military judge, despite requests or objections by the defense, must sua sponte instruct on all lesser included offenses he, in his discretion, deems appropriate. Just prior to the Staten and Jackson cases, the Navy Court of Military Review decided United States v. Head, 6 M.J. 840 (N.C.M.R. 1979). In Head, the Navy court

held that mere failure to object to proposed instructions or to request instructions on lesser included offenses does not constitute a waiver of such instructions. A waiver may be invoked, however, where there is the intent to mislead the military judge as described in the Moore and Mundy cases, supra. (Note: It is opined that the issue of LIO instructions is not analogous to the misconduct not charged instruction discussed in United States v. Wray, 9 M.J. 361 (C.M.A. 1980) wherein C.M.A. decided that acceding to a defense request not to give an instruction on such a collateral issue was not error by the military judge.) Similarly, where the defense counsel objects to the giving of instructions on lesser included offenses, but the military judge exercises his discretion and refuses to accede to the defense objections, his failure to instruct on all of the lesser included offenses raised by the evidence is error and cannot be considered as a desire of the defense such that those lesser included offenses not instructed upon are considered waived. United States v. Johnson, 1 M.J. 137 (C.M.A. 1975). In United States v. Duggan, 4 C.M.A. 396, 15 C.M.R. 396 (1954), however, C.M.A. did recognize an effective express waiver of an LIO instruction in appropriate tactical situations, such as where the defense was presenting an "all-or-nothing" defense, such as alibi, or where the defense contended that the prosecution's case was too weak to convict the accused of anything. In such situations, the defense would assert that an LIO instruction would be tantamount to an invitation to the members to return a compromise verdict. Allowing the members to make findings as to an LIO not reasonably raised is tantamount to a finding of not guilty. United States v. Waldron, 11 M.J. 36 (C.M.A. 1981).

H. Multiple LIO's. Some offenses consist of two or more lesser included offenses. In such a case, if the LIO's are reasonably raised by the evidence and properly instructed upon, the court can convict the accused of more than one LIO, instead of the greater compound offense charged. For example: Accused was charged with robbery "by means of force and violence, stealing from the presence of Lehr, against his will, seventy Deutsch Marks and a Volkswagen taxi of a value of about . . . the property of Kuchta." The Court found the accused not guilty of robbery, but guilty of: (1) Wrongful appropriation of the alleged items; and (2) assault and battery on Lehr. Held: The findings were permissible. These two offenses were LIO's of robbery, were raised by evidence and instructed upon. Even though they were merged in the one specification, they can be treated as though they were separately alleged. United States v. Calhoun, 5 C.M.A. 428, 18 C.M.R. 52 (1955). This is, of course, a rather rare occurrence. This type of duplicious finding should be carefully distinguished from duplicious pleading which is prohibited. Duplicious findings, therefore, are permitted while duplicious pleading is not. United States v. Francis, 15 M.J. 424 (C.M.A. 1983); Part IV, para. 10c(11), MCM, 1984.

I. Is one offense an LIO of another? In most cases, it is rather simple to determine if one offense is an LIO of another. After carefully evaluating the factual context of the charges, the following method will be helpful.

1. Examine the Manual for Courts-Martial. Part IV, MCM, 1984, lists the common lesser included offenses for most of the offenses under the code. If the offense is listed as an LIO of the other, it is probably an LIO. However, test it against the rules in Part IV, para. 2, MCM, 1984, and examine the cases and other sources to be certain. If the offense is not listed as an

LIO of the other, it nevertheless may actually be an LIO of the other. It is never safe to assume that it is not an LIO merely because it is not listed as an LIO in the MCM. The MCM is intended as a guide only and was not designed to be all-inclusive.

2. Research the case law and texts. This is especially important in the area of the concept of offenses which are "fairly embraced," either because of facts or pleadings. United States v. Baker, 14 M.J. 361 (C.M.A. 1983); United States v. Glenn, 20 M.J. 172 (C.M.A. 1985). It is essential to research the concept for each offense since the case law may differ depending upon the offense. Compare Glenn, supra, with United States v. Grasha, 20 M.J. 220 (C.M.A. 1985), for example.

3. If not listed in Part IV, MCM, 1984, and if research fails to help, apply the concepts of the "necessarily included doctrine" and argue the facts of the case.

J. LIO's through special pleading. See para. 158, MCM, 1969 (Rev.).

1. Pleading may raise LIO's. Although a particular offense is not usually an LIO of another, it may become an LIO under the particular circumstances of a case. Therefore, the facts of the charged offense may be pleaded in such a way as to raise an LIO. For example, in United States v. Hollimon, 16 M.J. 164 (C.M.A. 1983), the ordinarily separate offenses of rape and communicating a threat were held to be multiplicious (merged for findings) because the threat was alleged as the force used to overcome the victim's will in the rape specification.

2. Need for careful research. Diligent research of the case law is absolutely essential in order to avoid prejudicial error in failing to instruct on an LIO raised by the evidence. C.M.A. has generally taken a liberal view in deciding what is an LIO of an offense charged, ultimately basing its decision on a careful analysis of the facts of each case. See, e.g., United States v. King, 10 C.M.A. 465, 28 C.M.R. 31 (1959); United States v. Jackson, 6 M.J. 261 (C.M.A. 1979); and United States v. Rodwell, 20 M.J. 264 (C.M.A. 1985). However, in United States v. McKinley, 27 M.J. 78 (C.M.A. 1988), the court held that in circumstances where (a) the Manual states that there are no LIO's, (b) the judge rules that there are no LIO's, and (c) the counsel agree that there are no LIO's, such a ruling becomes the law of the case.

K. Findings of guilty to an LIO. When a court finds an accused not guilty of the offense charged, but guilty of an LIO, this is done by the process of exception and substitution. The court deletes (i.e., excepts) the words in the specification that pertain to the offense charged and substitutes language appropriate to the LIO. For example, the accused is charged with burglary but found guilty of housebreaking. The charge sheet might read:

> Charge: Violation of the Uniform Code of Military Justice, Article 129.
>
> Specification: In that Seaman Buster G. Force, U.S. Navy, USS Neversail, on active duty, did onboard Naval Education and Training Center, Newport, Rhode Island, on or about 10 April 1987, in the nighttime, unlawfully break and enter the dwelling house of Captain Arnold (NMN) Hab, U.S. Navy, with intent to commit rape therein.

The court, in returning its findings, would announce that it found the accused:

> Of the Specification of the Charge: GUILTY, except for the words "unlawfully break and enter," and "rape," substituting therefore the words "unlawfully enter" and "a criminal offense, to wit: communicating a threat, respectively; of the excepted words, NOT GUILTY: of the substituted words, GUILTY. Of the charge: NOT GUILTY, but GUILTY of a violation of Article 130, UCMJ.

0207 MULTIPLICITY AND JOINDER (Key Numbers 957-960)

A. General concept. "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4) (Discussion), MCM, 1984. See United States v. Posnick, 8 C.M.A. 201, 24 C.M.R. 11 (1957). The unreasonable multiplication of charges is known in military law as "multiplicity." Competing with the rule against multiplicity is the rule on joinder which, although giving the convening authority broad discretion, advises: "ordinarily all known charges should be referred to a single court-martial." R.C.M. 601(e)(2) (Discussion), MCM, 1984. Compounding the joinder problem was the prohibition in the MCM, 1969 (Rev.), against the joinder of major and minor offenses. Part IV, para. 26c, MCM, 1969 (Rev.). This major/minor prohibition is conspicuously and purposefully absent from the MCM, 1984. See appendix 21, MCM, 1984, analysis to R.C.M. 601(e). Accordingly, to satisfy the multiplicity and joinder requirements of the 1984 Manual, the government should refer all known charges to trial and yet avoid an unreasonable multiplication of charges.

B. Rationale

1. Joinder - The policy behind the requirement that all known offenses be tried together is to protect the accused from a succession of prosecutions, and possibly a succession of Federal convictions. "Being called upon to defend himself in a number of trials may be harassing to a defendant and be a disadvantage far outweighing the prejudice which may result from a joinder." Remington and Joseph, Charging, Convicting, and Sentencing the Multiple Criminal Offender, 1961 Wis. L. Rev. 528, 538. See Ciucci v. Illinois, 356 U.S. 571 (1958), where the accused argued unsuccessfully that his four separate trials for the murders of his wife and three children on the same occasion were motivated by a prosecutorial desire to keep prosecuting until the death penalty was achieved. (The death penalty was adjudged in the third trial.) Another policy favoring the joinder of all known offenses is the economy of a single trial. It should be recognized, however, that the joinder of offenses may also operate to the detriment of an accused. This may be so for several reasons:

> ....(1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of various crimes charged and find guilt when, if considered separately, it would not so find.

Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964). Although Drew was decided on the basis of statutory interpretation, there is authority for the proposition that an improper joinder can be violative of due process. See United States ex rel Evans v. Follette, 364 F.2d 305 (2d Cir. 1966). Accordingly, it would appear that defense counsel who fear any of the evils described in Drew v. United States, supra, might object on due process grounds to the referral of all known charges to a single court-martial.

2. Multiplicity - The policy supporting the prohibition against the unreasonable multiplication of charges is essentially the policy against improper joinder discussed in Drew v. United States, supra. Additionally, there is the danger that a multitude of similar and/or interrelated charges may overcomplicate the task of sorting and evaluating the evidence and applying the reasonable doubt standard. The resulting confusion could lead to an unjust acquittal ("This much confusion must mean reasonable doubt."), or an unjust conviction ("It's unclear what really happened, but where there's smoke there's fire, so the accused must be guilty of something."). Also, overcharging can be abused as an improper vehicle for encouraging harsher sentences. See United States v. Hughes, 1 M.J. 346, n.3 (C.M.A. 1976). Based on these rationales, the current charging practice is to refer to a single court-martial all known, nonmultiplicious offenses. The balance of this chapter will discuss multiplicity in its various forms and applications.

C. Multiplicity defined. The question of multiplicity involves an examination of the charges to determine if they describe separate offenses. Offenses which are separate are separately chargeable and punishable. The courts have used several tests to determine whether offenses are separate. R.C.M. 1003c(1)(C).

1. The test of reasonableness. The basis for all of the multiplicity tests is the test of reasonableness. The basic rule is against the unreasonable multiplication of charges. What is reasonable will depend upon the particular facts of each case, and is very largely a matter of judgment. Trial counsel and convening authorities must use good common sense and not try to carve out every possible specification. The classic example of unreasonableness is United States v. Sturdivant, 13 M.J. 323 (C.M.A. 1982), where the findings and sentence were set aside when the government referred ten separate drug specifications arising out of one incident in which the accused agreed to purchase drugs. United States v. Sheffield, 20 M.J. 957 (A.F.C.M.R. 1985) (one collision causing the instantaneous death of two people is separately chargeable).

2. The Baker tests. In the case of United States v. Baker, 14 M.J. 361 (C.M.A. 1983), the Court of Military Appeals discussed multiplicity in great detail. In Baker, the court pointed out that, over the years, various tests have been used to determine whether offenses were separate or multiplicious. The court indicated that offenses were multiplicious where inconsistent findings of fact would be required to find guilt and that an offense which was a lesser included offense would be multiplicious with the charged offense.

a. Inconsistent findings. In United States v. Cartwright, 13 M.J. 174 (C.M.A. 1982), the accused's convictions of larceny of property and of receiving the same stolen property were reversed "because of the inconsistency between finding that an accused took property from the owner and

finding that he received it from some other person who had taken the property from the owner." Id. at 175. These offenses are multiplicious because the charges appear to make two inconsistent crimes out of one event.

b. Lesser included offenses. In United States v. Stegall, 6 M.J. 176 (C.M.A. 1979), the accused struck a superior NCO with a cane. He was charged with, and convicted of, assault and battery in violation of Article 128, UCMJ, and assault upon a superior NCO in violation of Article 91, UCMJ. The Court of Military Appeals reversed, holding that, since the article 128 assault was clearly a lesser included offense of the article 91 offense, they were multiplicious and the convictions of both could not stand. If one uses the traditional lesser included offense analysis discussed in chapter I of this text, the lesser included offense test for multiplicity is fairly straightforward. Difficulty arises, however, due to the fact that in United States v. Baker, 14 M.J. 361 (C.M.A. 1983), the Court of Military Appeals has added another category of offenses which will be considered lesser included offenses for multiplicity purposes. The court held that, where an offense would not normally be considered a lesser included offense because it contained elements which were different from the greater offense, it could still be a lesser included offense if "these different elements are fairly embraced in the factual allegations of the other offense and established by evidence introduced at trial." Baker, id. at 368 (emphasis added). This new, "fairly embraced" category of lesser included offenses and the court's application of the "fairly embraced" standard have created a great deal of confusion in the military law of multiplicity. See United States v. Zupancic, 18 M.J. 387, 391-95 (C.M.A. 1984) (Cook, Judge, concurring in part and dissenting in part). See discussion at section 0206 above.

c. The Navy court has recently attempted to enunciate a bright-line test for multiplicity and to resolve the apparent inconsistencies among the rule, the discussion to R.C.M. 1003(C)(1)(c), the analysis to the rule, and the case law. In United States v. Jones, 20 M.J. 602 (N.M.C.M.R. 1985), one panel of the Navy court held that R.C.M. 307(c)(4), 907(b)(3)(B) and 1003(c)(1)(C), when read together, clearly adopt the multiplicity doctrine of the Federal courts as set forth in Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed. 306 (1932), and that neither the discussion nor the Court of Military Appeals can change that. Panel Two of the Navy court has continued to decide cases in accordance with this rule. United States v. Meace, 20 M.J. 972 (N.M.C.M.R. 1985). Panel One of the Navy court has followed both Baker and Blockburger and Panel Three, in an unpublished case, appears to be following Baker. The Court of Military Appeals has resolved this conflict by reversing the N.M.C.M.R. panel which handed down Jones. See United States v. Jones, 23 M.J. 301 (C.M.A. 1987), wherein C.M.A. held that the President, in adopting the 1984 MCM, did not reverse the holding in Baker, supra.

d. What follows are just a few examples of apparently inconsistent applications of the "fairly embraced" test.

(1) Rape cases

(a) United States v. Glover, 16 M.J. 397 (C.M.A. 1983). The accused was charged with rape and aggravated assault. Held: Not multiplicious, since the rape specification did not fairly embrace the aggravated assault.

(b) United States v. Hollimon, 16 M.J. 164 (C.M.A. 1983). The accused was charged with rape and communicating a threat, although the threat pleadings made no reference to the rape and vice versa. Held: Multiplicious, since the threat was shown by the evidence to be fairly embraced.

(2) Assault cases

(a) United States v. Baker, 14 M.J. 361 (C.M.A. 1983). The accused was charged with aggravated assault and communicating a threat. Held: Not fairly embraced.

(b) United States v. McKinnie, 15 M.J. 176 (C.M.A. 1983). The accused was charged with the same offenses as in Baker, supra. Held: Multiplicious.

3. Congressional intent. The most recent decisions in this area have focused much more on congressional intent than prior decisions have. For example, in Ball v. United States, 470 U.S. ___, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985), the Supreme Court held that an accused found in possession of an illegal firearm could not be convicted of both possessing and receiving that same firearm. After scrutinizing the legislative history of the two statutes in question, the Supreme Court ascertained that Congress did not intend such a result, citing Blockburger approvingly as a statutory rule of construction to aid in determining Congress' intent. In United States v. Hickson, 22 M.J. 146 (C.M.A. 1986), the Court of Military Appeals considered the impact of Blockburger and Ball in a prosecution for rape and adultery arising from one act of intercourse. While reaching different conclusions on the issue, both Chief Judge Everett and Judge Cox focused on the intent of Congress, suggesting this may be the key to multiplicity disputes in the future.

D. Applying the multiplicity tests. Because of the still developing body of law applying the "fairly embraced" multiplicity standard, it is virtually impossible to provide any concrete guidance to counsel at the trial level who must apply these rules. The astute defense counsel will probably want to move to dismiss as multiplicious any multiple charges which all arise from a single event or episode. The trial counsel will want to ensure that the pleadings in such cases do not on their face embrace any other offenses and should always be prepared to fall back to the reasonableness test. The nature of the facts and the facts which are plead may decide the issue.

E. Examples. While not all-inclusive, the following is a list of recent appellate applications of the multiplicity tests.

1. Drug offenses. Possession of marijuana is multiplicious for findings purposes with possession of the same marijuana with intent to distribute. United States v. Forance, 12 M.J. 312 (C.M.A. 1981). Similarly, possession and introduction of same drug are multiplicious for findings. United States v. Hendrickson, 16 M.J. 62 (C.M.A. 1983). Possession and distribution of same drug are multiplicious for findings. United States v. Zubko, 18 M.J. 378 (C.M.A. 1984). Introduction and possession with intent to distribute are not multiplicious since each have element(s) not common to the other. United States v. Zupancic, 18 M.J. 387 (C.M.A. 1984). A difficult, unresolved question

arises where a different quantity of drug is involved. For example, A possesses an ounce of marijuana and distributes that ounce to B. Clearly, these offenses (possession and distribution) are multiplicious. Zubko, supra. Assume instead that A possesses a pound of marijuana and distributes one ounce to B. Is A's possession of at least the remaining 15 ounces a separate and distinct crime? Although this specific issue has not been addressed, a panel of the Army Court of Military Review has held in a similar situation that the possession of the remaining cache of marijuana at a different time and place was an offense separate from the earlier distribution. United States v. McGary, 12 M.J. 760 (A.C.M.R. 1981), petition denied, 13 M.J. 120 (C.M.A. 1982); United States v. Snook, summary disposition, 19 M.J. 282 (C.M.A. 1984); United States v. Cirabisi, summary disposition, 19 M.J. 269 (C.M.A. 1984) (distribution and subsequent possession of the "left-overs" from the stash are not multiplicious for findings); United States v. Isaacs, 19 M.J. 220 (C.M.A. 1985) (distribution of marijuana and possession of cache across town are not multiplicious for findings or sentence). Compare United States v. Care, 20 M.J. 216 (C.M.A. 1985) (introduction and possession are multiplicious though separated by one day). Accord, United States v. Johnson, 26 M.J. 686 (A.C.M.R. 1988), charging accused's act in "lining out" three portions of cocaine on a mirror, rolling up a dollar bill, and offering the substance to three other soldiers in three specifications of distribution was unreasonably multiplicious for findings. Specifications alleging the use of marijuana and cocaine at the same time and place were multiplicious for findings where both substances were contained in the same cigarette and consumed simultaneously. United States v. White, 28 M.J. 530 (A.F.C.M.R. 1989).

2. Absence offenses. Breaking restriction and unauthorized absence of more than thirty days are not multiplicious for findings. United States v. DiBello, 17 M.J. 77 (C.M.A. 1983). Compare United States v. Doss, 15 M.J. 409 (C.M.A. 1983) and United States v. Campfield, 20 M.J. 246 (C.M.A. 1985), in which breaking restriction and a short UA were found to be multiplicious. Citing DiBello, supra, C.M.A. has also held that missing movement and an absence of over thirty days are not "fairly embraced." United States v. Murray, 17 M.J. 81 (C.M.A. 1983). A short UA and a missing movement are "fairly embraced." United States v. Palmiter, 20 M.J. 90 (C.M.A. 1985); United States v. Baba, 21 M.J. 76 (C.M.A. 1985). Escape from custody and absence from unit have been held to be separate offenses, since one can escape from custody without absenting oneself from one's unit. United States v. Johnson, 17 M.J. 83 (C.M.A. 1983).

3. Property offenses. Willful damage to military property is not multiplicious with arson. United States v. Kotulski, 16 M.J. 43 (C.M.A. 1983). Writing bad checks is multiplicious with larceny of the property received in return for the checks. United States v. Allen, 16 M.J. 395 (C.M.A. 1983); United States v. Ward, 15 M.J. 377 (C.M.A. 1983). Loss of military property (article 108) is not multiplicious for findings or sentence with larceny (article 121) of the same property. United States v. West, 17 M.J. 145 (C.M.A. 1984). Larceny of automatic teller machine card and subsequent use of that card to withdraw money from owner's credit union account were not multiplicious. United States v. Fairley, 27 M.J. 582 (C.M.A. 1988), overruling United States v. Pulliam, 17 M.J. 1066 (A.F.C.M.R. 1984). United States v. Glenn, 20 M.J. 172 (C.M.A. 1985) held willful damage to military property, including, among other items, a building, was multiplicious with arson in which building was the

subject. Compare with United States v. Grasha, 20 M.J. 220 (C.M.A. 1985), where it was held that aggravated arson of an inhabited building was not multiplicious for findings with simple arson of some contents of that same building. Conviction for wrongful appropriation of a rental car, and dishonorable failure to pay a just debt by failing to return the car when due cannot both stand. Analogizing to the "waiver of tort" doctrine, the court allowed only the conviction for wrongful appropriation to stand. United States v. Hale, 28 M.J. 310 (C.M.A. 1989).

4. Offenses against the person. In United States v. Jean, 15 M.J. 433 (C.M.A. 1983), resisting apprehension was considered multiplicious for findings with simple assault. In United States v. Teeter, 16 M.J. 68 (C.M.A. 1983), a felony murder charge was held to be multiplicious for findings with premeditated murder and rape. In United States v. Hollimon, 16 M.J. 164 (C.M.A. 1983), communication of a threat was held to be "fairly embraced" within a charge of rape. In United States v. Glover, 16 M.J. 397 (C.M.A. 1983), the court found that an aggravated assault was not multiplicious with a charge of rape. In United States v. Baker, 14 M.J. 361 (C.M.A. 1983) and United States v. McKinnie, 15 M.J. 176 (C.M.A. 1983), the accuseds' were each charged with assault and communicating a threat. In Baker, the offenses were held to be separate; but, in McKinnie, they were found to be multiplicious and the threat charge dismissed. Two deaths from a one-car collision are not multiplicious. United States v. Sheffield, 20 M.J. 957 (A.F.C.M.R. 1985). Solicitation to commit murder is not multiplicious for findings with conspiracy to commit murder. United States v. Herd, 29 M.J. 702 (A.C.M.R. 1989).

5. Falsification offenses. Where an accused signed two false official records at the same time and place, and made the same false representation in each, the two offenses were multiplicious for findings purposes. United States v. Burris, 21 M.J. 82 (C.M.A. 1985).

F. Multiplicious pleading for contingencies of proof. One of the tests for multiplicity was the situation in which two offenses were pleaded, but inconsistent findings of fact would be required to find guilt of both offenses. United States v. Cartwright, 13 M.J. 174 (C.M.A. 1982) (conviction of larceny of property and of wrongful receipt of the same stolen property could not stand). An accused cannot both steal and wrongfully receive the same stolen property. There are times, however, when it is permissible for the government to charge offenses which would be multiplicious under the theory of inconsistent findings. Such multiplicious pleading is permitted in order to allow the government to prepare for contingencies of proof. The remedy available to the accused is dismissal of one offense after findings of guilt have been entered to the other.

1. Example. A is found in possession of recently stolen property. Although he had the means and opportunity to steal the property, there is no direct evidence which proves him guilty of the actual larceny. The government, relying on their circumstantial case, charges A with larceny and presents its evidence. In defense, A takes the stand, denies taking the property, but admits to obtaining it from the real thief -- knowing it to be stolen. Result: A is acquitted (assuming that his story creates a reasonable doubt). The government, for contingencies of proof, should have charged A with both larceny and receiving stolen property. The possibility of A's judicial confession to the other offense would be protected.

2. Example. B sells what she advertises as heroin to a government agent. Lab tests reveal that the substance was tooth powder. The government charges B with attempted distribution of heroin. B, at her trial, presents evidence that she knew all the time the substance was tooth powder. Result: Assuming that her story creates a reasonable doubt concerning her intent to distribute heroin, B will be acquitted. It would therefore have been wise for the government to have alleged both attempted distribution of heroin and larceny of the money received.

G. Multiplicity for sentencing. When an accused is found guilty of more than one offense, the maximum allowable punishment may be imposed for each separate offense. Offenses which are not separate for the purposes of computing the maximum punishment are referred to as being multiplicious for sentencing. The test for determining multiplicity for sentencing is broader than the previously discussed multiplicity tests. The 1984 Manual states, "offenses are not separate if each does not require proof of an element not required to prove the other." R.C.M. 1003(c)(1)(C), MCM, 1984. This test is the included offense test utilized by the Supreme Court in Blockburger v. United States, 284 U.S. 299 (1932). The discussion and analysis to R.C.M. 1003(c)(1)(C) indicate that the military test for sentencing multiplicity is broader and more complicated than the included offense analysis. The discussion to the rule points out that, even if each offense requires proof of an element not required to prove the other, they may not be separate for punishment purposes if the offenses were committed as the result of a single impulse or intent. R.C.M. 1003(c)(1)(C), discussion, MCM, 1984. Accordingly, offenses which are separate for purposes of findings may yet be multiplicious for purposes of sentencing because they arose as a part of a single intent or purpose. See United States v. Jones, 20 M.J. 602 (N.M.C.M.R. 1985) for a resolution of the issue employing the Blockburger rationale.

1. Example. The accused absents himself from his unit for a period of one year and does so by intentionally missing the movement of his ship. These offenses of UA and missing movement are separate for findings purposes. United States v. Murray, 17 M.J. 81 (C.M.A. 1983). Because they arose out of a single intent, they would merge into one offense for the purposes of punishment. United States v. Posnick, 8 C.M.A. 201, 24 C.M.R. 11 (1957).

2. Example. The accused is found guilty of larceny and of unlawfully opening the mail. The evidence shows that the mail was opened in order to commit the larceny. The offenses would be multiplicious for sentencing and therefore not separately punishable. R.C.M. 1003(c)(1)(C), discussion, MCM, 1984.

3. Exceptions

a. Conspiracy and the crime which is the object of the conspiracy are always separate for findings and sentence. Part IV, para. 5c(8), MCM, 1984.

b. If it is clear that the intent of the legislature was to make crimes separately punishable, the legislative intent will be honored in spite of the fact that the offenses were the result of a single impulse or intent. United States v. West, 17 M.J. 145 (C.M.A. 1984) (larceny and wrongful disposition of the same military property held to be separate for findings and sentence based on legislative intent). See also Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

CHAPTER III

ABSENCE OFFENSES

(Key Numbers 655-678, Desertion, Unauthorized Absence, or Missing Movement)

0300 UNAUTHORIZED ABSENCE, Article 86, UCMJ, and Part IV, para. 10, MCM, 1984

A. Text of article 86. "Any member of the armed forces who, without authority --

1. fails to go to his appointed place of duty at the time prescribed;

2. goes from that place; or

3. absents himself or remains absent from his unit, organization, or place of duty at which he is required to be at the time prescribed;

shall be punished as a court-martial may direct."

B. Types of article 86 offenses. There are essentially three types of article 86 offenses. They are:

1. Article 86(1) -- failure to go to an appointed place of duty;

2. Article 86(2) -- going from an appointed place of duty; and

3. Article 86(3) -- unauthorized absence from unit, organization or place of duty.

C. Purpose of article 86. The purpose of this article is "to cover every case not elsewhere provided for in which any member of the armed forces is through his own fault not at the place where he is required to be at the prescribed time." Part IV, para. 10c(1), MCM, 1984.

0301 FAILURE TO GO TO APPOINTED PLACE OF DUTY

A. Elements

1. That a certain authority appointed a certain time and place of duty for the accused;

2. that the accused knew of that time and place;

3. that the accused failed to go to his appointed place of duty at the prescribed time; and

4. that the accused's failure to go to his appointed place of duty at the time prescribed was without authority.

B. Element 1. That a certain authority appointed a certain time and place of duty for the accused.

1. An order. Underlying the first element of this offense is some form of order to the servicemember to be at a certain place at a certain time. Accordingly, many of the issues relating to orders offenses discussed in Chapter IV of this text will be applicable to this first element of article 86(1). For example, if the person appointing the place for duty had no lawful authority to do so, the accused who failed to go to that place would have a defense related to the unlawfulness of orders. See section 0401.A of this text.

2. A "certain time." There must be a certain time appointed by the order. Although it may not be absolutely necessary (yet it is strongly recommended as the better practice) to allege the time in the failure to go specification, evidence must be presented by the trial counsel to establish that a certain specified time was appointed. For example: The accused was told to perform hard labor without confinement at the orderly room and in the barber shop "after duty." The evidence showed that the performance of hard labor was normally begun between 1800 and 1830; however, the proof did not show that the accused was aware of this custom. Held: Not a violation of article 86(1), because the order did not sufficiently define a certain time for the accused to report. United States v. VanLierop, 4 C.M.R. 758 (A.B.R. 1952).

3. A "certain place." There must be a certain place appointed by the order.

a. The "certain place" of duty in article 86(1) and 86(2) has generally been considered to be a very narrowly defined geographical area as opposed to the organizational area concept of article 86(3). In United States v. Bement, 34 C.M.R. 648, 649 (A.B.R. 1964), the board said that:

> ...the phrase "place of duty" as used in Article 86, subdivisions one and two, refers to a specifically appointed place such as the first floor of Barracks A ..., whereas the phrase "other place of duty", as used in conjunction with the terms "unit" and "organization" in Article 86, subdivision (3), is a generic term designed to cover the broader concepts of a general place of duty as might be contained within the terms "command", "quarters", "station", "base", "camp", or "post."

The board determined that a specification which alleged "going from appointed place of duty, to wit: Headquarters and Headquarters Company, 1st Brigade, 4th Armored Division" was fatally defective since it alleged a general place of duty as opposed to a specific place of duty. Although a later Navy Board of Review, in dictum, disagreed with the rationale by determining that article

86(1) is not limited to a particular place within the geographical limits of the command, but applies to a general place of duty as well, the board felt constrained to acknowledge that an order to report to a unit (1st Tank Battalion) included therein the duty to present oneself to "The Personnel Administrative Headquarters." United States v. Federer, NCM 67-1125 (N.B.R. 9 June 1967). The board appears to have followed the concept of "specific place" as a requirement for the failure to go offense, and merely decided to consider an order to a unit to be constructively an order to its headquarters.

(1) Even before the board in Bement clearly enunciated the requirements for article 86(1) and 86(2), the case of United States v. Skipper, 1 C.M.R. 581, 584 (C.G.B.R. 1951) stood for the proposition that "The offense of failing to go to an appointed place of duty contemplates only a specific place of duty such as muster, the No. 1 fireroom, etc., and not a failure to go to his unit, his general place of duty" (emphasis added). In Skipper, the accused had been ordered to report for duty aboard a USCG lightship and had been convicted for a failure to go due to his late arrival. Reversal was based on the determination that a ship was a general place of duty.

(2) In United States v. Reese, 7 C.M.R. 292 (A.B.R. 1953), the board decided that the offense of failure to go to an appointed place of duty under article 86(1) is not a lesser included offense of absence without authority from unit or organization under article 86(3). The Coast Guard Board of Review made the same determination with regard to the offense of going from an appointed place of duty under article 86(2) in United States v. Sears, 22 C.M.R. 744 (C.G.B.R. 1956). See United States v. Sturkey, 50 C.M.R. 110 (A.C.M.R. 1975) (*specification alleging failure to go to* "3d Platoon, Company C ..." is not specific enough to state an offense).

(3) The place of duty may be a rendezvous for several persons or for only one person. Examples would include muster of restricted men, duty as helmsman on the bridge, relief of the quarterdeck watch.

(4) The place of duty need not be on a military reservation. Example: Duty driver is ordered to pick up the commanding officer, who is returning from TAD, at Boston Airport at 1600.

(5) Note: If no certain time or no certain place was designated, but the accused did have a specified duty to perform, he may still be charged with dereliction of duty under article 92(3).

(6) Note: The fact that a specification alleges a general rather than a specific place of duty does not mean that a finding of guilty to an unauthorized absence from a unit, organization, or general place of duty under article 86(3) can be returned. Article 86(3) is not a lesser included offense of either article 86(1) or (2). United States v. Sheehan, 1 C.M.A. 532, 4 C.M.R. 124 (1952); United States v. Sturkey, supra.

b. Not only must the government prove that the accused was ordered to a specific place of duty, but that specific place of duty must also be alleged in the specification. United States v. Skipper, 1 C.M.R. 581 (C.G.B.R. 1951).

C. Element 2. That the accused knew of that time and place.

1. Paragraph 165, MCM, 1969 (Rev.), states: "A place of duty is not appointed within the meaning of this article unless the accused knew or had reasonable cause to know, of the order purporting to appoint that place of duty." (Emphasis added.)

2. Apparently the drafters of the 1969 MCM intended to make one criminally liable for failure to go to an appointed place of duty even without actual knowledge on the part of the individual as long as the lack of knowledge is due to some fault on the part of the individual. In United States v. Curtin, 9 C.M.A. 427, 26 C.M.R. 207 (1958), C.M.A. held that actual knowledge of the order allegedly violated was required in order to convict an accused of an article 92(2) offense. The court there disregarded the 1951 MCM provision, which permitted conviction under article 92(2) on proof of the accused's "reasonable cause to know" of the order. In light of the relationship between orders offenses and offenses under article 86(1) and (2), the logical extension would be to require actual knowledge for a failure to go conviction. Although C.M.A. has not extended this rule to article 86(1) and (2) offenses, a requirement of actual knowledge has been imposed for "missing movement" charges under article 87. United States v. Chandler, 23 C.M.A. 193, 48 C.M.R. 945 (1974). As in Curtin, the court in Chandler seems to have disregarded the 1969 MCM provision of "reasonable cause to know." The drafters of the 1984 MCM have concluded that the Chandler and Curtin reasoning applies to article 86(1) and (2) and have deleted the "reasonable cause to know" language from Part IV, para. 10, MCM, 1984. Accordingly, actual rather than constructive knowledge is the requirement.

3. Proof of actual knowledge can be demonstrated by the use of direct or circumstantial evidence.

a. Direct evidence is evidence tending directly to establish a fact in issue (i.e., "Did the accused know of the order?"). Example: A statement by the accused wherein he admits that he knew about the order.

b. Circumstantial evidence is evidence tending to establish a fact from which a fact in issue can be inferred. Example: The accused's division officer testifies that he announced at quarters that the accused should report to sick bay at 1300 for a flu shot and that the accused was present at quarters at the time the announcement was made. In United States v. Zammit, 16 M.J. 330 (C.M.A. 1983), C.M.A. held that the Court of Military Review erred in determining that the evidence did not indicate whether the appellant had actual knowledge of his duty to muster. Indeed, circumstantial evidence of his actual knowledge was presented when it was shown that the accused had appeared at several musters before missing several more, and that, when the muster schedule was changed, the accused signed the document indicating his awareness of the new hours.

D. Element 3. That the accused failed to go to his appointed place of duty at the time prescribed.

1. A violation of article 86 is not a continuing offense. The offense is complete at the moment the accused fails (without authority) to appear at his appointed place of duty at the prescribed time. The fact that the accused later went to his appointed place of duty is not a defense. His subsequent arrival is solely a matter in extenuation and mitigation.

2. There is no requirement that the accused leave naval jurisdiction. A servicemember could violate article 86(1) without leaving his or her ship or unit. For example, a sailor on board a ship at sea can be charged for failing to appear at a scheduled muster at a specific time and place.

E. Element 4: "Without authority"

1. Failure to allege "without authority." The failure of the accused to go to his appointed place of duty at the time prescribed is not, in and of itself, criminal. Criminal liability attaches only when the failure to go is without the permission to be absent from some authority competent to give that permission. Service personnel are frequently absent from duty without being in violation of article 86 (e.g., leave, liberty, sick call, TAD, etc).

a. Failure to allege the absence to be "without authority" results in a fatally defective specification if challenged at trial, since it fails to state an offense under the UCMJ. The word "absent" does not, of itself, import criminality. United States v. Fout, 3 C.M.A. 565, 13 C.M.R. 121 (1953); United States v. Hale, NCM 73-2279 (N.C.M.R. 8 Nov 1973); United States v. Tepsitch, 5 C.M.R. 212 (A.B.R. 1952).

b. Failure to allege an offense is a nonwaivable ground for dismissal. The motion can be entertained at any stage of the proceedings. R.C.M. 907(b)(1)(B), MCM, 1984. However, should the failure to state an offense issue be raised for the first time on appeal, the omission of the words "without authority" do not automatically require reversal. In United States v. Watkins, 21 M.J. 208 (C.M.A. 1986), the court adopted the post-conviction liberal construction rule of the Federal system. The rule is that, when the sufficiency of a pleading is first challenged on appeal, a conviction thereon will be reversed only on a showing of prejudice to the accused or when it cannot within reason be construed to charge a crime. See United States v. Thompson, 356 F.2d 216 (2d Cir. 1965), cert. denied, 384 U.S. 964, 86 S.Ct. 1591, 16 L.Ed.2d 675 (1966) and United States v. Hart, 640 F.2d 856, cert. denied, 451 U.S. 992, 101 S.Ct. 2334, 68 L.Ed.2d 853 (1981). In Watkins, supra, the issue was first raised on appeal after a guilty plea pursuant to a pretrial agreement. During providency, the accused admitted that his absence was without authority. Under the specific facts of the case, C.M.A. allowed the conviction to stand and overruled Fout, supra, to the extent that it conflicts with the holding in Watkins. See also United States v. Miller, 48 C.M.R. 446 (N.C.M.R. 1973).

2. Proving "without authority"

a. In order to obtain a conviction for failure to go under article 86(1) (and similarly for absence offenses under article 86(2) and (3)), there must be proof that the failure to go was without authority. Merely pr ing an absence does not prove that an offense has been committed. The

government must prove beyond a reasonable doubt at trial that the absence was not authorized by anyone competent to authorize it. For example: The accused, an Army OC, was convicted by GCM of several failures to go to class formations. The trial counsel sought to prove his case with testimonial evidence alone. Four officers testified as to the absences, but none testified that the absences on two specific dates were without authority. Held: The findings of guilty as to those two dates were disapproved because there was no evidence, either direct or circumstantial, that the accused did not have permission to be absent. United States v. Neff, 9 C.M.R. 332 (A.B.R. 1953).

b. In the ordinary article 86(3) absence case, the unauthorized absence is proved by introducing a page from the accused's service record. (See section 0303.D, below). With regard to article 86(1) and (2) offenses, however, no service record entries are made in the Marine Corps for unauthorized absences of less than 24 hours duration. In the Navy, absences of less than one day's duration are recorded on page 13 of the service record, but should there be no entry because of administrative error, or in Marine cases, it may become necessary, by other means, to prove the negative fact--that the absence was not authorized -- in addition to the fact of the absence itself. Usually there are witnesses who can testify as to the absence itself. Note also that, under Mil.R.Evid. 803(6) and (8), it may be possible to use muster chits, morning reports, or other documents which may qualify as public records or business records to establish the offense. The lack of authority for the absence, on the other hand, may be proved by calling the immediate superiors of the accused as witnesses. They should be asked such questions as: (1) "Did you give the accused permission to be absent?" and (2) "To your knowledge, did anyone else in authority give the accused permission to be absent?"

F. Pleading problems. See Part IV, para. 10f(1), MCM, 1984.

1. The specific place of duty must be alleged in the specification (e.g., the officers' galley, the quarterdeck, aftersteering, etc).

2. The words "without authority" must be alleged.

3. It is not necessary to allege the time that the accused was to be at his place of duty, but it is good practice to do so and is highly recommended.

4. The duration of the unauthorized absence usually is not alleged when this sample form specification is used.

5. Sample specification: In that Ensign Ernst E. Eveready, U.S. Navy, USS Notawake, on active duty, did, on board USS Notawake, at sea, on or about 30 January 19CY, without authority, fail to go at the time prescribed to his appointed place of duty, to wit: 0800 junior officer of the deck watch on the bridge of the USS Notawake.

G. Instruction. See Military Judges' Benchbook, DA Pam. 27-9 (1982), Inst. No. 3-13.

0302 GOING FROM APPOINTED PLACE OF DUTY

A. Elements

1. That a certain authority appointed a certain time and place for duty for the accused;

2. that the accused knew of that time and place;

3. that the accused went from his appointed place of duty; and

4. that the accused's going from his appointed place of duty was without authority.

B. Similarity with article 86(1). Elements (1), (2), and (4) above are the same as discussed in section 0301, infra, failure to go to appointed place of duty. Element (1) requires a lawful order to go to a certain place at a certain time. Element (2) requires actual knowledge of that order. Element (4) requires that the going from be without authority. Element (3) is what differentiates article 86(1) and (2) offenses.

C. "Went from"

1. This element requires proof of two facts. First, the prosecution must prove that the accused reported for or assumed the duty he was required to perform. Second, the prosecution must prove that, after he reported for or assumed his duties, he left that place of duty. For example, in United States v. McKittrick, 8 C.M.R. 848 (A.B.R. 1953), the accused, who had been assigned duties as a barracks guard, was convicted under article 86(2). The trial counsel failed to prove that the accused had ever reported for duty. Held: Evidence insufficient, findings of guilty set aside. This case is a good example of a situation where the person drafting the specifications could properly have charged both 86(1) and 86(2), in order to provide for contingencies of proof.

a. The fact that the accused returns to his place of duty after he has once left it does not constitute a defense, but it is matter in extenuation. Article 86(2) is not a continuing offense. It is an instantaneous crime and is complete when the accused, without authority, goes from his appointed place of duty.

b. Failure to perform the duty. If the accused in fact goes to his appointed place of duty at the time prescribed, but fails to enter upon the duty there required of him, he is not guilty of either article 86(1) or Article 86(2). Reason: He has neither failed to go nor has he left. For example: Seaman Sinbad is ordered to report to the galley for duty as a messman at 0500, 1 Jan 19CY. Sinbad reports at that place and time and immediately sits on the deck and falls asleep against a sack of potatoes. At 0600, the chief cook awakens Sinbad and asks him why he hasn't peeled the spuds, his customary initial task. Sinbad replies that he was too sleepy. Query: An offense? Answer: He could be charged with dereliction of duty (article 92(3)), but not failure to go or going from place of duty.

2. Article 86(1) and (2) are general intent or negligence type of offenses (i.e., the accused need not have specifically intended to leave his place of duty). Example: Sinbad assumes his watch in the crow's nest as lookout. Elated because the ship is en route to the port where his favorite girl lives, he pulls a bottle out of his jumper and celebrates. He falls into the ocean as a result of the liquor. Query: Has he violated article 86(2)? Answer: Yes.

D. Pleading. Sample specification, Part IV, para. 10f(1), MCM, 1984.

Specification: In that Signalman Third Class Wana I. Sign, U.S. Navy, USS Frankenstein, on active duty, did, on the signal bridge on board USS Frankenstein, at sea, without authority, go from his appointed place of duty, to wit: 0800 to 1200 signal bridge watch.

Note that, for article 86(2) offenses, it is not common practice to include the time the accused went from his duty, since usually the exact time he left will not be known.

E. Instruction. Military Judges' Benchbook, DA Pam. 27-9 (1982), Inst. No. 3-13.

0303 ABSENCE FROM UNIT, ORGANIZATION OR PLACE OF DUTY

A. Elements

1. That, at the time and place alleged in the specification, the accused absented himself from his unit, organization, or other place of duty; and

2. that such absence was without authority.

B. Unit, organization, place of duty. These terms have been defined by custom of the Navy and Marine Corps, but they are not sharply defined. For example, Naval Air Station, Lemoore, California, may properly be considered either an "organization" or a "place of duty."

1. Unit. This term usually connotes a lower level military entity, such as a company, squadron, or battery in the Marine Corps, or a ship or flying squadron in the Navy.

2. Organization. This term usually connotes a larger command or middle level military activity, such as an air group in the Marine Corps, or a shore command in the Navy.

3. Place of duty. The place of duty referred to in article 86(3) has been interpreted as being broader than the specific place of duty provided for in article 86(1) and (2). United States v. Brown, 24 C.M.R. 585 (A.F.B.R. 1957). It is not limited to a specific place, but instead includes a general place of duty. The reason is because the term "place of duty" in article 86(3) follows the general terms unit and organization, as compared to the specific term "appointed place of duty" in article 86(1) and (2), which applies only to a specific part of the ship or command and not to a "unit" or organization."

4. Misdesignation of term "unit," "organization," or "place of duty." Misdesignation of a unit as an organization, an organization as a place of duty, etc., is not a fatal error. United States v. Brown, supra; United States v. Jack, 7 C.M.A. 235, 22 C.M.R. 25 (1956). Specificity when using the various designations, though, is preferred since that will best apprise the accused of what he must defend against and protect him from the possibility of former jeopardy.

This misdesignation variance should not be confused with the situation where a specific unit is plead but the government proves an entirely different unit, which is a fatal defect in the specification. United States v. Walls, 1 M.J. 734 (A.F.C.M.R. 1975); United States v. Rosen, 45 C.M.R. 728 (A.F.C.M.R. 1972).

5. Determining the unit, organization, or place of duty of the accused

a. The unit, organization, or place of duty of an accused is an administrative determination made in accordance with the regulations of the servicemember's armed force. In the Navy and Marine Corps, the servicemember is generally attached, assigned, or joined to a specific unit or organization. That specific unit or organization is determined by looking at the personnel record of the accused for an entry indicating that the accused has been joined to the unit or organization (page 5 in Navy service records; page 3 in Marine Corps service records). Thus, a person is normally said to be attached to that ship or station which "holds" his service record. This choice of words is unfortunate. United States v. Walls, 1 M.J. 734 (A.F.C.M.R. 1975), discloses a potential problem where centralized administrative offices are used. In Walls, the accused was charged with UA from a central base personnel office rather than his new unit. A.F.C.M.R. held this to be a fatal defect because the naming of a particular organization as the accused's unit serves to both identify and limit the offense charged. It was a fatal variance to plead the CBPO and prove the new unit. Thus, while a person is normally attached to that ship or station which holds his records, the Navy's Pay/Personnel Administrative Support System (PASS), a consolidated administration and recordkeeping system, does not make the Navy member "attached" to the PASS Office. As a general rule, a member is attached to the ship or station to which he or she is administratively assigned for accounting purposes. (MILPERSMAN 3430100.8.)

b. A person en route between activities pursuant to permanent change of station order is considered to be attached to the activity to which he is ordered to report. Part IV, para. 10c(7), MCM, 1984. See United States v. Pounds, 23 C.M.A. 153, 48 C.M.R. 769 (1974). But see United States v. Stroud, 27 M.J. 765 (A.F.C.M.R. 1988). To determine the activity, unit, etc. to which accused is ordered to report, examine the wording of the permanent change of station orders.

c. Multiple units. It frequently happens that an accused actually belongs to more than one unit. For example, if a member has been assigned temporary additional duty (TAD), he is not detached from his permanent duty assignment but becomes a member both of his parent command and his TAD command. Absence of a servicemember from his TAD command makes him also absent from his parent command; therefore, "a specification

could allege an accused absent from either unit without running the hazards of fatal variance or, because of the dates alleged in the specifications, subject the accused to the possibility of double jeopardy." United States v. Mitchell, 7 C.M.A. 238, 240, 22 C.M.R. 28, 30 (1956).

6. Absent. In order to be "absent," there is no requirement that the accused be completely outside of naval jurisdiction. (See discussion infra on "Determining commencement and termination of UA" at section 0304.G.)

C. "Without authority." Same as in article 86(1) and (2) generally. Note, though, that as long as the accused has gone where an agent of the government has instructed him to go, he cannot be convicted of absence from his proper place of duty "without authority." In United States v. Davis, 22 C.M.A. 241, 46 C.M.R. 241 (1973), an agent of the government had told the accused to "go home and await orders." Although the accused "awaited orders" from June 27, 1969, until December 14, 1971, it was held that he could not be convicted of unauthorized absence. A similar holding was rendered in United States v. Hale, 20 C.M.A. 150, 42 C.M.R. 342 (1970) (accused, an officer, was told to wait at home for a port call to Vietnam that never came, but failed to report the fact for over a year). See also, United States v. Raymo, 23 C.M.A. 408, 50 C.M.R. 290 (1975) (unauthorized absence terminated when accused was ordered to report to the FBI and he did so, even though FBI released him); United States v. Williams, 23 C.M.A. 223, 49 C.M.R. 12 (1974) (accused was authorized by his commanding officer to attend a civilian court session that resulted in his being sentenced and sent to prison). In United States v. Vidal, 45 C.M.R. 540 (A.C.M.R. 1972), however, an accused given a 15-day delay en route to a new duty station was held to be obligated to find out himself where he was to go when he discovered he had been issued another soldier's orders. His conviction for UA was upheld.

D. Proof of absence. In the ordinary UA case, the inception of, termination of, and lack of authority for the absence are usually proved by putting in evidence the appropriate entry from the accused's service record, which contains the words "on unauthorized absence." This is a hearsay document which, if properly prepared and authenticated, is admissible under the "public records" exception to the hearsay rule. See Mil.R.Evid. 803(8). Thus, it usually is easy to present a prima facie case of an 86(3) offense. See United States v. Demings, 22 C.M.A. 483, 47 C.M.R. 732 (1973) (properly authenticated copies of entries in official records are competent evidence of the facts they recite and are sufficient in law to sustain a conviction of UA). If proper service record entries are not available, however, trial counsel will have to call witnesses to establish inception, termination and lack of authority. For the Navy, any unauthorized absence should be noted on page 13 of the service record as an administrative remark. An OCR document, the present page 6 of the enlisted service record was created to record unauthorized absences that exceed 24 hours, since those absences affect the unauthorized absentee's pay status. Accordingly, once an accused initially absents himself, that absence is recorded via a page 13 entry. As soon as the absence exceeds 24 hours, a page 6 entry is also made. See MILPERSMAN 5030310, 5030420; PAYPERSMAN 10373, 90435, and 90437. For Marines, no service record entries are made for unauthorized absences of less than 24 hours. Unauthorized absences in excess of 24 hours are recorded on page 12, Offenses and Punishments, of the service record. See IRAM para. 4013.2a(a). For samples of unauthorized absence entries on a Navy service record page 13 and 6, and a

Marine Corps service record page 12, see examples at the end of this chapter. Note that there may be other documents, such as muster chits, morning reports, and even other service record pages for Marines, which may be admissible under Mil.R.Evid. 803(6) and (8) as records of regularly conducted business activities or public records to establish the offense. These other nontestimonial sources of evidence concerning a UA offense may help to save or streamline prosecution of an offense where the main service record entries usually relied upon are inadmissible for some reason. See, e.g., United States v. Lewis, NCM 73-0058 (N.C.M.R. 26 Mar 1973) (military judge properly relied on an entry in page 3, Record of Service, of a Marine enlisted service record to prove UA inception date where the usual page 12 entry was ruled inadmissible). It must be remembered that public records are admissible as exceptions to the hearsay rule only if they are prepared in accordance with applicable regulations. United States v. Fowler, 48 C.M.R. 94 (A.C.M.R. 1973). In Fowler, the offered documents were not admitted because they had not been signed by the proper official. They thus constituted incompetent hearsay, even though there had been no objection by the defense. However, where a document is not admissible as an official (public) record, it often may be admitted as a business entry (a record of regularly conducted business activity). E.g., United States v. Mullins, 47 C.M.R. 828 (N.C.M.R. 1973) (a service record entry inadmissible as an official record due to an unauthorized signature was held admissible as a business entry).

E. Proof of military status of the accused. In United States v. Spicer, 3 M.J. 689 (N.C.M.R. 1977) and United States v. Bobkoskie, 1 M.J. 1083 (N.C.M.R. 1977), petition denied, 3 M.J. 118 (C.M.A. 1977), the Navy Court of Military Review held that, in the prosecution of an article 86 offense in which the defense makes a motion to dismiss the charge on grounds that the court-martial lacked jurisdiction over the person of the accused, the jurisdiction question must be proven by the government beyond a reasonable doubt instead of by the usual standard for motions, which is a preponderance of the evidence. The reason stated was that, in cases involving unauthorized absence, the accused's status as a member of the military becomes, in effect, an element of the offense when absence or desertion is charged. Subsequent to these decisions, however, the Navy court, en banc, re-examined the Spicer opinion and unanimously decided in United States v. Bailey, 6 M.J. 965 (N.C.M.R. 1979) that, while the accused's status is always a fundamental part of a purely military offense, it is not, itself, a separate element. Additionally, the court stated:

> ... the standard of proof on all motions to dismiss for lack of personal jurisdiction when presented to the military judge, whether or not desertion or unauthorized absence is alleged, remains a preponderance of the evidence. If the motion is denied by the judge, the issue of military status, when it bears on the ultimate issue of guilt or innocence, may be raised again during trial on the merits, and at that time the Government must prove beyond a reasonable doubt that the accused is a member of the military.

Id. at 969.

Proof of military status in a contested case is normally accomplished by introduction in evidence of the accused's enlistment contract and related papers found in the service record.

F. UA providency inquiry. If an accused pleads guilty to the offense of UA, the following inquiry into the plea of guilty has been recommended by N.C.M.R. in United States v. Sutherland, NCM 73-1073 (N.C.M.R. 31 May 1973) and United States v. Avery, NCM 73-1118 (N.C.M.R. 16 July 1973):

1. He is the accused in question.

2. The specification reflects the correct organization from which absence is alleged.

3. The absence in fact commenced on the date alleged.

4. The manner in which the departure from the command was effected (i.e., failed to return from leave, or just decided to leave without authority).

5. Did accused consider that he had permission from competent authority to be absent during the period?

6. During the period, did he in fact believe he was absent without authority?

7. Whether the absence was caused or extended by any physical inability to return.

8. At any time between the commencement and the termination of the absence did he have contact with military authorities? If so, the nature of the contact should be explained.

9. Location of the accused during the period of absence.

10. Manner in which the absence was terminated. If the accused was apprehended by civil authorities, it should be ascertained whether such apprehension was for the purpose of terminating the absence or for a violation of civilian law. However, an accused should not be required to provide information covering misconduct not the subject of the present court-martial proceedings.

11. Lack of conformance to the above format has been determined to be nonprejudicial to the accused where the military judge failed to ask the accused whether he had contacted military authorities during his UA and failed to establish the accused's location during his UA, [United States v. Kaleiwahea, NCM 76-0330 (N.C.M.R. 22 Nov 1976)] and failed to elicit from the accused the manner in which he departed the command to initiate the UA and the manner in which he terminated his absence [United States v. Heisey, NCM 78-1370 (N.C.M.R. 25 Jan 1979)]. In fact, in Avery, supra, in a concurring opinion, Judge Glasgow contended that, while the elements formulated in Sutherland were not merely advisory, he denied that omission of some of the elements of the inquiry demanded reversal.

G. Order requirement. Another distinction between article 86(1) and (2) offenses and article 86(3) offenses is that the latter lacks the order aspect of the former, generally. The exception is where a servicemember receives orders to a new duty station or TAD assignment, and his failure to report subjects him to a charge of UA. The order aspect might be raised as an affirmative defense; for example, where the accused alleges that the order to report is an illegal one. But see United States v. Matthews, 8 C.M.A. 94, 23 C.M.R. 318 (1957) (conviction of orders violation for failing to report to new duty station reversed because person issuing the orders had no authority to do so, but article 86(3) specification upheld).

H. General intent. A simple (i.e., nonaggravated) UA offense under article 86(3), like the article 86(1) and (2) offense, is a general intent offense. The accused need not have specifically intended to be UA. Indeed, he might have specifically intended the exact opposite. For example, the accused fully intends to go to work on time. To assist him, he sets three alarm clocks. Nevertheless, he oversleeps and doesn't get there on time. He is still UA, though he may have a good case in mitigation.

I. Pleading. Sample specification, see Part IV, para. 10f(2), MCM, 1984:

> Specification: In that Hull Technician Third Class Will B. Seedy, U.S. Navy, USS Sleezeball, on active duty, did, on or about 1 April 19CY, without authority, absent himself from his unit, to wit: USS Sleezeball, located at Newport, Rhode Island, and did remain so absent until on or about 13 August 19CY.

J. Instruction. Military Judge's Benchbook, DA Pam. 27-9 (1982), Inst. No. 3-14. Note that the instruction lists a third element for an article 86(3) offense, which is not listed in this text, that "(the accused) remained so absent until _____" (i.e., that there be some specific termination shown). Is some showing of a specific termination an element of UA? No, UA is an "instantaneous" offense, and duration is only a matter in aggravation. See section 0304.E.2, below. The extra "element" presents very few practical problems though, since it is rare that the government is unable to show termination, and it always does so as a matter in aggravation. To confuse matters though, for purposes of former jeopardy, the length of the UA may be an integral part of the offense. That problem is a complex one, and is discussed in detail in section 0304.F, below.

0304 AGGRAVATED FORMS OF UNAUTHORIZED ABSENCE

A. Variations. In addition to the three types of UA delineated by article 86, there are variations of UA under article 86(3) which are more serious because of the addition of certain matter in aggravation. These variations, while not specifically contained in the language of article 86, are delineated in Part IV, para. 10b, MCM, 1984. The special aggravating factors fall into four groups.

1. Duration of the absence.

2. Special type of duty from which the accused absents himself.

3. Specific intent which accompanies the absence.

4. Manner of termination.

B. Aggravated UAs (and their maximum punishments)

1. Unauthorized absence for more than three days. (Six months CONF and forfeiture of 2/3 pay per month for six months.)

2. Unauthorized absence for more than thirty days. (DD, one year CONF, and total forfeiture.)

3. Unauthorized absence for more than thirty days, terminated by apprehension. (DD, 18 months CONF, and total forfeiture.) A definition of apprehension is contained in section 0306.E.

4. Unauthorized absence from a guard, watch, or duty. (Three months CONF and forfeiture of 2/3 pay per month for three months.)

5. Unauthorized absence from guard, watch, or duty section with the intent to abandon it. (Specific intent) (BCD, six months CONF, and total forfeiture.)

6. Unauthorized absence with the intent to avoid maneuvers or field exercises. (Specific intent) (BCD, six months CONF, and forfeiture of 2/3 pay per month for six months.)

C. The graduated scale of more severe punishment for each of these aggravated UA offenses is set forth in Part IV, para. 10e, MCM, 1984. It must be noted that the maximum authorized punishment for any absence commencing before 1 August 1984 (the effective date of the 1984 MCM) is the maximum authorized under either the 1969 MCM or the 1984 MCM, whichever is less. United States v. Fielder, 21 M.J. 544 (A.F.C.M.R. 1985).

D. Note that the aggravating elements of these more serious UA offenses are not essential elements of a violation of article 86. They simply constitute special matters in aggravation which must be established beyond a reasonable doubt in order to increase the authorized maximum punishment.

1. If the aggravating element is not proved, but the basic elements of the UA are proved, the court-martial may still convict of the basic UA offense by simply excepting the aggravating facts in returning the court's findings as to the specification. For example: Willy is charged with UA from his watch with intent to abandon the same. The court is convinced of his guilt of UA from the watch, but is not convinced that he intended to abandon the same. The court's finding should be announced: "... the court ... finds you: Of the Specification, Guilty, except the words "with the intent to abandon the same"; of the excepted words, not guilty. Of the Charge: Guilty."

2. In order to utilize the higher scales of punishment provided for aggravated UA, the special matter in aggravation must be plead, proved, and instructed upon.

E. Duration of the absence

1. UA under article 86(3) is also an instantaneous offense. United States v. Lynch, 22 C.M.A. 457, 47 C.M.R. 498 (1973); United States v. Newton, 11 M.J. 580 (N.C.M.R. 1980). It is committed at the instant the accused absents himself without authority. However, the duration of the absence is a matter in aggravation for the purpose of increasing the maximum punishment authorized for the offense. It is not an essential element of UA. United States v. Morsfield, 3 M.J. 691 (N.C.M.R. 1977). But see section 0303.F, below.

2. Customarily, the duration of the absence will be pleaded in all article 86(3) specifications even though the absence was not over three days. Time (as opposed to day) is usually not pleaded, unless the UA is less than one day, or unless it is necessary to show that the UA was more than three days or more than thirty days. Time will be expressed on a 2400-hour basis.

F. Special problems. When the commencement and termination dates of UA as developed at trial are not as alleged in the specification, the resulting variance between the pleadings and the proof must be resolved by the court's findings. This is easiest to understand in terms of specific fact patterns.

1. The "one-day" rule. If the termination date of the absence is not pleaded, or is pleaded but none is proved, the accused can only be convicted of, and punished for, one day of UA. United States v. Lovell, 7 C.M.A. 445, 22 C.M.R. 235 (1956) (alleged UA of two months; government showed date of inception, but no evidence of termination. Held: Guilty of one day UA).

2. Termination only. If the government proves the termination date, but fails to show any prior inception date, the accused may only be convicted of a one-day UA, the date of termination. United States v. Harris, 21 C.M.A. 590, 45 C.M.R. 364 (1972). In Harris, the court faced a situation where no inception date was shown, the opposite of the situation in United States v. Lovell, supra. The trial court in Harris returned a guilty finding to the alleged UA of 3 December 1969 to 1 April 1977, even though there was considerable evidence that the accused was still present at his unit until about 1 January 1970. In taking his action on the record of trial, the convening authority approved only a UA from 2 January 1970 to 1 April 1971 by an action he termed one of "clemency" (though it actually appeared to be an attempt to eliminate appellate review difficulties). The Court of Military Appeals held that proof of an inception date was essential to a successful UA prosecution, and thus the convening authority had acted improperly in approving a date for commencement where there had been no evidence at trial that the UA commenced on that date. However, the court did find a commencement date of 9 January 1970, since a record book entry introduced at trial indicated that the accused had been dropped from the rolls of his unit on that date because of his unauthorized absence. The court further stated that, had no inception been found, only a one-day UA, the date of the alleged termination, could have been upheld.

3. Note. Courts will often seize upon unexpected bits of evidence to show inception/termination dates where none are proven in the usual manner. For example, in United States v. Westbrook, NCM 78-1012 (N.C.M.R. 27 Nov 1978), the court held that it could not determine the commencement time of the accused's UA since it could not determine the time the accused failed to report as he had been required to do. However, the desertion entry made in the accused's service record 30 days after the alleged commencement date was held to be prima facie evidence that the accused was UA on the date that entry was made, and that date was made the commencement date by exception and substitution. In United States v. Martin, NCM 73-2488 (N.C.M.R. 31 Jan 1974), the alleged absence was from 5 June to 30 December. The prosecution proved the commencement date of 5 June by an admissible record book entry dated 18 July, but failed to show a termination date. The court held that the date of the entry itself justified affirming a UA from 5 June to 18 July.

4. Early termination. If the government proves the inception date alleged and a termination date earlier than the one alleged in the specification, the accused may be properly convicted of the lesser period. United States v. Reeder, 22 C.M.A. 11, 46 C.M.R. 11 (1972). Reeder was charged with unauthorized absence from 4 January 1969 until 11 June 1971. His plea of guilty was found by the Army Court of Military Review to be improvident insofar as it admitted an unauthorized absence for the entire period alleged, since the accused stated that he had attempted to surrender on 10 January 1969 and then absented himself a second time from that date to 11 June 1971. The C.M.A. held that the Army court had correctly affirmed a finding of guilty of an absence from 4 January 1969 to 10 January 1969.

5. Later inception. If the government proves an inception date later than the one alleged and the termination date as alleged, the accused may be properly convicted of the lesser period. United States v. Harris, supra.

6. Inclusive dates. A logical combination of Reeder and Harris permits conviction of the accused for a shorter period, if the government proves inception and termination dates different from those in the specification provided the new dates fall within the period alleged, but not of a longer period.

7. Early termination and subsequent absence. If the government proves two distinct periods of unauthorized absence which fall within the period alleged (i.e., two pairs of unique and noncontradictory inception and termination dates), the accused can be convicted of both, but the maximum punishment will be limited to the maximum for the charged offense. United States v. Francis, 15 M.J. 424 (C.M.A. 1983). This approach came as something of a surprise to military practitioners. Historically, the courts had taken the view that the government could not prove two included periods of absence when only one was charged. United States v. Reeder, supra. This created a windfall to the accused who had, unbeknownst to the prosecution, terminated his absence prior to the charged date.

(a) For example, X is charged with an absence from 1 January 19CY(-1) to 1 August 19CY. At trial, the defense presents evidence that, on 10 January 19CY(-1), the accused surrendered to authorities in a remote location who exercised control over the accused by providing a bus ticket to the accused's home port. The accused instead used the ticket to continue his or her adventures away from the Navy. Under the previous Reeder approach, the accused could be convicted only of the 10-day UA. Due to former jeopardy problems, he could not be tried for the remaining 18 months of absence. United States v. Lynch, 47 C.M.R. 143 (A.C.M.R.), aff'd, 22 C.M.A. 457, 47 C.M.R. 498 (1973). Based on the dicta of Francis, supra, X will now simply be convicted of two periods of absence (from 1 Jan CY,(-1) - 10 Jan CY(-1)) and (from 10 Jan CY(-1) - 1 August CY). The punishment will be limited to the maximum provided for the offense charged.

(b) Although the language in Francis is not necessary to the holding of the case, there can be little doubt that the Francis approach is the treatment of the early termination issue favored by the Court of Military Appeals. In a speech presented at the Army JAG School in August, 1984, Chief Judge Everett referred to Francis as having overruled Reeder. Trial judges are unanimously following the Francis dicta. Accordingly, trial counsel faced with a case in which the accused presents evidence tending to make two or more UA's out of one charged UA should simply request the court to find the accused guilty of the several periods. The protection for the accused is found in Francis, supra, 15 M.J. at 429, where the court indicates that, even though found guilty of more UA periods than originally charged, the accused may not be subjected to any greater maximum punishment than if he were convicted as charged.

8. Single UA in fact. If the government alleges two distinct periods of UA, but the proof shows only one continuous absence encompassing both, the accused can be properly convicted only of the specification containing the proven inception date. United States v. Moore, 1 M.J. 940 (N.C.M.R. 1976).

9. Former jeopardy. If the court-martial acquits (or convicts for a lesser period) the accused as charged, and he is thereafter prosecuted for an absence included within the original dates charged, he may not be convicted because of former jeopardy. United States v. Lynch, 47 C.M.R. 143 (A.C.M.R. 1973), aff'd, 22 C.M.A. 457, 47 C.M.R. 498 (1973), and United States v. Francis, supra.

G. Determining commencement and termination of UA. In drafting the specification, and in proving aggravated forms of UA caused by duration, it is essential to determine precisely when the unauthorized absence began and at what point in time it terminated.

1. Commencement of UA:

a. UA commences when the accused leaves his unit, organization, or place of duty without authority; or

b. UA commences when the accused fails to return at the proper time from authorized leave or liberty; or

c. UA commences simply when the accused is not where he is supposed to be at the time he is required to be there.

There is no requirement that the unauthorized absentee be completely outside of naval jurisdiction for him to have left his "unit, organization, or place of duty." See the "casual presence aboard base" cases directly below. But cf. United States v. Barbour, NCM 80-0497 (N.C.M.R. 30 June 1980) (military judge erred in accepting accused's guilty plea to UA from his organization, NAS Corpus Christi, where accused indicated that he had broken restriction by leaving his barracks aboard the air station, but had only gone across the street to "think things out"); United States v. McCreary, NCM 80-2457 (N.C.M.R. 21 Nov 1980) (military judge erred in accepting accused's plea of guilty to UA from his ship where accused stated during providency that he had not left the ship but had spent most of the time asleep in his rack -- he may have been guilty of dereliction of duty, but not UA); United States v. Phillips, 28 M.J. 599 (N.M.C.M.R. 1989) (accused could be convicted of unauthorized absence because of his failure to be at the training center to which he was assigned, even though he did not leave the military installation on which his unit was located; his mere presence in his barracks on the host base was not the equivalent of his presence with his unit).

2. Termination of UA. The status of UA terminates upon the accused's return to military control.

a. A return to one's own duty station is not essential to terminate UA. For example: A Navy UA accused was apprehended by civilians, delivered to the Air Force, and confined in an Air Force brig. Held: UA "is legally ended by return to military control, regardless of whether that control be exercised temporarily by a service other than that of the offender involved." United States v. Coates, 2 C.M.A. 625, 630, 10 C.M.R. 123, 129 (1953). United States v. Bews, No. 81-1927 (N.M.C.M.R. 17 Nov 1981). (Court held there was a termination despite an Air Force gate guard's refusal to accept surrender. The court stated: "It is the policy of the Department of Defense that they (absentees) shall be received at any military installation which is manned by active duty members.")

b. The casual presence of an absentee on a military installation is not enough to constitute military control. If his presence is known but his UA status is unknown to competent authority, this does not sufficiently constitute military control.

(1) In United States v. Jackson, 1 C.M.A. 190, 2 C.M.R. 36 (1952), Jackson was UA from his Army unit in Korea and was apprehended by another command for several minor offenses. He was tried by that command on 15 January under his correct name, service number, and organization, and was awarded a forfeiture of pay and released. Subsequently, he was tried by his parent command for UA from 1 January to 7 March. Question: Did the temporary exercise of Army jurisdiction constitute a legal termination of the absence which commenced on 1 January? C.M.A. said:

> ...[R]eturn by the absentee to his duty station is not necessary to terminate an unauthorized absence status, and that termination is effected by any proper exercise of military control over the absentee .... An absentee's casual presence at a military installation, unknown to competent authority and for purposes primarily his own does not end his unauthorized absence .... Further, even known presence at a military installation will not constitute termination where the absentee, by design and misrepresentation, conceals his identity or status .... If the absentee discloses his status so that the military authorities have full knowledge of all the facts, they could not, with propriety, contend that the absence was not legally terminated. Further, we think that if the authorities concerned could, by the use of reasonable diligence, obtain knowledge of the soldier's true status, the same result should obtain. Thus, where an absentee is apprehended by his parent organization, tried for some minor offenses, then released, we think it proper to place the burden on that organization to know or to ascertain his duty status. Here there was neither actual knowledge nor reasonable opportunity to obtain such knowledge.

Id. at 193, 2 C.M.R. 99. Held: UA was not terminated by the summary court-martial because accused's status was unknown and there was no cause for military authorities to know of the accused's status.

(2) In United States v. Norman, 9 C.M.R. 496 (A.B.R. 1953), accused's casual presence at his office for his own purposes during UA did not terminate that status *nor effect* his return to military control.

(3) In United States v. Morris, 11 C.M.A. 16, 28 C.M.R. 240 (1959), accused, UA in foreign country, visited the American Vice Counsel to obtain a U.S. passport. The Military Attache was not informed of the accused's presence or of his desires. A simple visit to the U.S. Legation cannot be construed as a return to military control.

(4) In United States v. Grant, NCM 80-1168 (N.C.M.R. 22 Dec 1980), the accused's presence aboard the base at his unit was "casual" and insufficient to terminate his UA where the accused did not go to work or submit himself to competent authority, and advised an NCO friend of his status but with no intention of changing it.

(5) In United States v. Johnstone, 8 C.M.R. 401 (A.B.R. 1953), an Army captain was UA from 7 to 11 October. On 9 October, the accused's CO saw him in the Battalion area for a short time, but he was not close enough to engage him in a conversation. Held: This did not terminate the UA. In this case, a bona fide return to duty was required; a casual appearance in the area not occasioned by surrender, apprehension, or actual return to duty is insufficient.

(6) In United States v. Ziglinski, 4 C.M.R. 209 (A.B.R. 1952), the accused was UA but was apprehended by MP's for being drunk. He did not reveal his UA status, he concealed his organization and he was later released by the MP's. Held: UA was not terminated by this apprehension by the MP patrol.

(7) In United States v. Hart, 47 C.M.R. 686 (A.C.M.R. 1973), the court held that checking into a Veterans' Administration Hospital and informing the civilian personnel of his UA status was insufficient to terminate the UA. The court reasoned that such a facility is not a military authority, and there was no further evidence that it detained the accused pursuant to military orders or that military authorities knew of the accused's location. But compare United States v. Zammit, 14 M.J. 554 (N.M.C.M.R. 1982), rev'd on other grounds, 16 M.J. 330 (C.M.A. 1983) (UA status was terminated when the accused went to a VA hospital for the purpose of receiving medical treatment and terminating his absence. The court relied upon five factors:

(a) The accused presented himself to the civilian officials of the hospital;

(b) a full knowledge of his UA status was disclosed to these officials by the accused;

(c) the surrender was voluntarily initiated by the accused with the intent to return to duty;

(d) control over the accused was exercised by these civilian officials; and

(e) this control was exercised by officials with acknowledged responsibility to act for and on behalf of the armed forces in terminating the unauthorized absences of active duty military personnel treated at their facility.)

(8) In United States v. Coglin, 10 M.J. 670 (A.C.M.R. 1981), the accused did not terminate his UA status by reporting to an installation to which he was not assigned where he did not present himself to competent military authorities with the intention of terminating his absence, his whole purpose being to obtain compassionate reassignment and to get paid, and he did not disclose his UA status. Note: This case contains a good general discussion of termination.

(9) Presence at a selective service office, coupled with disclosure of all pertinent facts and compliance with a commissioned officer's directions, terminated the absence. United States v. Raymo, 1 M.J. 31 (C.M.A. 1975). But compare United States v. Dubry, 12 M.J. 36 (C.M.A. 1981) (UA was not terminated where accused went to Reserve Center and spoke to military authorities who did not apprehend him while he was released on bond pending determination of civilian charges); United States v. Shilling, NCM 76-1978 (N.C.M.R. 26 October 1976) (social encounter at a bar between accused and a recruiter, where accused revealed his UA status but did not surrender and recruiter did not attempt to apprehend him, did not terminate accused's UA); United States v. Gardenier, NCM 78-0894 (N.C.M.R. 16 November 1978)

(accused's UA was not terminated where he reported his status at a recruiting station but failed to follow instruction he was given to report to a Reserve Center, which had facilities to process unauthorized absentees, and instead went back home).

(10) Disclosure by absentee to Navy doctor of all facts and a willingness to submit to military control terminates the absence even though the doctor exercised minimal control over the accused. United States v. Rayle, 6 M.J. 836 (N.C.M.R. 1979).

(11) Telephone calls to military authorities do not terminate the absence. United States v. Baughman, 8 M.J. 545 (C.G.C.M.R. 1979); United States v. Anderson, 1 M.J. 688 (N.C.M.R. 1975); United States v. Cash, NCM 76-1793 (N.C.M.R. 22 September 1976) (accused's UA was not terminated when he called a Shore Patrol Headquarters, told them he was UA, gave his phone number and address, and asked them to pick him up, and the Shore Patrol called back and told the accused they could not pick him up). See United States v. Dubry, 12 M.J. 36 (C.M.A. 1981), where the court held that no termination of the UA status resulted when the accused simply telephoned a Reserve Center to apprise them of his status because he never surrendered himself in person.

(12) In United States v. Claussen, 15 M.J. 660 (N.M.C.M.R. 1983), an accused was charged with unauthorized absence from 1 February 1982 to 20 April 1982. He consulted a Navy chaplain about a week before the alleged termination of his unauthorized absence. This interview did not serve to terminate the accused's unauthorized absence since the chaplain did not exercise any military control over him, and since the accused did not effect a voluntary termination. (Note: This is an excellent case which capsulizes the requirements for termination.)

H. Methods of return to military control

1. Surrender to military authority. If a person (1) intends to surrender, (2) submits himself to military authority and, (3) discloses to that authority his UA status, such authority is bound to exercise control over him, and such a surrender terminates his UA. MILPERSMAN 3430100. See IRAM, para. 4004.2a(2)(c). Note the "exceptions" in the cases listed in section G, above, where the accused disclosed his status to military authority but did so without intent to terminate his UA, or subsequently frustrated efforts by the military to exercise control over him. Note also that surrender to civilian police does not constitute surrender to military authority.

2. Apprehension by military authority. Apprehension by military authority of a known absentee terminates a UA. United States v. Jackson, supra; MILPERSMAN 3430100. See LEGADMINMAN 4006; IRAM, para. 4004.2a (2)(c).

3. Delivery to military authority. If a known absentee is delivered by anyone to military authority, this terminates UA. MILPERSMAN 3430100. See IRAM, para. 4004.2a(2)(c).

4. Apprehension by civil authorities at the request of the military. UA is terminated upon apprehension of a known absentee by civil authority acting at the request and on behalf of military authority. Part IV, para. 10c(10)(d), MCM, 1984.

a. Example: In United States v. Garner, 7 C.M.A. 578, 23 C.M.R. 42 (1957), the sheriff received a DD Form 553, Absentee Wanted by the Armed Forces, requesting the apprehension of Garner because he was an absentee. The sheriff arrested Garner on 23 November, notified Army authority on the same day, and retained custody of Garner for the Army until the Army picked up Garner on 1 December. He was charged with UA terminating on 1 December. Held: The absence terminated 23 November.

b. The court explained the result this way:

> When the military authorities issued an apprehension order, they, in effect, asked the civil authorities to detain the accused for them. A detention effected in accordance with such a notice is a detention on behalf of the military and under the authority granted by Congress for that purpose. In our opinion, it constitutes military control over the absentee for the purpose of terminating his absence.

Id. at 582, 23 C.M.R. 46.

c. The same rule applies when civilian charges are tried and the accused is held longer due to a DD 553.

5. Apprehension by civil authorities without prior military request. Article 8, UCMJ, authorizes any civil officer with the power to apprehend offenders under state or Federal law to summarily apprehend deserters. In the absence of a DD Form 553 though, it is not the physical act of apprehension which terminates an unauthorized absence. An unauthorized absence terminates when civil authorities notify military authority that they are holding the accused and that he is available for return to military control. Part IV, para. 10c(10)(e), MCM, 1984. This is so whether the accused gives himself up or is apprehended on information provided by sources other than the military. In United States v. Ward, 48 C.M.R. 554 (A.C.M.R. 1974), it was held that the accused's UA was terminated on the date he went to a civilian police station and stated that he was UA. The civilians contacted military authorities, who advised the civilians that "Washington" had been contacted and that the accused was not wanted. He was consequently released by the civilians. The court did not indicate where it felt control over the accused had been exercised. Two thoughts come to mind in this regard. First, the court noted that a DD 553 had been issued for the accused and the civilian police department to which the accused surrendered was a distributee of that form such that the court may have believed there was constructive knowledge and they should have exercised control. Or, secondly, the court may have considered the accused's waiting in the police station until his status was verified by Armed Forces Police to have constituted control. Whatever the unspecified rationale, it would seem doubtful that an accused would be considered to have terminated his absence had there been no valid DD 553 or erroneous confirmation of no absentee status.

Note that, regardless of whether the civilian authorities are aware of the accused's UA status or not, if the accused is apprehended by them for a civilian offense, the UA status does not terminate until military authorities are notified that the accused is available for return to military control in the absence of a DD 553, regardless of the disposition of the civilian case. See e.g., United States v. Lanphear, 23 C.M.A. 338, 49 C.M.R. 742 (1975) (an unauthorized absentee's physical inability to return due to an apprehension by civilian authorities for a civilian offense is not a defense, but where it is additionally shown that the civilian authorities indicated a willingness to surrender the absentee immediately to military authorities, the failure or refusal of the military authorities to take affirmative measures to take the absentee into custody operates constructively to terminate the absence); United States v. Maloney, NCM 76-1584 (N.C.M.R. 26 August 1976) (unauthorized absentee became drunk and surrendered to a local sheriff. After twice informing Marines of accused's presence and having no one arrive to take custody of the accused, the sheriff released him. Initial UA terminated when the sheriff notified the Marines of his presence and, since sheriff was in effect acting as a government agent, accused was not UA when he was released by the sheriff.); United States v. Cleland, NCM 80-3001 (N.C.M.R. 13 February 1981) (when a serviceman presents himself to civilian authorities and informs them of his UA status, but the police are unable to verify his status and therefore do not take him into custody, there is no termination of UA); United States v. Grover, 10 C.M.A. 91, 27 C.M.R. 165 (1958). (Grover was UA when apprehended by civil police for illegal possession of narcotics. He was tried, acquitted, and returned to military authority. Held: UA for the entire period. "There is nothing to indicate that the continuation of the absence was other than by his own misconduct." Id. at 94, 27 C.M.R. 168.)

1. CAUTION: As noted above, the surrender of an absentee to civilian police is not considered "a surrender to military authorities" for purposes of determining when the UA terminates. However, depending on the circumstances, voluntary submission to civil authorities may very well terminate the absence by surrender for purposes of aggravation. See Military Judge's Benchbook, DA Pam 27-9 (1982), Inst. 3-14, note 4. A full discussion appears at section 0306.E (desertion terminated by apprehension). The drafters analysis of the 1984 Manual indicates that the addition of the aggravating factor of apprehension to article 86 was intended to parallel the effect of termination by apprehension on desertion. App. 21, para. 11, MCM 1984.

0305 AFFIRMATIVE DEFENSES TO UA

A. Affirmative defenses to UA are generally based on the concept that an absence which is due to no fault of the absentee is excused and is not an offense. Part IV, para. 10(c)(6), MCM, 1984, provides: "When, however, a person on authorized leave, without fault, is unable to return at the expiration thereof, that person has not committed the offense of absence without leave."

B. Three types of affirmative defenses to UA's are raised by this provision:

1. Mistake;

2. ignorance; and

3. impossibility.

C. Mistake of fact. In order to constitute a defense, a mistake of fact as to article 86(1) and 86(2) must be honest only, and simple (nonaggravated) UA under 86(3) must be both honest and reasonable. United States v. Graham, 3 M.J. 962 (N.C.M.R. 1977).

1. Intent. These are general intent or simple negligence offenses; no specific intent is required. United States v. Holder, 7 C.M.A. 213, 22 C.M.R. 3 (1956). For example: Seaman Jones is not in the liberty section but he honestly believes that he is and, without making any effort to discover his duty status, he goes ashore, absenting himself from his unit. Does he have a defense? Answer: No. Although honest, his mistake was not reasonable.

2. Rule. Where the absentee could discover his true status by the exercise of ordinary diligence, his failure to do so renders his mistake unreasonable and is no defense. United States v. Holder, supra; United States v. Ener, NCM 77-0708 (N.C.M.R. 6 July 1977) (even assuming accused honestly believed he could go home without a discharge in hand, such a belief by a staff sergeant with 12 years of service was entirely unreasonable).

3. Caveat. If the UA alleged consists of one of the aggravated variations of UA under article 86(3), examine it carefully to see if the aggravating factor includes a specific intent. For example: Unauthorized absence from watch with intent to abandon the same. If it does, then an honest mistake alone, even though unreasonable, is a valid defense to the aggravating factor alleged.

D. Ignorance of fact

1. Article 86(1) and (2) offenses. Knowledge is an affirmative element which must be established by the prosecution as a part of its case-in-chief. Hence, lack of knowledge as to these offenses does not fall within the category of an affirmative defense. It is simply a general defense (i.e., government must prove knowledge initially).

2. Article 86(3), Knowledge is not an affirmative element of the offense of UA under article 86(3). Query: Can lack of knowledge be raised as an affirmative defense to this offense?

a. Example: Willy was given a thirty-day leave. On the first day of his leave, his command mails a letter to him at his leave address, saying that his leave is canceled and that he will return to his command immediately. Willy does not return to his command immediately. Willy does not return to his command until the thirtieth day provided in his leave papers. He is charged with UA for 25 days (excluding normal mail and travel time). Willy testifies that he never received the letter. Does this raise a valid defense? Answer: Yes. Applying United States v. Holder, supra, his failure to know of his changed status could certainly be found to be honest and reasonable (i.e., genuine, and not the result of lack of due diligence). Applying the language of Part IV, para. 10(c)(6), MCM, 1984, his absence was not through any fault on his part.

b. Example: Same facts, except the accused testifies that, although he received a letter from the command, he did not open it because (1) he didn't have his glasses handy, and (2) he thought it was a minor matter relating to a pending office party which he had asked to have sent to him. Further, he laid the letter on a table and, when he returned to get it a little while later, it was missing. No one in the house knew anything about it, and he assumed that one of his young children had disposed of it. He dismissed the matter as unimportant, since he believed it was simply an office memo on a pending social party. Does this raise a valid defense? Answer: Yes, applying United States v. Holder, supra, his lack of knowledge could be found to be honest and reasonable. The defense is therefore raised by the evidence and the factfinder will evaluate the honest and reasonable nature of the accused's ignorance of his duty to return.

E. Impossibility. Occasionally, a servicemember is prevented from getting back to his unit prior to the expiration of leave or liberty entirely as the result of a mishap. If the mishap is neither foreseeable nor due to his own fault, it is a valid defense.

1. If the mishap is foreseeable or due to his own fault, the mishap is no defense to the UA charge.

a. Example: Willy is on liberty, and he depends on "split-second timing" to get back on time. However, he ran out of luck, all the lights were red, and he returned five minutes late. Willy is UA. Such "mishaps" are foreseeable.

b. Other examples where a mishap is foreseeable and no valid defense exists include: Missing a train, [United States v. Cliette, 7 C.M.R. 406 (A.B.R. 1952)]; taking a wrong plane [United States v. Mann, 12 C.M.R. 367 (A.B.R. 1953)]; running out of gas.

c. The question to be answered in all of these situations is, did the accused's own negligence cause his absence or was it due to no fault of his own? In addition, the mishap, in order to be a defense, must actually prevent the accused's return. In United States v. Scott, 9 C.M.R. 241 (A.B.R. 1952), the accused was involved as a passenger in an automobile accident and voluntarily stayed to help with the accident investigation. The board held that there was no impossibility, merely an inconvenience. A similar finding was reached in United States v. Kessinger, 9 C.M.R. 261 (A.B.R. 1952) (accused's car broke down and he voluntarily remained with it until it could be repaired). In United States v. Lee, 14 M.J. 633 (A.C.M.R. 1982), rev'd, 16 M.J. 278 (C.M.A. 1983), the accused was in a UA status for forty hours due to car troubles. The Court of Review held that the defense of impossibility was not raised because the accused was at fault; C.M.A. reversed, citing that the accused did raise a valid impossibility defense (car trouble unforeseen) during presentencing and the military judge should have inquired further into inconsistent matter raised before accepting the accused's guilty plea. It is important to note that, in Lee, C.M.A. did not hold that the trouble was unforeseeable, but rather that the judge should have developed more information on that issue prior to accepting the guilty plea.

2. In general, there are three categories of occurrences that are not foreseeable: (1) Acts of God; (2) acts of third parties; and (3) physical disability/inability.

a. Impossibility due to acts of God. For example: Sudden and unexpected floods, snow storms, hurricanes, earthquakes, or any unexpected sudden, violent, natural occurrence. However, if the particular act of God (or Nature) may be expected to occur, it is not a defense because it is foreseeable. For example: In an area where snowstorms customarily occur during a particular season, one must anticipate an ordinary snowfall to occur and take appropriate action to insure timely arrival. If a particularly severe storm is forecast, one must act accordingly.

b. Impossibility due to acts of third parties

(1) Wrongful acts of another. For example: Seaman Jones is returning to the Naval Base in his car and has plenty of time to make it. His car is suddenly involved in an accident which was not caused by his fault. Jones has a defense.

(2) Detention by civilian authorities. Rule: If the absentee was on leave or liberty and was detained beyond his leave or liberty by civil authorities, his resulting absence is excused if he is tried by civil authorities and acquitted of the offense for which he was detained. Reason: He was unable to return through no fault of his own. Part IV, para. 10(c)(6), MCM, 1984.

(a) But, if he is tried by civil authorities and convicted of the offense for which he was detained, the absence is not excused. Reason: The absence was caused by his own fault. United States v. Myhre, 9 C.M.A. 32, 25 C.M.R. 294 (1958). In such a situation, the UA period commences at the time his leave or liberty expired. Query: Can an accused attack the civilian conviction in an attempt to show that, in spite of his conviction, the absence was not his fault? There are no known decisions on this issue.

(b) If he is not tried by civil authorities for the offense (or is tried but no verdict is returned), the question of whether or not his absence is excused depends upon his actual guilt of the offense for which he was detained. United States v. Myhre, supra. In such a case, two alternatives are available to the government.

-1- Charge him only with UA, put on a prima facie case by entering in evidence the SRB entries regarding UA and wait for the accused to raise the affirmative defense of impossibility. If he does, then prove that the accused actually committed the crime for which the civilian authorities detained him, thus establishing that his absence was through his own fault.

-2- Charge the accused with UA and the offense for which he was detained. But see JAGMAN. § 0116d (limitations on retrying a case previously adjudicated in another forum).

(c) If he is UA when picked up and detained by civil authorities for an offense, his detention will not constitute a valid defense to any part of the resulting increased absence, regardless of whether

he is convicted or acquitted, or even if he is not tried at all. He is UA for the entire period. Reason: His UA during the detention period resulted through his own fault (i.e., because he was UA). United States v. Grover, 10 C.M.A. 91, 27 C.M.R. 165 (1958).

-1- Rule: Once UA, always UA. Part IV, para. 10(c)(6), MCM, 1984.

-2- Caveat: This rule may not apply to a detained accused who makes an effort to return to military control:

> Whether an accused would be criminally responsible for the entire period of an absence which at its inception is unauthorized, but where he attempts to terminate his absence without leave status and is prevented from doing so by virtue of his confinement, trial, and acquittal by civil authorities, need not concern us here. There is nothing in the evidence in the instant case to indicate the accused made any effort to terminate his absent without leave status.

United States v. Grover, supra, at 94, 27 C.M.R. at 168. There are no reported cases where this caveat has applied and, in view of the language of Part IV, para. 10(c)(6), MCM, 1984, its applicability is questionable.

(d) A member of the armed forces turned over to civil authorities upon request under Article 14, UCMJ, is not absent without leave while being held by them under that delivery. Part IV, para. 10(c)(5), MCM, 1984; United States v. Williams, 23 C.M.A. 223, 49 C.M.R. 12 (1974) (accused's plea of guilty to UA was improvident where he testified that his commanding officer gave him permission to attend a civilian court session after which the accused was taken straight to the county jail and imprisoned).

(e) Chart of rules regarding detention by civil authorities:

Result of the civil case:	UA at the time of detention:	Leave or liberty at time of detention:
Acquittal	Guilty of UA	Not guilty of UA
Conviction	Guilty of UA	Guilty of UA
Release w/o completed trial	Guilty of UA	Guilt of UA depends on determination by court-martial of his guilt of offense for which he was detained.

c. Impossibility due to physical disability. If a person on leave or liberty fails to return at the proper time because of physical inability to return, such disability, if not due to his/her own fault, is a defense to the absence caused thereby.

(1) Examples of a valid defense due to physical disability:

(a) Accused on leave was stricken with a recurring spell or illness and was absent. United States v. Phillips, 14 C.M.R. 472 (N.B.R. 1953).

(b) Accused on liberty was struck on the head and robbed and was thereby absent. United States v. Mills, 17 C.M.R. 480 (N.B.R. 1954).

(c) Accused on leave became too sick to travel and was therefore absent. United States v. Edwards, 18 C.M.R. 830 (A.B.R. 1955).

(d) Accused was convicted of a five-day UA. He testified that at the expiration of an authorized pass he was ill. He went to a doctor and was unable to see him, but consulted the doctor's brother-in-law, who gave him pills and recommended rest for a few days. Because of this advice, he remained home for about four days, spending about half that time in bed. He then surrendered to military authority. Held: This raised an issue of physical inability to return [citing para. 165, MCM (1951)], and the law officer's failure to instruct on it was prejudicial error. "An accused is entitled to have presented instructions relating to any defense theory for which there is any foundation in the evidence." United States v. Amie, 7 C.M.A. 514, 518, 22 C.M.R. 304, 308 (1957). It was held in United States v. Bermudez, 47 C.M.R. 68 (A.C.M.R. 1973), however, that, where the accused's version of the events was unsupported and manifestly improbable, the government had no duty to rebut such unbelievable testimony, although the accused was entitled to an instruction to the court on his defense theory. The court found that the service record book case of the government against the accused had not been insufficient merely because of such testimony by the accused.

(2) Examples where disability is not a defense

(a) Accused stays in a bar too long and gets so drunk that he is actually completely incapacitated. Foreseeable: Yes; own fault. But, if the accused were given a "knockout" powder without his knowledge, he would have a valid defense.

(b) Accused's wife has a heart attack. No defense, must be his disability. (Note that, while technically there may be no defense, this is not the sort of case likely to be pursued.)

(c) No defense that an accused was unable to report to his appointed place of duty because the MP's had apprehended him for possession of marijuana; the offense occurred through the accused's own fault and was not excusable. United States v. Petty, NCM 77-0021 (N.C.M.R. 22 February 1977).

(d) No defense that an accused did not return to his ship due to problems with seasickness. United States v. Buttry, No. 81-1412 (N.M.C.M.R. 13 Aug 1981).

3. Impossibility arising after UA commenced. A mishap which occurs after leave or liberty has expired is not a defense to UA, even if it was not foreseeable, but it is matter in extenuation. Part IV, para. 10(c)(6), MCM, 1984; United States v. Moore, 6 M.J. 644 (N.C.M.R. 1978). Remember the rule: Once UA, always UA. What if the mishap occurred before his liberty expired, but at a time when the accused would have been late getting back even if no catastrophe had taken place? Answer: UA for the entire period. Reason: No causal connection between mishaps and absence. That is, these catastrophes did not cause him to be absent; he would have been absent anyway. Hence, no defense.

F. Other defenses. Note that most of the defenses discussed in Chapter 10 of this Study Guide may be applied to UA offenses; that chapter should be consulted for a more detailed discussion of defenses. Two of the other defenses most often encountered are:

1. Drunkenness. While voluntary intoxication can be a defense against specific intent offenses, it is not a valid defense to general intent offenses such as article 86(3) "simple" UA. But see United States v. Hubbard, NCM 81-0426 (N.C.M.R. 18 March 1981). (Guilty plea to a seven-day UA cannot be affirmed where accused stated during providency inquiry that his UA had commenced when he was too intoxicated to know what he was doing, a state in which he remained for two or three days. Although voluntary intoxication is not a defense, the inquiry did not establish that accused's intoxication was voluntary.)

2. Duress. See the companion cases of United States v. Roberts and Sutek, 14 M.J. 671 (N.M.C.M.R. 1982), for an excellent discussion of the duress defense in unauthorized absence cases. Sutek, the wife, and Roberts, the husband, were both tried for UA. At Sutek's trial, she raised the duress defense based on her fear of being physically forced to undergo a shipboard initiation ceremony in which she was to be "greased" and inked. The Navy-Marine Corps Court of Military Review disapproved the findings of guilty as to Sutek, because of the defense of duress. At Roberts' trial, he also raised the defense of duress unsuccessfully and his conviction was affirmed. His sentence was reduced to "no punishment," N.M.C.M.R. concluding that such a sentence was appropriate for the case. The Court of Military Appeals held, however, that Roberts was also entitled to the defense of duress based on its prior "holding in United States v. Palus, 13 M.J. 179, 180 (C.M.A. 1982), that the commission of an act that amounts to an offense 'to save ... [one's] family from physical harm ... raise[s] the defense of duress.'" United States v. Roberts, 15 M.J. 106 (C.M.A. 1983). In United States v. Hullum, 15 M.J. 261 (C.M.A. 1983), the accused had raised a duress defense at trial that he went UA because of racial discrimination and threats to his life. The accused was otherwise a model sailor. A bad-conduct discharge was awarded at trial, with a recommendation for suspension. C.M.A. determined that the accused did not receive adequate assistance from an appellate defense counsel who failed to argue the issue of sentence appropriateness, considering that the accused's duress defense was not frivolous.

3. Statute of limitations. The statute of limitations is Article 43, UCMJ. In 1986 this statute was completely rewritten by Congress, with the result that there are now, in effect, two separate statutes of limitations. The first is what might be called "old" article 43, namely, article 43 as it existed prior to its amendment in 1986. It applies to all unauthorized absences commenced before 14 November 1986. The second is what might be called "new" article 43, namely, article 43 in its present form since its amendment in 1986. It applies to all unauthorized absences commenced on or after 14 November 1986. Old article 43 and new article 43 will be discussed separately herein.

a. Old article 43. Under old article 43, there is no statute of limitations for desertion or UA commencing during time of war. In time of peace, the statute of limitations is three years for desertion and two years for UA.

(1) Counting the days. The appropriate method for computing when the two- or three-year period elapses is where an accused went UA on 16 October 1979 and sworn charges alleging UA were received by the officer exercising summary court-martial jurisdiction held that the two-year statute of limitations for UA had not expired. United States v. Tunnell, 23 M.J. 110 (C.M.A. 1986).

(2) Time spent by the accused where the U.S. has no authority to apprehend does not count towards computation of the statute of limitations. United States v. Wallen, NCM 77-0682 (N.C.M.R. 1 June 1977) (that part of accused's UA which he spent in the Republic of the Philippines did not count toward the two-year statute of limitations for UA).

(3) Time spent by the accused in civilian custody does not count towards the period of limitation. United States v. Robinson, NCM 76-0477 (N.C.M.R. 12 April 1976).

(4) Many statute of limitations problems arise because various regulations require the centralized collection of the service records of those who have gone UA for more than a specific period of time. Care should be taken to ensure that desertion/UA charges have been preferred by an accuser and receipted for by an officer exercising summary court-martial jurisdiction over the command to which the accused is attached before service record books are stored away and forgotten. Only such actions as these will toll the running of the statute of limitations. Once an accused has returned from his UA and is referred to trial, ensure that the original charge sheet is utilized. United States v. Rooney, NCM 77-0233 (N.C.M.R. 21 March 1977). (The original charge sheet alleging desertion was seasonably sworn. A second charge sheet, alleging UA, was substituted, however, and the charge was not receipted for until nine days after the running of the two-year statute of limitations. Held: Military judge improperly denied motion to dismiss, though it would have been proper to try the accused on the original charge sheet by amending it.) Note also that, if UA is pled and found as a LIO of a desertion charge, the two-year statute of limitations must apply as opposed to the three-year statute applicable to desertion. United States v. Gray, NCM 81-0197 (N.C.M.R. 23 February 1981) (N.C.M.R. must set aside findings where accused originally charged with desertion pleaded to, and was found guilty of, the LIO

of UA pursuant to a pretrial agreement, but sworn charges against the accused were received more than two years after the inception of the period of absence).

(5) An attempt to subvert the statute of limitations through the pleading process will be closely scrutinized. Such a problem occurred in United States v. Newton, 11 M.J. 580 (N.M.C.M.R. 1980) and in United States v. Dufour, 15 M.J. 1016 (A.F.C.M.R. 1983). In Dufour, the accused had originally been absent from 7 September 1977 to 8 July 1982. The statute of limitations had never been tolled. On 1 October 1982, the charge was preferred to allege an inception date of 2 October 1980, conceivably to override the statute of limitations. The court held that this was improper, contending that absence without leave is an instantaneous offense and that charges must be preferred and the statute tolled within two years of the commencement of the absence.

b. New article 43. Under new article 43, there is no statute of limitations for capital offenses or for UA or missing movement in time of war.

(1) As to all other offenses under the UCMJ, an accused may not be tried by any court-martial unless sworn charges are received by the officer exercising summary court-martial jurisdiction within five years after the commission of the offense.

(2) A person charged with an offense is not liable to be punished under article 15 if the offense was committed more than two years prior to the imposition of punishment.

(3) Periods during which the accused is UA are excluded in computing the period of limitation.

(4) If charges or specifications are dismissed as defective or insufficient for any reason, and the period of limitations either has expired or will expire within 180 days after the date of dismissal, then the accused may nevertheless be brought to trial on new charges and specifications if the new charges and specifications are received by the officer exercising summary court-martial jurisdiction within 180 days after the date of dismissal and the new charges and specifications allege the same acts or omissions as the dismissed pleadings.

(5) As can readily be seen, new article 43 is rather plainly designed to eliminate all the problems and pitfalls discussed under old article 43 above.

0306 DESERTION

A. Text of article 85(a)

Any member of the armed forces who --

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

2. Quits his unit, organization, or place of duty with intent to avoid hazardous duty or to shirk important service; . . . is guilty of desertion.

B. UA with specific intent to remain away permanently

1. The intent required is not necessarily an intent to remain away from the U.S. Navy, but is simply an intent to remain away permanently from his unit, organization, or place of duty. It is not necessary that the accused be absent from naval jurisdiction to be a deserter. Part IV, para. 9c, MCM, 1984. Absence from unit, organization, or place of duty is all that is required, just as for simple UA.

2. The intent to remain away permanently must exist at some time during the absence. It may exist at the time the accused leaves his unit, etc., or it may be formed after he has been absent for a period of time. The intent does not have to exist throughout the absence. If at any time during the absence the intent is formed, the crime is complete and cannot be undone. If he changes his mind, that is repentance; good in extenuation, but no defense. Part IV, para. 9c, MCM, 1984.

3. NOTE: Article 85a(3), UCMJ, states:

> Any member of the armed forces who ... without being regularly separated from one of the armed forces enlists or accepts an appointment in the same or another one of the armed forces without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service, except when authorized by the United States, is guilty of desertion.

Prior to 1957, it was believed that article 85(3) defined a separate form of desertion accomplished by enlisting in the same or another armed force. In United States v. Huff, 7 C.M.A. 247, 22 C.M.R. 37 (1956), C.M.A. held that the act of enlisting or accepting an appointment in the same or another armed force without disclosing a membership already existing was nothing more than a violation of the offense described in article 85a(1). The court held that the act of enlistment in another armed force is merely evidence of the accused's intent to remain away permanently from his unit, organization, or place of duty.

4. Proof of the specific intent to remain away permanently. See Part IV, para. 9c(1)(c), MCM, 1984.

a. In United States v. Cothern, 8 C.M.A. 158, 23 C.M.R. 382 (1957), C.M.A. struck down an instruction, based upon the 1951 MCM, which indicated that a court was, in effect, required to find an intent to remain away permanently if a prolonged absence was established. Prolonged absence, stated C.M.A., is but one circumstance from which that inference may be drawn. The Cothern rule was incorporated into paragraph 164a of the 1969 Manual. See United States v. Hoxsie, 14 M.J. 713 (N.M.C.M.R. 1982), where the military judge failed to apply the Cothern rule, making an improper finding

of desertion, which required reversal. The 1984 Manual specifically provides that standing alone proof, even of a lengthy period of unauthorized absence, is not enough evidence to prove the intent to remain permanently absent. Part IV, para. 9c(1)(c)(v), MCM, 1984.

b. Intent to remain away permanently may be established by direct evidence or by circumstantial evidence.

c. Examples of facts and circumstances tending to establish the intent to desert.

(1) Direct evidence: As the accused departs, he says: "I ain't ever comin' back." After his return, he says: "Yes, I intended never to come back."

(2) Circumstantial evidence: Evidence directly establishing the accused's intent ordinarily is not available unless, for example, he has been overhead making a statement of his intent. However, intent may be proved by circumstantial evidence; that is, by facts and circumstances from which one may, according to the common experience of mankind, reasonably infer existence of an intent. In determining the accused's intent, all the evidence in the case must be carefully weighed. No one factor will be determinative of the issue of intent. The following may, when considered with all the other evidence in the case, support an inference of an intent to remain away permanently: A prolonged absence; disposal of military uniforms and the wearing of civilian clothes; disposal of all military identification; purchase of a one-way ticket to a distant point; changing names or assuming an alias; assuming a disguise; securing civilian employment; going into hiding; leaving the country; failing to surrender when in the vicinity of military establishments; leaving while awaiting trial for another offense, or otherwise fleeing from the consequences of unlawful acts; enlisting in another or foreign armed force; absence terminated by apprehension.

(a) In United States v. Krause, 8 C.M.A. 746, 25 C.M.R. 250 (1958), it was held that evidence showing that the accused was UA from 15 December 1954 to 29 January 1957, and that the absence was terminated by apprehension, was sufficient to support a finding of an intent to remain away permanently. However, it held that the law officer erred in instructing the court that an intent to remain away permanently could be inferred solely from evidence of a prolonged, unexplained, unauthorized absence. The effect of this instruction, reasoned C.M.A., was to shift the burden of proof to the accused. A proper instruction must advise that the period of absence, regardless of its duration, is but a single fact from which, when considered with all the other evidence in the case, an intent to desert may be inferred. United States v. Soccio, 8 C.M.A. 477, 24 C.M.R. 287 (1957) (error for the law officer to instruct "you must determine whether or not the absence was much prolonged and, if so, whether or not there was satisfactory explanation for it").

(b) In United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969), the Court of Military Appeals again held that the extraordinary duration of the UA (18 May 1967 until 13 August 1968), standing alone, would not establish the intent required for desertion. However, this duration, combined with an apprehension 3,000 miles from the accused's last duty station, did support an inference of an intent to remain away permanently.

(c) In United States v. Wallace, 19 C.M.A. 146, 41 C.M.R. 146 (1969), prior convictions of UA were held admissible to show intent to remain away permanently where the successive absences could fairly be considered as part of a course of conduct and as portraying a man who refused to remain with the service.

d. Examples of facts and circumstances tending to negate the intent to desert:

(1) Direct evidence: Statements by the accused that he intended to return to his unit.

(2) Circumstantial evidence: Prior long and excellent military service; wearing uniforms during the absence; using the armed forces ID card; using his actual names; remaining at the home of record during the UA; voluntary return to military control; leaving property in the locker when leaving the command.

C. UA with intent to shirk important service or to avoid hazardous duty. The crime defined under article 85a(2) remains a separate offense, since the specific intent required is different from that required for an article 85a(1) violation.

1. Elements

a. That, at the time and place alleged in the specification, the accused absented himself from his unit, organization, or other place of duty;

b. that such absence was without authority;

c. that the accused had, at the time of the absence, an impending duty which was hazardous or impending service which was important;

d. that the accused knew of the impending duty or service at the time of the absence; and

e. that the accused absented himself from his unit, organization, or other place of duty with the intent of avoiding the duty or shirking the service.

2. The word "quits" in the statute simply means "goes absent without authority." United States v. Bordar, 2 C.M.A. 357, 8 C.M.R. 157 (1953). It is not necessary that the accused report to the place of hazardous duty or important service in order to "quit" it. Reason: The gist of this offense is deliberately avoiding the hazardous duty or important service. (NOTE: Contrast this offense with article 86(3) -- UA from guard watch, etc., with intent to abandon same -- where the government must prove that the accused assumed the duty and then left it.)

3. Avoiding hazardous duty must be the specific intent for, rather than a consequence of, the absence. United States v. Stewart, 19 C.M.A. 58, 41 C.M.R. 58 (1969).

4. Knowledge. Part IV, para. 9c(2)(c), MCM, 1984 provides:

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

5. "Hazardous duty," Part IV, para. 9c(1)(a), MCM, 1984, includes: Duty in a combat area or any duty performed before or in the presence of the enemy, a rebellious mob, or a band of renegades. It is not limited to actual front-line combat. See United States v. Smith, 18 C.M.A. 46, 39 C.M.R. 46 (1968) (hazardous duty can exist in peace or wartime).

6. "Important service," as used in Part IV, para. 9c(2)(a), MCM, 1984, is an important military duty as distinguished from ordinary duty. United States v. Deller, 3 C.M.A. 409, 12 C.M.R. 165 (1953). ("Some critical quality attributable to duty of a certain sort must be present to justify its characterization as 'important'." Id. at 412, 12 C.M.R. at 168. Held: Basic training is "important service" within the meaning of article 85.)

a. In United States v. McKenzie, 14 C.M.A. 361, 34 C.M.R. 141 (1964), C.M.A. held that evidence proving that an infantryman, who had been ordered to duty in Korea in 1962, went UA with the intent to avoid such duty was not sufficient evidence to support a conviction of desertion with intent to avoid important duty because in 1962 Korean service, despite sporadic incidents of violence, was not per se important duty. Compare United States v. Gaines, 17 C.M.A. 481, 38 C.M.R. 279 (1968) (operations of a rifle company in Vietnam are "important service").

b. In United States v. Merrow, 14 C.M.A. 265, 34 C.M.R. 45 (1963), the accused, a seaman apprentice cook aboard an icebreaker operating in the Antarctic, was convicted of desertion with intent to shirk important service. Evidence showing that the task force was engaged in supplying Antarctic bases, which were part of Operation Deepfreeze, with men and supplies to carry on scientific research and observation in the Antartic, was sufficient evidence to permit a court to find that the accused went UA with intent to avoid important service (desertion with that intent).

> Assignment to overseas duty or to sea duty may, under some conditions, be important service; under others it may not be. Thus, assignment to an overseas unit "during time of war or under emergency conditions and in or near a combat area" is substantially different from assignment today to a unit stationed in Okinawa or Spain .... Whether "the 'something more' [that distinguishes important service from ordinary everyday service of the same kind] is present depends entirely upon the circumstances of the particular case."

Id. at 268, 34 C.M.R. at 47.

c. In United States v. Tiller, 48 C.M.R. 583 (C.G.C.M.R. 1974), the Coast Guard Court of Military Review upheld the conviction of a senior chief (E-8) for quitting his ship with intent to shirk important service. His ship had received orders to assume surveillance of foreign fishing trawlers sighted near a U.S. fisheries zone. Tiller, upon learning of this, left the ship and went home. The court stated, "When one knows what the mission of his ship is, and has a legal duty to participate in it, but nevertheless quits the ship without authority, he does so at the peril of a jury later determining that the ship's mission was important service." 48 C.M.R. at 586.

7. The question of whether the duty constitutes "important service" or "hazardous duty" is a question of fact for the court to decide. Part IV, para. 9c(2)(a), MCM, 1984. Nevertheless, in United States v. Wolff, 25 M.J. 752 (N.M.C.R. 1987), the Navy-Marine Corps court held that serving a 30-day sentence to confinement following summary court-martial was not important service "as a matter of law...." Id. at 754. More recently, the Air Force court held that accused's attendance at his own special court-martial was not "important service" within the meaning of article 85(a)(2). United States v. Walker, 26 M.J. 886 (A.F.C.M.R. 1988).

D. Attempting to desert. Article 85 (desertion) is one of five punitive articles that contains the offense of attempt as an offense in addition to the principal offense. Therefore, an attempt to desert is charged as an offense under article 85 and not under article 80 (attempts). For an example of attempted desertion, see United States v. Johnson, 7 C.M.A. 488, 22 C.M.R. 278 (1957), wherein the accused, a soldier in Germany, tried unsuccessfully to get a cab driver to take him within the prohibited area adjoining the East German border. The accused proceeded on foot into the area and was apprehended by the border police and turned over to the Army. The accused stated that he was "trying to go to the East German Zone." At all times, the accused was on authorized liberty and within the 50-mile limit of his pass. He was found guilty of desertion. Held: The evidence was not sufficient to support a conviction of desertion, but it was sufficient to support a finding of guilty of attempted desertion. His acts amounted to more than mere preparation. Likewise, attempted UA under article 80 can be an LIO of desertion or attempted desertion. United States v. Evans, 28 M.J. 753 (A.F.C.M.R. 1989).

E. Effect of "termination by apprehension"

1. Intent. The fact that the UA was terminated by apprehension is some, though not conclusive, evidence of an intent to remain away permanently. See United States v. Krause, 8 C.M.A. 746, 25 C.M.R. 250 (1958).

2. Punishment. Desertion with intent to remain away permanently has two scales of punishment, depending upon the method by which the desertion is terminated: if by apprehension -- three years CONF; if terminated "otherwise" -- two years CHL. See Part IV, para. 9e(2), MCM, 1984.

3. Terminated "otherwise" was first defined in United States v. Nickaboine, 3 C.M.A. 152, 11 C.M.R. 152 (1953), in which C.M.A. stated that this phrase is the equivalent of "terminated by surrender"; that is, "freely and voluntarily."

4. "Apprehension," as used when describing a means for terminating an unauthorized absence, is a term of art which imports that the accused's return to military control was involuntary and not initiated by the accused. Compare United States v. Fields, 13 C.M.A. 193, 32 C.M.R. 193 (1962), which stands for the proposition that, where an accused deserter is arrested by civil authorities for a civilian offense and makes his military status known when required to fully identify himself by the civilian police, or when he does so to escape punishment at the hands of the civilian authorities, his absence is not terminated voluntarily, but by apprehension; with United States v. Lewandowski, 37 C.M.R. 777 (C.G.B.R. 1967), aff'd on other grounds, 17 C.M.A. 51, 37 C.M.R. 315 (1967), which stands for the proposition that, where an accused is questioned by civilian police for their own purposes but has committed no civilian offense, discloses his status as an absentee, and is turned over to military authorities, his absence has not been terminated by apprehension. See also Military Judge's Benchbook, DA Pam 27-9 (1982), Inst. 3-9, note 5.

5. The fact of termination by apprehension may be proved simply by a properly executed morning report, unit diary or SRB entry (e.g., "UA terminated by apprehension on (date)"). Mil.R.Evid. 803(6) and (8). See MILPERSMAN, Art. 3430300 and IRAM, para. 4014.2a(2)(c). In United States v. Simone, 6 C.M.A. 146, 19 C.M.R. 272 (1955), a unit morning report (Army's term for USMC unit diary and Navy's page 6 (1070/606)) stated that the "accused was apprehended by civilian authorities [date/place]. At that time he was dressed in civilian clothes. On April 11, he was surrendered to military control at [place],..." This case contains an excellent summary of the variant holdings in prior cases dealing with this proof of apprehension issue. The court here distinguished the effect of an official (public) record assertion of termination by apprehension from the stipulated testimony of a civilian policeman. The evidence in Simone was found to be legally sufficient to establish apprehension. Whereas a civilian policeman may use the term "apprehension" to mean simply "taken into custody," the military officer making an "official (public) record" has a "distinct duty . . . to record the fact of apprehension of a returned absentee if, and only if, he was returned to military control against his will and by events and agencies wholly beyond his control." Id. at 150, 19 C.M.R. at 276. See also United States v. Krause, 8 C.M.A. 746, 25 C.M.A. 250 (1958). Compare United States v. Patrick, 48 C.M.R. 55 (A.C.M.R. 1973), holding that entries in the remarks section of two Air Force duty status charge forms, indicating only that the accused had been apprehended by state police and the next day transferred to military custody, were not alone sufficient to prove that the accused's return to military control was involuntary; it must be shown either that the accused was apprehended by civil authorities for the military service rather than for a violation of state law, or that the accused was returned to the military by the civil authorities for some reason other than by the accused's own voluntary request for such return. The most recent in this line of cases is United States v. Washington, 24 M.J. 527 (A.F.C.M.R. 1987), in which an accused entered a plea of guilty to desertion terminated by apprehension. During the Care inquiry, the accused indicated that he had been apprehended by civilian authorities for "grand theft auto" and was turned over to military authorities five days later. Held: The plea of guilty was improvident, at least as to the aggravating element of termination by apprehension, since the military judge failed to exclude by his inquiry the possibility that the accused might have voluntarily disclosed his UA

status to the civilian authorities for some purpose other than to avoid prosecution -- in which case the termination of his UA status would be by voluntary surrender -- citing United States v. Nickaboine, 3 C.M.A. 152, 11 C.M.R. 152 (C.M.A. 153) and United States v. Beninate, 4 C.M.A. 98, 15 C.M.R. 98 (C.M.A. 1954).

F. Duration. Duration of the absence in desertion is not an essential element of desertion; however, the duration of the absence should be alleged and proved. Duration, when considered with other evidence, is an aggravating circumstance as well as being indicative of "intent never to return." Furthermore, if the necessary intent is not proved, the court may still convict the accused of the LIO of UA for the period alleged, in which event the court may impose the authorized punishment for whatever period of UA is proved. Although the length of the absence is an aggravating circumstance in a case of desertion, the punishment table for desertion is not scaled to duration.

G. Defenses. The same affirmative defenses are available for desertion as were discussed earlier regarding article 86, UA. The defense of mistake of fact in desertion need only be honest, as opposed to honest and reasonable, since desertion is a specific intent offense. See, e.g., United States v. Holder, 7 C.M.A. 213, 22 C.M.R. 3 (1956) (issue of mistake of fact raised where accused, who was under a suspended BCD, went UA and was picked up by civilian authorities and given a jail term. He notified the military of his UA status through the civilian authorities, but discovered there was no "hold" placed upon him when he was released from civilian confinement. Assuming his suspended BCD had been vacated, he went home and waited for it to be sent to him.). See also R.C.M. 907(b)(2)(D)(iii), MCM, 1984, which describes a novel motion to dismiss applicable only to the crime of desertion called "constructive condonation of desertion." United States v. Scott, 6 C.M.A. 650, 20 C.M.R. 366 (1956), discusses the defense but does not apply it under the facts of that case.

H. Pleadings and instructions

1. Desertion with intent to remain away permanently, terminated by apprehension.

a. Sample specification. Part IV, para. 9f(1), MCM, 1984.

Specification: In that Seaman Recruit Jonathan B. Rollo, U.S. Navy, USS Neversink, on active duty, did, on or about 1 January 19CY, without authority and with intent to remain away therefrom permanently, absent himself from his unit, to wit: USS Neversink, located at Newport, Rhode Island, and did remain so absent in desertion until he was apprehended on or about 22 February 19CY.

b. Sample instruction. Military Judges' Benchbook, DA Pam. 27-9 (1982), Inst. No. 3-9. Note: At this point, the term "apprehension" should be defined. The instruction should be tailored to cover the particular theory in each case (e.g., if the only evidence regarding apprehension is that the accused was initially picked up by military police, or that he was picked up by civil police solely at the request of military authority, the following definition would ordinarily be sufficient: The term "apprehension," as used in

the specification, imports that the accused's return to military control was involuntary). It must be shown that neither the accused nor persons acting at his request initiated his return. Id.

2. Desertion with intent to remain away permanently, "terminated otherwise" (i.e., other than by apprehension)

a. Sample specification. Part IV, para. 9f(1), MCM, 1984.

Specification: In that Seaman Recruit Jonathan B. Rollo, U.S. Navy, USS Neversink, on active duty, did, on or about 1 January 19CY, without authority and with intent to remain away therefrom permanently, absent himself from his unit, to wit: USS Neversink, located at Newport, Rhode Island, and did so remain absent in desertion until on or about 22 February 19CY.

b. Sample instruction. The same instruction as above applies except that, since it is not alleged, the military judge could not instruct upon apprehension, nor can the accused be convicted of or punished for it.

0307 MISSING MOVEMENT. Art. 87, UCMJ; Part IV, para. 11, MCM, 1984.

A. Text, Article 87, UCMJ:

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

B. Article 87 contains two offenses:

1. Missing movement through design, and

2. missing movement through neglect.

C. Elements. Part IV, para. 11b, MCM, 1984.

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

2. that the accused knew of the prospective movement of the ship, aircraft, or unit;

3. that the accused missed the movement of the ship, aircraft, or unit; and

4. that the accused missed the movement through design or through neglect.

D. "Required in the course of duty to move with a ship, aircraft or unit"

1. Without authority. This element requires the government to prove that the missing of the movement was without authority. Proof of UA at the time the ship, aircraft, or unit moved would also be proof that the accused had no authority to miss the movement. United States v. Posnick, 8 C.M.A. 201, 24 C.M.R. 11 (1957). ("Every missing movement offense includes an unauthorized absence plus other factors." Id. at 203, 24 C.M.R. at 13. Held: Missing movement and attendant UA are multiplicious for sentencing purposes.)

2. Mode of movement. Article 87, UCMJ, indicates that guilt under this article is predicated on the duty to move with a ship, aircraft, or unit. Three questions have arisen in attempting to categorize the necessary mode of transportation encompassed by article 87: (1) Must the accused be assigned to the crew of the ship or aircraft; (2) must the ship or aircraft be a military ship or aircraft; and (3) is the article applicable only to ships, aircraft, or units?

a. In United States v. Johnson, 3 C.M.A. 174, 11 C.M.R. 174 (1953), the Court of Military Appeals addressed the first question: "No such limitations are found in the language of the Article itself, in the provisions of paragraph 166, Manual for Courts-Martial, 1951, . . . nor in any expression of Congressional intent . . . ." Id. at 176. Thus, the court decided that a person who was merely a passenger on an assigned aircraft could be guilty of missing the movement of the aircraft. See United States v. Graham, 12 M.J. 1026 (A.C.M.R. 1982), aff'd, 16 M.J. 460 (C.M.A. 1983), where the court held that missing a port call for a Military Airlift Command flight constituted missing a movement.

b. While Johnson, supra, involved military aircraft, previous Board of Review decisions appear to have determined that the second question had to be answered in the affirmative. In other words, an individual who was not required to move as a member of a unit on a civilian ship or aircraft does not violate article 87 when he misses the movement of that aircraft. E.g., United States v. Burke, 6 C.M.R. 588 (A.B.R. 1952); United States v. Jackson, 5 C.M.R. 429 (A.B.R. 1952).

(1) For some time, the Navy and Air Force Courts of Military Review were split on the question of whether a serviceman traveling independently and assigned merely as a passenger on a civilian aircraft could be convicted of missing movement. In United States v. Gillchrest, 50 C.M.R. 832 (A.F.C.M.R. 1975), the court, after examining the legislative background of Article 87, UCMJ, held that the evidence failed to establish "either an urgency of the movement or the existence of an essential mission assigned the accused." Id. at 835. Although it had been stressed to the accused that he had a definite commercial flight overseas that he was expected to make, the court emphasized the fact that supplemental transportation arrangements for the accused at either end of the assigned flight were not specified. The Air Force court modified its position somewhat in United States v. DeFroideville, 9 M.J. 854 (A.F.C.M.R.), petition denied, 10 M.J. 189 (C.M.A. 1980). There, a conviction for missing a military charter of a commercial airline was upheld where the accused was twice assigned a seat and demonstrated "an intention not to go to Korea at all." Contrast the position of the Navy court in United

States v. St. Ann, 6 M.J. 563 (N.C.M.R. 1978), petition denied, 7 M.J. 392 (C.M.A. 1979). Without moderating their holding, the Navy court held provident a plea to missing a regular commercial flight, even though the accused was not a member of the crew, traveling with his unit, or ostensibly assigned to an essential mission, merely because he had a duty to make the movement.

(2) The Court of Military Appeals finally addressed this issue in United States v. Gibson, 17 M.J. 143 (C.M.A. 1984), in which the accused had been given a ticket and orders to report for a commercial flight from Philadelphia to Norfolk. The court surmised that the Navy would have been satisfied had the accused caught any flight that would have returned him to Norfolk on that day and concluded that "in any event, the 'foreseeable disruption' to naval operations caused by [the accused's] failure to make the particular flight is not of such magnitude as to require the more severe punishment afforded by the application of Article 87." Id. at 144. The accused's guilty plea to missing movement was therefore held improvident, and his conviction thereof was reversed. But see United States v. Smith, 26 M.J. 276 (C.M.A. 1988), infra, where individual travel is in conjunction with the relocation of a unit.

c. Military Sealift Command (MSC, formerly Military Sea Transport Service, MSTS) ships are considered military ships. While travel by MSC ships is no longer common, a person required to travel individually aboard one who wrongfully misses its movement has violated article 87. For example, in United States v. Gallagher, 15 C.M.R. 911 (A.F.B.R. 1954), an Air Force first lieutenant was found guilty of missing the movement of a Navy transport ship in which he and his family were to be moved from Southampton, England, to the United States for separation.

d. The term "unit" is not limited to any specific technical category such as those listed in a Table of Organization and Equipment. The word "unit . . . not only includes the foregoing but also units which are established prior to the movement with the intention that they have organizational continuity upon arrival at their destination, regardless of their technical designation." United States v. Burke, 6 C.M.R. 588, 592 (A.F.B.R. 1952). "Unit" would also include a T/O organization draft of replacements intended to be disbanded upon arrival at its destination.

(1) A "Standard Transfer Order" involving only one or several men would not constitute the movement of a "unit." Rather, this is a transfer from one unit to another unit. United States v. Jackson, 5 C.M.R. 429 (A.F.B.R. 1952).

(2) Once it is shown that there was a "unit" involved in the movement, the mode of transportation is not important. It could be either military or commercial and would include travel by ship, plane, truck, bus, or even forced march. See United States v. Pender, 5 C.M.R. 741 (A.F.B.R. 1952) (railroad as a mode of transportation; contains a discussion of the legislative history of article 87).

(3) In United States v. Smith, 26 M.J. 276 (C.M.A. 1988), accused Army privates' plea of guilty to missing movement was upheld where it was shown that his unit (an artillery battery) was transferred from CONUS to West Germany even though accused was authorized to travel individually and, when he missed his "port call," specific transportation had not been arranged for him. The court said: "Any person subject to the Uniform Code who is transferred incident to the relocation of a unit and who willfully absents himself incident to or in conjunction with the transfer is guilty of 'missing movement.'" Id. at 277.

e. "Ship" or "unit" -- summary. The three questions raised with regard to the issue of movement have apparently been solved as follows:

(1) If the accused was assigned as a member of the crew, or was ordered to move as a passenger via a particular military or chartered civilian ship or aircraft, proof that he missed the sailing or flight is sufficient for a finding of a violation of article 87.

(2) If the accused was required to move as a member of a unit, proof that he missed the movement of the unit, regardless of the mode of transportation -- whether it be military or commercial, jet or walking -- is sufficient for a finding of a violation of article 87.

(3) If the accused is traveling individually and is given a ticket on a commercial carrier, he or she will not have missed a movement unless more is shown concerning the particular military need for the accused to have made that specific flight, as where he is travelling individually incident to the relocation of his unit. See United States v. Smith, supra.

E. Knowledge

1. Part IV, para. 11c(5), MCM, 1984, states: "In order to be guilty of the offense, the accused must have actually known of the prospective movement that was missed."

a. Article 87, UCMJ, itself does not specifically list knowledge as an element of the offense.

b. It was generally accepted that in order to convict an accused of missing movement through design, the accused must have had actual knowledge of the prospective movement. The rationale for this position is that an accused could hardly intend to miss a movement if he had no knowledge that a movement was to be made.

c. As for missing movement through neglect, a considerable disagreement existed with respect to the question of whether actual knowledge is or is not required. C.M.A. has resolved this issue by requiring actual knowledge even for a conviction for missing movement by neglect. In United States v. Chandler, 22 C.M.A. 193, 48 C.M.R. 945 (1974), the accused was found guilty of a charge of missing movement by neglect. The only evidence presented by trial counsel was an entry from the accused's service record stating that the accused had "missed (the) sailing" and had been "informed of the scheduled movement by the ship's plan of the day." The court noted that this entry had not been made in accordance with requirements of BUPERSMAN

(now MILPERSMAN) 3430150 because it did not state that the accused was informed of the movement by a specific person. The court thus concluded that "the entrant intended to report only that the accused learned of the plan by means other than public announcement of it in his presence." Id. at 195, 48 C.M.R. at 947. Citing United States v. Curtin, 9 C.M.A. 427, 26 C.M.R. 207 (1958), the court held that actual knowledge of the movement was required under article 87 and that the entry in question was legally insufficient to prove such knowledge. The court further stated that:

> ...publication [of a ship's plan of the day] merely indicates an "opportunity to know" on the part of the accused; that opportunity can provide the basis for an inference that the accused "did know" but the inference is not a substitute for actual knowledge of the movement, which is essential for conviction of the offense of missing the movement.

Id. quoting United States v. Newville, NCM 72-0071 (N.C.M.R. 31 Mar 1972). Although the accused's absence for eleven days before the movement of the ship in the Chandler case certainly supported the argument that the accused had not read the plan of the day and thus lacked actual knowledge of the movement, the court clearly stated that a mere "duty to inform oneself about a particular matter is not the equivalent of actual knowledge...." Id. Whether the case would have been decided differently if there was evidence that the accused was aboard ship when the plan of the day was posted is not entirely clear. See United States v. Wahnon, 49 C.M.R. 484 (C.G.C.M.R. 1974) (proof merely that a chart listing future ship movements had been posted while accused was aboard was not sufficient to establish actual knowledge), rev'd on other grounds, 1 M.J. 144 (C.M.A. 1975).

d. Actual knowledge that the ship, aircraft, or unit was scheduled to move, like specific intent, is a fact which can sometimes be proved by direct evidence, but ordinarily it is proved by circumstantial evidence. Examples:

(1) Direct evidence

(a) Statement by the accused to a friend: "The ship is going to Gitmo next week."

(b) Statement by the accused to an investigator: "Yes, I knew the ship was going to sail for Gitmo on New Year's Day."

(c) A mimeographed statement, contained in accused's service record bearing his signature, in which the accused acknowledges that he has been informed of a particularly described prospective movement.

(2) Circumstantial evidence

(a) Testimony that the accused was personally informed or present at quarters when the word was passed. United States v. Balthazor, 9 C.M.R. 549 (N.B.R. 1953).

(b) Evidence that the scheduled movement was published in the plan of the day and had been brought to the attention of the accused, either directly or inferentially. United States v. Posnick, 22 C.M.R. 681 (N.B.R. 1956).

(c) Evidence of personal actions on the part of the accused which are apparently in response to knowledge of the scheduled movement. In United States v. Gallagher, 15 C.M.R. 911 (A.F.B.R. 1954), evidence that the accused prepared himself and his family for return to the United States, cleared the base, attended a medical examination formation, and got on the bus which was designated to take the accused and his family to the ship was sufficient proof of knowledge to sustain a conviction for missing movement through design, even though there was no proof that the accused had ever actually received the orders to the ship which had been issued to him.

(d) Whether a service record entry that the accused has been informed as to the prospective movement is admissible to prove the element of knowledge has been a source of dispute for some time. The answer is important, as it determines whether a missing movement case can be proved entirely through service record entries. MILPERSMAN 3430150.3 requires an entry to be made in the service records of absentees whenever the ship sails for local operations or for another port and directs that, where appropriate, details showing that the absentee had knowledge shall be included in such entry if such information was imparted to him. In United States v. Miller, 33 C.M.R. 622 (N.B.R. 1963), the board held that such a service record entry was admissible. But, four years later, in United States v. Heltsley, NCM 67-1182 (N.B.R. 29 June 1967), the board expressly declined to follow the Miller case, declaring that the BUPERS Manual (presently MILPERSMAN) could not, by mere fiat, create a new business entry (now regularly conducted business activity) or official (public) records exception to the hearsay rule. Still more recently, in United States v. Newville, NCM 72-0071 (N.C.M.R. 31 March 1972), the court held that an entry, "NEWVILLE was informed as (sic) the scheduled movement by E. F. McCANN, LT, USNR, on 15 Sep 70 at morning quarters," was an official (public) record made in conformance with BUPERS Manual and, therefore, was admissible as an exception to the then hearsay rule under paragraph 144c, [now Mil.R.Evid. 803(8)]. In that same case, however, the accused testified that he did not know of the scheduled movement. The court set aside the conviction because the inference of knowledge arising from the service record entry was not proof beyond a reasonable doubt in view of the clear and uncontroverted testimony of the appellant. In United States v. Chandler, supra, discussed in detail above, the court stated that such entries "would appear to fall within the 'evaluative' report category." As such, they would be admissible under proposed Fed.R.Evid. 803 only in "civil cases and against the government in criminal cases." 22 C.M.A. at 195, 48 C.M.R. at 947. However, the court did not reach this issue since it found the entry legally insufficient to support a conviction even if it was admissible.

(e) "Public Record" exception to the hearsay rule. Mil.R.Evid. 803(8) provides that personnel accountability documents are admissible as a record of fact or event if made by a person within the scope of his official duties to prove the truth of such matters. A service record entry declaring that the accused knew of the prospective movement, however, would likely not be admissible, since it is not a record of a fact but of an opinion as to what was within the accused's mind.

2. Preciseness of the knowledge

a. Knowledge of the exact hour or even of the exact date of the scheduled movement is not required. Part IV, para. 11c(5), MCM, 1984.

b. Knowledge of the approximate date is sufficient. Example: The accused knew that his ship was scheduled to move "in the middle of next week." Held: Sufficient. United States v. Balthazor, 9 C.M.R. 549 (N.C.M.R. 1953).

3. Source of the accused's knowledge

a. Several Courts of Military Review have held that the knowledge of the prospective movement must come to the accused either directly or indirectly from an official source and cannot be based merely upon rumor or personal speculation. E.g., United States v. Nunn, 5 C.M.R. 334 (N.B.R. 1952) (statement by the accused that he knew his ship was leaving "sometime in April," without more, not sufficient to sustain a conviction); United States v. Foster, 3 C.M.R. 423 (N.B.R. 1952) (inference of a movement of a ship, based upon fleet operational policy, not sufficient to sustain a conviction).

b. In United States v. Posnick, 22 C.M.R. 681 (N.B.R. 1956), incompetent evidence (plan of the day, unauthenticated), which would have tended to show knowledge circumstantially, was received in evidence. The accused then testified that he had not seen the plan of the day, but that "there was scuttlebutt that there was a possibility of the ship leaving Monday, but that was not official." He said he heard it at quarters "and the Second Division Officer was taking muster; he said it wasn't official, but the ship is expected to leave Monday, unofficially." The board held that this was sufficient evidence of knowledge. Note: C.M.A. subsequently granted a petition for review on the issue of whether or not the UA specification, article 86, and the missing movement through neglect specification, article 87, were multiplicious. United States v. Posnick, 8 C.M.A. 201, 24 C.M.R. 11 (1957). C.M.A. held they were multiplicious, but affirmed the findings of guilty as to both specifications, and merely returned the case to the Court of Military Review for reassessment of the sentence.

F. "That the accused missed the movement ..." This element has three sub-elements which the government must prove.

1. First, the government must prove that there was in fact a "movement" by the ship, aircraft, or unit. "Movement," as used in article 87, is a term of art, and failure of the law officer (military judge) to define it in his instructions to the court is error. United States v. Jones, 1 C.M.A. 276, 3 C.M.R. 10 (1952). "Movement" means a substantial change in location; it contemplates a major transfer of a ship, aircraft, or unit involving a substantial distance and period of time. Whether a particular movement is substantial is a question to be determined by the court by considering all the circumstances. See United States v. Kingsley, 17 C.M.R. 469 (N.B.R. 1954), for an extended discussion of this problem. What constitutes a substantial distance and time is necessarily a relative matter and will vary greatly, depending upon the facts of the case.

a. Examples of movement: An overseas flight or voyage; transfer from one post, camp, or station to another; destroyer departs Newport for operations off Norfolk; destroyer departs Newport for a week's training cruise, returning to Newport at the end of the week; an operational flight of a patrol plane from Oceana to Cherry Point.

b. Examples of changes which do not constitute a movement: Practice marches of a short duration with a return to the point of departure; United States v. Smith, 2 M.J. 566 (A.C.M.R. 1976); minor changes in location of ships, aircraft, units, as when a ship is shifted from one berth to another in the same shipyard or harbor, or when a unit is moved from one barracks to another on the same post.

c. If three movements are required to move the accused's squadron, the accused may be convicted of three separate article 87 violations. United States v. Bisser, 27 M.J. 692 (N.M.C.M.R. 1988).

2. Second, the government must prove that the movement occurred. If the scheduled movement is canceled, the offense of missing movement is not committed, regardless of the accused's purpose and absence at the scheduled time. The accused may have committed other offenses such as: Unauthorized absence (article 86); desertion with intent to shirk important service (article 85); attempted missing movement through design (article 80).

3. Third, the government must prove that the accused actually missed the movement. The fact that the ship was to depart at some particular time and the accused was absent will not be a missing movement violation if the ship departs late and, due to the late departure, the accused, though late, arrived in time to depart with the ship. A guilty plea to another specification alleging UA covering the same period of time as the alleged missing movement specification cannot be used to prove that the accused missed the movement. Independent evidence must be introduced to prove that he missed the movement. United States v. Dorrell, 18 C.M.A. 424 (N.B.R. 1954).

G. Intent. Article 87 includes both a specific and general intent offense.

1. "That he missed the movement through design"

a. Design means on purpose, intentionally, or according to plan and not merely carelessness or accident. United States v. Clifton, 5 C.M.R. 342 (N.B.R. 1952). "Design" implies premeditation and constitutes "specific intent."

b. Proving design. As in most cases involving specific intent (except where there is a statement by the accused that he intended to miss the movement), the government will have to prove the intent (design) to miss the movement by circumstantial evidence; that is, by proof of facts from which an inference of the specific intent to miss the movement may be drawn. Examples of the circumstantial evidence tending to show design to miss movement: Failure to get inoculations where the unit was scheduled for foreign duty; dislike of a particular duty station where the unit was scheduled for deployment; distaste for air travel.

2. "That the accused missed the movement through neglect"

a. This article 87 offense is intended to cover those situations where the accused does not consciously intend to avoid the scheduled movement, but through a negligent act or omission on his part fails to be present at the time of a scheduled movement. United States v. Thompson, 2 C.M.A. 460, 9 C.M.R. 90 (1953).

b. "Through neglect" means the omission by a person to take such measures as are appropriate under the circumstances to assure that he will be present with his ship, aircraft, or unit at the time of a scheduled movement, or the commission of some act without giving attention to its probable consequences in connection with the prospective movement.

c. In the ordinary missing movement case, the simple act of being UA at the time the ship is to sail, the aircraft to depart, or the unit to move, meets the requirement of this element and, if knowledge is proven, makes out a prima facie case of missing movement through neglect.

H. Affirmative defenses to missing movement. Since missing movement is an absence offense, the same defenses are available as against a charge of UA (i.e., mistake, ignorance, and impossibility).

1. Missing movement through design and mistake of fact. The mistake need only be an honest one. United States v. Holder, 7 C.M.A. 213, 22 C.M.R. 3 (1956). This rule differs from the article 86(3), "simple" UA mistake of fact rule since this is a specific intent offense. In UA, the mistake must be honest and reasonable. For example: While Rollo, the accused, is UA, he sees his buddy in a bar, who falsely tells him the ship's sailing has been canceled. If the accused honestly believes this, he is not guilty of missing movement through design. He could not have intentionally missed the movement if he really believed there would not be a movement.

2. Missing movement through neglect and mistake of fact. The rule is the same as the article 86(3) mistake of fact rule, since missing movement through neglect is a general intent offense or crime arising out of negligence. The mistake of fact as to missing movement through neglect must be both honest and reasonable. Even though Rollo honestly believed his buddy in the foregoing example, his belief was not reasonable. He would have found out that the ship was actually moving if he had been aboard ship at the proper time or had verified its sailing schedule. In other words, he did not act reasonably (i.e., he did not exercise due diligence). See United States v. Holder, supra.

I. Pleading, instructions, and findings

1. Sample specification, Part IV, para. 11f, MCM, 1984

Specification: In that Fireman Henry Z. Voodoo, U.S. Naval Reserve, USS Zombie, on active duty, did, at Kingston, Jamaica, on or about 23 September 19CY, through design, miss the movement of the USS Zombie with which he was required in the court of duty to move. (Note: Substitute "neglect" for "design" when appropriate.)

2. Sample Instruction. Military Judges' Benchbook, DA Pam. 27-9 (1982), Inst. No. 3-17.

3. If the prosecution fails to convince the court beyond a reasonable doubt that the accused is guilty of missing movement through design, but the court is convinced beyond a reasonable doubt that he is guilty of missing movement through neglect, the court may find the accused guilty of missing movement through neglect by "exceptions and substitutions" in announcing its findings.

4. If neither missing movement through design nor missing movement through neglect are proven beyond a reasonable doubt, the court could still find the accused guilty of the LIO of UA. See United States v. Bridges, 9 C.M.A. 121, 25 C.M.R. 383 (1958); United States v. Smith, 2 M.J. 566 (A.C.M.R. 1976). This would, however, require an unusual amount of skill in announcing the findings by exceptions and substitutions. The best practice is to allege two specifications -- the UA period under article 86 and the missing movement under article 87 -- simplifying the task in announcing findings, and possibly avoiding fatal error in that matter.

0308 RELATIONSHIP BETWEEN UA, DESERTION, AND MISSING MOVEMENT -- SUMMARY

A. Unauthorized absence

1. UA is simply an absence without authority. The crime is completed at the moment the accused absents himself without authority, either by departing without authority or by failing to return at the expiration of his leave or liberty.

2. It is a general intent crime; that is, a specific intent to be so absent is not needed to constitute the crime. It may also be a crime of negligence.

3. Duration is simply a matter in aggravation. There is a graduated scale for maximum punishment based upon the length of the UA.

4. Likewise, specific intent is a matter in aggravation (e.g., absence from watch with intent to abandon same).

5. The major affirmative defenses available to UA are: Mistake of fact, ignorance of fact, and impossibility. These defenses are also available to desertion and missing movement.

B. Desertion

1. Desertion is simply UA plus a specific intent (to remain away permanently, or to shirk important service, or to avoid hazardous duty).

2. The crime of desertion is not necessarily completed the moment the accused absents himself without authority. The crime of desertion is completed the moment the accused, while absent without authority, initially forms the requisite intent. Thereafter, if he changes his mind, it is simply repentance, not a defense.

3. Duration is a matter in aggravation but, unlike UA, there is no graduated scale for maximum punishment purposes based upon the length of the period of absence.

4. However, desertion with intent to remain away permanently does have two different scales of punishment based upon the method of termination of the absence -- by apprehension (involuntarily) three years, or "otherwise" (voluntarily) two years.

5. The affirmative defense of mistake of fact and ignorance of fact need only be honest, whereas for UA the mistake or ignorance must be both honest and reasonable.

6. If the specific intent is not sufficiently proved to the court, it may find the accused guilty of the LIO of UA contained within the desertion specification.

C. Missing movement

1. Missing movement contains two distinct offenses, one which requires specific intent -- missing through design -- and the other which requires only a general intent -- or negligence -- missing through neglect. The latter (neglect) is an LIO of the former (design) and the court can, if not convinced that he acted with design, nevertheless convict the accused of the LIO of missing through neglect, contained within the missing through design specification.

2. As in UA and desertion, duration is not an element of missing movement. If the contemporaneous UA is of significant duration, a separate UA specification showing duration should be drafted, thus eliminating the difficulty in pleading the duration aspect of a missing movement and precluding the possibility of a duplicity problem arising.

3. The affirmative defenses of mistake of fact and ignorance of fact as to missing through design need only be honest.

4. Although missing movement includes UA, it is not advisable to treat UA as an LIO for pleading purposes, because of the difficulty in correctly returning the findings on such an LIO by exceptions and substitutions. In other words, plead two specifications: one alleging the UA duration aspect, and one alleging the missing movement aspect. However, if this is done, even if a guilty plea is entered to the UA specification, all of the elements of the missing movement specification must be independently proven. United States v. Wahnon, 1 M.J. 144 (C.M.A. 1975).

5. Missing movement through design could be an LIO of desertion, if specially pleaded. However, such pleading is unnecessary and inadvisable. The best solution is to plead two separate specifications.

ADMINISTRATIVE REMARKS
NAVPERS 1070/613 (Rev. 1-76)
S/N 0106-LF-010-6060

E-32
SEE BUPERSMAN 5030420

SHIP OR STATION
USS NEVERSAIL (DD-838)

01 JULY 84: On unauthorized absence from 0800, 01 July 1984. Intentions unknown.

J. B. BLOCKER, LCDR, USN
Personnel Officer
By direction of the Commanding Officer

NAME (Last, First, Middle)	SSN	BRANCH AND CLASS
BRANCH, Alvin Robert	001-01-0001	USN

* U.S. Government Printing Office: 1981—783-166/6427 2-1

13 5

BUPERS USE ONLY

P601-6R

BUPERS USE ONLY

38

RECORD OF UNAUTHORIZED ABSENCE

A

1. DATE OF SUBMISSION: 86JAN25

2. SHIP OR STATION AND LOCATION: USS NEVERSAIL DD-838

B

UNAUTHORIZED ABSENCE FROM: 3. HOUR: 0800 4. DATE: 84JUL01

[X] 5. OVER LIBERTY

LIBERTY BEGAN: 6. HOUR: 1600 7. DATE: 84JUN30

[ ] 8. OVER LEAVE [ ] 9. AWOL

C

HELD AND CHARGED BY CIVIL AUTH: 10. HOUR: 11. DATE:

[ ] 12. DELIVERED TO CIVIL AUTH

[ ] 13. APPREHENDED BY CIVIL AUTHORITIES

[ ] 14. DD 616 ISSUED

15. AT (ORGANIZATION AND LOCATION)

D

UNAUTHORIZED ABSENCE FOR 10 DAYS

[X] 16. DD 553 ISSUED

[X] 17. PERSONAL EFFECTS COLLECTED, INVENTORIED, AND IN SAFEKEEPING

E

18. UIC MEMBER UA FROM: 23456

19. ACTIVITY MEMBER UA FROM: USS NEVERSAIL DD-838

F

RETURNED TO MILITARY JURISDICTION: 20. HOUR: 1530 21. DATE: 85DEC25

[X] 22. APPREHENDED

[ ] 23. SURRENDERED

[ ] 24. DD 616 ISSUED

25. RETURNED TO MILITARY JURISDICTION AT (ACTIVITY): NETC, NEWPORT RI

26. UIC: 61723

[ ] 27. RET. ON BOARD

28. TRANSFERRED TO (ACTIVITY): USS NEVERSAIL DD-838

29. UIC: 23456

G

[ ] 30. DETERMINATION NOT UNAUTHORIZED ABSENCE

31. NAVPERS 1070/606 WHICH REPORTED ABSENCE IN ERROR

[ ] 32. ABSENCE EXCUSED UNAVOIDABLE

33. CHARGED NO DAYS LEAVE (DAY FOR DAY)

SKMC 34. FROM:

35. TO

[ ] 36. DISEASE DUE TO USE OF ALCOHOL/DRUGS

[ ] 37. OTHER

[X] 38. ABSENCE NOT EXCUSED

39. CHARGE NO DAYS LOST TIME (30 DAY MO): 534

40. CHARGE NO DAYS LOST TIME (DAY FOR DAY): 542

41. CHANGE EAOS TO: 90JUN05

42. CHANGE EXPR ENL TO:

H

[ ] 43. ADJUST PREVIOUSLY SUBMITTED 1070, 606

44. DATED

45. CORRECTED INFO ENTERED ABOVE [ ]

46. ERRONEOUSLY REPORTED LEAVE

47. ERRONEOUSLY REPORTED LOST TIME (30 DAY MONTH)

48. ERRONEOUSLY REPORTED LOST TIME (DAY FOR DAY)

I

49. AMPLIFYING REMARKS (MAY BE CONTINUED ON REVERSE)

84JUL02: UA FM USS NEVERSAIL DD-838 AT NEWPORT, RI 0800, 84JUL01.

JBB

J. B. BLOCKER, LCDR, USN, BY DIR CO USS NEVERSAIL DD-838

84JUL15: MISSED SAILING OF USS NEVERSAIL DD-838 FM NEWPORT, RI THIS DATE.

JBB

J. B. BLOCKER, LCDR, USN, BY DIR CO USS NEVERSAIL DD-838

84DEC27: RECORDS AND PERSONAL EFFECTS TRANSFERRED THIS DATE.

JBB

J. B. BLOCKER, LCDR, USN, BY DIR CO USS NEVERSAIL DD-838

86JAN25: APP BY CIV AUTH 1530, 85DEC25 AT NEWPORT, RI PURSUANT TO DD 553. RTN TO MILJURIS, NETC, NEWPORT, RI, 1700, 85DEC25. TRANSFERFED TO USS NEVERSAIL DD-838, 86JAN02. RTN FOR DISCACT.

JBB

J. B. BLOCKER, LCDR, USN, BY DIR CO USS NEVERSAIL DD-838

J

JBB

50. (SIGNATURE BY DIRECTION) RANK GRADE

J. B. BLOCKER, LCDR, USN, BY DIR CO USS NEVERSAIL DD-838

51. UNIT I.D. CODE: 23456

52. RATE: SN

53. NAME (LAST FIRST MIDDLE): BRANCH, ALVIN ROBERT

54. SSN: 001-01-0001

55. BRANCH CLASS: USN

RECORD OF UNAUTHORIZED ABSENCE NAVPERS 1070/606(REV 1-77) S/N 0106-LF-010-6956

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FIRST COPY

840116: MARCORADMINDET, NETC, NPT, RI: UA(AWOL) fr this org since 0915, 840112. Abs reported on UD# 007-84 dtd 840116.

A. Wall
By dir

840122: MARCORADMINDET, NETC, NPT, RI: Fr UA(AWOL) at 2020, 840120 apprehended by civil auth at Johnston, RI and was del to this org at 2330, 840120. Termination of abs reported on UD# 012-84 dtd 840122.

A. Wall
By dir

840130: MARCORADMINDET, NETC, NPT, RI 02841
" I certify that I was given the opportunity to consult with a lawyer, provided by the government at no cost to me, in regard to the NJP held on 840130. I understand that I have the right to refuse that NJP, but I choose not to exercise that right."

Dan O. Marino

840130: MARCORADMINDET, NETC, NPT, RI: Viol Art 86, UCMJ: Spec: UA(AWOL) fr 0915, 840112 to 2020, 840120. Awd Red to E-1, forf $100.00 pay per month for one month, restr for 30 days to the limits of NETC, NPT, and 30 days extra duties. Eff date of RED is 840130. Forf of $100.00 pay per month for one month is suspended for a period of three months, at which time, unless sooner vacated, will be remitted without further action. Awd at OIC's OH on 840130. Reported on UD# 016-84 dtd 840130. Not Appealed.

E Nuff
By dir

850409: MARCORADMINDET, NETC, NPT, RI: UA(AWOL) fr this org since 1330, 850408. Abs reported on UD# 096-85 dtd 850409.

E Nuff
By dir

850508: MARCORADMINDET, NETC, NPT, RI: UA(AWOL) fr this org since 1330, 850408. Declared deserter this date as of 0001, 850508, and dropped from the rolls this org on UD# 106-85 dtd 850508. DD 553 published this date.

E Nuff
By dir

GOOD CONDUCT MEDAL PERIOD COMMENCES:	ORGANIZED MARINE CORPS RESERVE MEDAL PERIOD COMMENCES:

EMBOSSED PLATE IMPRESSION

MARINO	DAN	O.	00 11 2222
NAME (Last)	(First)	(Middle)	SERVICE NO.

NAVMC 118 (12) (REV. 8-87) (PREVIOUS EDITIONS WILL NOT BE USED) C-16811 OFFENSES AND PUNISHMENTS (1070)

PAGE OF 12

CHAPTER IV

OFFENSES AGAINST AUTHORITY

0400 INTRODUCTION: This chapter analyzes different types of misconduct that involve offenses against authority. It discusses Articles 89 through 92 of the Uniform Code of Military Justice. The chapter is divided into three sections: The first will concern orders offenses (violations of "general" and "other lawful" orders, and willful disobedience of orders from superiors); the second will analyze the offenses of dereliction of duty and disrespect; and the last will examine the relationship between these offenses and discuss certain defenses commonly encountered in this area of the law. As noted before, this chapter is about offenses against authority; other offenses which may be characterized as such, but which are also substantive crimes in and of themselves, are discussed in other sections of this study guide.

SECTION ONE

0401 CONCEPTS COMMON TO ALL ORDERS OFFENSES. Despite the wide variety of orders offenses, all of them possess certain common concepts. For example, all orders must be lawful if they are to be enforceable in a punitive forum. Some of these common indicia may be more easily understood in terms of defenses available to an accused charged with a particular orders offense. Thus, an accused charged with the willful disobedience of his superior commissioned officer has a defense to the charge if it is shown that the order was unlawful. This section discusses some of these common concepts.

A. Lawfulness. (Key Numbers 507-509, 527-529, 532-534, 679-686, 841). The determination of lawfulness of an order may be a question of law, in which case the military judge rules finally. However, the question of lawfulness may rest on a factual issue, in which case the question should be submitted to the court. United States v. Avila, 41 C.M.R. 654 (A.C.M.R. 1969). For example, the question whether or not the person who issued an order occupied a position which would authorize issuance is a factual determination. United States v. Cassell, NMCM 85-2178 (24 Jan 1986).

1. Inference of lawfulness

a. "An order requiring the performance of a military duty or act may be inferred to be lawful and it is disobeyed at the peril of the subordinate." Part IV, para. 14c(2)(a)(i), MCM, 1984; United States v. Smith, 21 C.M.A. 231, 45 C.M.R. 5 (1972). United States v. Lusk, 21 M.J. 695 (A.C.M.R. 1985); United States v. Brown, 22 M.J. 448 (C.M.A. 1986).

b. The inference of lawfulness thus created by the MCM makes it unnecessary for the prosecution to introduce evidence to establish the lawfulness of an order. The accused has the burden of rebutting the inference; however, once rebutted, the prosecution must prove beyond a reasonable doubt that the order was lawful. United States v. Tiggs, 40 C.M.R. 352 (A.B.R. 1968).

c. The inference of lawfulness does not apply to a patently illegal order (i.e., an order which a reasonable man would know is a demand to commit an obviously illegal act). See Part IV, para. 14c(2)(a)(i), MCM, 1984; United States v. Calley, 22 C.M.A. 534, 48 C.M.R. 19 (1973). The order from an E-4 to an E-1 to continue driving a 2 1/2-ton truck with failing brakes was patently illegal and not a defense to the resulting death of a civilian. United States v. Cherry, 22 M.J. 284 (C.M.A. 1986).

2. The person issuing the order must have authority to give such an order. Authorization may arise by law, regulation, or custom of the service. See United States v. Marsh, 3 C.M.A. 48, 11 C.M.R. 48 (1953) and Part IV, para. 14c(2)(a)(ii), MCM, 1984.

a. "[A] commander has plenary power over his subordinate officers regarding command functions. In the ordinary course of his authority he can enlarge or restrict the power of particular subordinates." United States v. Gray, 6 C.M.A. 615, 20 C.M.R. 331 (1956). In Gray, the Division Commanding General issued an order that "no personnel will be placed in pretrial confinement without prior approval of the division's SJA." Accused was placed in pretrial confinement by his company commander without such prior approval. Accused escaped and was charged with the offense of escape from confinement. Held: The confinement was unlawful and, hence, he was not guilty of this offense. The Court of Military Appeals held, in United States v. Young, 1 M.J. 433 (C.M.A. 1976), that a subordinate commander may not impose haircut standards more stringent than promulgated by general regulations. United States v. Garcia, 21 M.J. 127 (C.M.A. 1985) (to the extent apparently conflicting orders can be read as compatible, the subordinate's order is also enforceable). A civilian DoD policeman cannot issue an order to a servicemember which can be enforced under 92(2) or 92(3). United States v. Cassell, NMCM 85-2178 (24 Jan 1986).

b. Subordinates may be empowered to give lawful orders to superiors. For example, sentinels or members of the armed forces police in the execution of their duties may lawfully issue orders to their superiors. United States v. Stovall, 44 C.M.R. 576 (A.F.C.M.R. 1971).

c. Whether the issuance of a certain order is authorized may depend on the circumstances under which it is given. Winthrop, Military Law 576 (2d Ed. 1926); United States v. Robinson, 6 C.M.A. 347, 20 C.M.R. 63 (1955).

(1) An order given during an emergency might be lawful, while the same order given under normal circumstances might not be lawful. For example: While flying over the Atlantic, a plane commander orders personnel to jettison all personal property including baggage, etc. Is this order lawful? Like all orders, it is inferred to be lawful. But, assume the reasons for the order are shown to be as follows:

(a) The plane commander wants the plane to go faster so he won't be late for a date. ORDER IS UNLAWFUL. It is an order "which has for its sole object the attainment of some private end." Part IV, para. 14c(2)(a)(iii), MCM, 1984. The inference is rebutted. United States v. Robinson, supra.

(b) Two of the plane's four engines have quit and the plane is losing altitude. The ordered action may lighten the plane enough to enable it to return to base. ORDER IS LAWFUL. Evidence does not rebut, rather it fully supports the inference.

(2) Geographical, political, or economic circumstances may have a bearing on whether a particular order is authorized.

(a) Activities of American military personnel in foreign countries may have different consequences as compared to the same activities performed in the United States. United States v. Wheeler, 12 C.M.A. 387, 30 C.M.R. 387 (1961) (marriage); United States v. Manos, 17 C.M.A. 10, 37 C.M.R. 274 (1967) (drinking age). But see United States v. Nation, 9 C.M.A. 724, 26 C.M.R. 504 (1958).

(b) In United States v. Martin, 1 C.M.A. 674, 5 C.M.R. 102 (1952), the accused was ordered by the XO not to barter cigarettes to the natives in a foreign port. American cigarettes were scarce and black markets flourished in the port. He was convicted of a violation of this order. Held: Order was lawful. In view of the disorders created by such undercover transactions, and the difficulty in controlling them, the authority of the XO could reasonably include any order or regulation which would tend to discourage participation in such activities. Under the circumstances, the fact that the order prohibited the disposition of personal property owned by the accused does not render it unlawful. See United States v. Lehman, 5 M.J. 740 (A.F.C.M.R. 1978).

3. Orders which do not relate to a military duty are unlawful. Part IV, para. 14c(2)(a)(iii), MCM, 1984; United States v. Wilson, 12 C.M.A. 165, 30 C.M.R. 165 (1961); United States v. Musguire, 9 C.M.A. 67, 25 C.M.R. 329 (1958).

a. The term "military duty" includes not only those activities usually thought of as military duties, but also includes all activities which are reasonably necessary to safeguard or promote the morale, discipline, and usefulness of members of a command. United States v. Manos, 17 C.M.A. 10, 37 C.M.R. 274 (1967); United States v. Martin, 1 C.M.A. 674, 5 C.M.R. 102 (1952).

b. Examples of orders which do not relate to military duties:

(1) Order to accused, who works in the paint shop, to paint the Admiral's privately owned automobile. Reason: Sole object is a private end. United States v. Smith, 1 M.J. 156 (C.M.A. 1975).

(2) Order to accused to donate money to charity. Reason: Donation is necessarily a matter of personal decision. If an order serves a military purpose, however, the fact that an accused will have to expend funds to carry out the order will not render it unlawful. For example: An order to get a regulation haircut or to have a uniform cleaned relates to a military duty (proper appearance) and would be lawful, notwithstanding the fact that in carrying out the order the accused will be required to spend his own money. See United States v. Gordon, 3 C.M.R. 603, n.1 (A.B.R. 1952). However, if an accused has no funds when the order is given, this may constitute the defense of impossibility of compliance. United States v. Pinkston, 6 C.M.A. 700, 21 C.M.R. 22 (1956).

c. The fact that an ordered act will accomplish both a military and a private objective will not render the order unlawful.

(1) Part IV, para. 14c(2)(a)(iii), MCM, 1984, provides that an order which has for its sole object the attainment of some private end is unlawful.

(2) Example: The accused was ordered to perform certain work in an Officers' Mess. He refused to comply, contending that the work he had been ordered to do was for the private benefit of the officers of the mess. Held: Messing of officers at Fort McNair is a military necessity. While the individuals would benefit from his services, the work would also be performed for the benefit of the military command. United States v. Robinson, 6 C.M.A. 347, 20 C.M.R. 63 (1955).

d. United States v. Dykes, 6 M.J. 744 (N.C.M.R. 1978), contains an extensive discussion of the relationship between an order and military duty. After examining the circumstances, the military interest and the infringement on personal rights or interests of the accused, the Navy court held that a general order prohibiting the possession of rolling papers and pipes was legal.

4. Orders that are contrary to the Constitution, provisions of an act of Congress are unlawful. Part IV, para. 14c(2)(a)(iv), MCM, 1984.

a. Contrary to Article 31, UCMJ. Orders which have allegedly compelled the accused to incriminate himself or herself in violation of article 31's mandate that "No person subject to this Chapter (the UCMJ) may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him" have generated much litigation in the past. In United States v. Heyward, 22 M.J. 35 (C.M.A. 1986), the court held that the accused could not be convicted of dereliction of duty for failure to report drug abuse by others on those occasions when the accused was also a principal to the same drug use. The privilege against self-incrimination excuses his compliance. See United States v. Tyson, 2 M.J. 583 (N.C.M.R. 1976). An accused may be excused from reporting an offense by another even when the accused is not himself a principal. In United States v. Reed, 24 M.J. 80 (C.M.A. 1987), the accused was charged with failure to obey Article 1139, U.S. Navy Regulations (1973), which states: "Persons in the Department of the Navy shall report to the proper authority offenses committed by persons in the Department of the Navy which come under this (sic) observation."

In dicta, a plurality of the court found the regulation unconstitutionally vague and overbroad in reversing a conviction pursuant to the accused's guilty pleas for failing to report drug use and transfer by a fellow servicemember. The majority opinion stated that that regulation did not put the accused on notice as to what constitutes an offense, or whom the proper authority is to report it to.

(1) Many "old" cases have held that orders to an accused to do or submit to any number of tests amounted to orders to incriminate himself, and consequently were illegal. For example, United States v. Rosato, 3 C.M.A. 143, 11 C.M.R. 143 (1953) held that an order to submit a handwriting sample was illegal because it violated article 31. United States v. Musguire, 9 C.M.A. 67, 25 C.M.R. 329 (1958), held an order to submit to a blood test was unlawful. United States v. Jordan, 7 C.M.A. 452, 22 C.M.R. 242 (1957); United States v. Ruiz, 23 C.M.A. 181, 48 C.M.R. 797 (1974); and United States v. Jackson, 1 M.J. 606 (A.C.M.R. 1975) all held that an order to produce a urine specimen was unlawful.

In Unger v. Ziemniak, 27 M.J. 349 (C.M.A. 1989), Lieutenant Unger, a female, refused to obey an order to provide a urine sample while being observed from a distance of about 18 inches by a female enlisted person. The court held that, while an order is presumed to be lawful, that presumption may be rebutted if the order provided for the collection of the sample under degrading or humiliating conditions. In this case, the court agreed that the order was not illegal as a matter of law. If the issue of legality of the order is raised by the evidence at trial, however, the finder of fact would have to determine whether the order given to Lieutenant Unger required her to provide a urine sample under conditions that were humiliating and degrading.

(2) Subsequent cases have held that such tests need not be preceded by article 31 warnings. Hence, an accused need not be advised of his article 31 rights prior to requesting him to submit to such tests. It would seem then that an order to so submit could be enforced against an accused who refuses to participate. It must be remembered that oral self-incrimination and "verbal acts" that incriminate may not be legally ordered. In United States v. Lee, 25 M.J. 457 (C.M.A. 1988), the accused was convicted of violating a lawful general regulation which required him to show continued possession or lawful disposition of duty-free or controlled items. On appeal, the court held that, while the regulation dealt with a legitimate administrative inquiry, it could not be used in a way to subvert the constitutional or statutory rights of a person suspected of a crime. Therefore, one suspected of violating the regulation had to be informed of his rights under article 31 before he could be interrogated. For a full discussion of the subject, see Naval Justice School Evidence Study Guide, Chapter XII.

b. Contrary to Article 15, UCMJ, or other orders

(1) In United States v. McCoy, 12 C.M.A. 68, 30 C.M.R. 68 (1960), the accused was awarded 14 hours extra duty at mast (NJP). After the 19th hour, he refused to go on, despite a direct order by the CMAA to continue. He was convicted of willful disobedience of the order of the CMAA. Held: The CMAA's order violated both the terms of the NJP imposed by the accused's CO and article 15. Consequently, the order was unlawful.

(2) Pretrial confinement restricted by higher authority. United States v. Gray, 6 C.M.A. 615, 20 C.M.R. 331 (1956).

c. While military authorities are authorized to issue orders, they may not use this authority perversely to hamper an accused in military justice proceedings. An accused and his counsel are entitled to ample opportunity to prepare a defense, and an order which prohibits contacts with witnesses against the accused is unlawful and unenforceable. United States v. Aycock, 15 C.M.A. 158, 35 C.M.R. 130 (1964); United States v. Wysong, 9 C.M.A. 249, 26 C.M.R. 29 (1958). An order to have no contact with witnesses is too broad to be enforceable. United States v. Merriweather, NMCM 85-1790 (8 Jul 1985).

5. While an order may reasonably limit the exercise of a person's rights, if it constitutes an arbitrary or unreasonable interference with the private rights or personal affairs of individuals, it is unlawful. In United States v. Womack, 27 M.J. 630 (A.F.C.M.R. 1988), the accused was convicted of willful disobedience of a lawful order requiring him to inform his future sexual partners that he was infected with the AIDS virus and to protect his sexual partners from any contact with his bodily fluids and excretions. Held: The order was lawful exercise of the superior's command authority in that it helped to safeguard the overall health of the organization, and helped to insure unit readiness and the ability of the unit to accomplish its mission.

a. The accused was convicted of violating an order not to drink alcoholic beverages. Held: In the absence of circumstances tending to show its connection to military needs, an order prohibiting the use of alcoholic beverages without limitation as to time or place is so broadly restrictive of the private rights of an individual as to be arbitrary and unlawful. United States v. Wilson, 12 C.M.A. 165, 30 C.M.R. 165 (1961); United States v. Kochan, 27 M.J. 574 (N.M.C.M.R. 1988). Of similar import, United States v. Smith, 1 M.J. 156 (C.M.A. 1975), which held that a naval regulation prohibiting all loans between naval personnel could not be upheld. United States v. Manos, 17 C.M.A. 10, 37 C.M.R. 274 (1967) (order establishing minimum drinking age for all Navy personnel in Japan is lawful). See United States v. Green, 22 M.J. 711 (A.C.M.R. 1986) (order restricting soldiers from having any alcohol in their system during working hours is arbitrary, unreasonable, and standardless).

In United States v. Roach, 29 M.J. 33 (C.M.A. 1989), the court again considered the issue of whether a military order could be lawfully used to control alcohol use. Seaman Roach had been involved in numerous alcohol incidents, one of which involved a civilian arrest for assaulting a police officer. He also was absent without authority for four days prior to sailing on deployment. While on patrol, the commanding officer at NJP awarded 30 days restriction, suspended for 3 months, for the aforesaid absence. In addition, the commanding officer told Seaman Roach that he would be permitted to go on liberty during a one-day layover in port, but that he was forbidden to consume any alcohol while on liberty. He went on liberty and consumed alcohol and, upon returning to the ship, set fire to the paint locker. The fire was eventually extinguished with relatively minor damage. The Coast Guard Court of Military Review set aside a conviction for willful disobedience. They held that there was no valid military need for the order and that it was in violation of regulations promulgated by the Commandant of the Coast Guard for dealing with incidents of alcohol abuse, and therefore illegal. On appeal,

pursuant to Article 67(b)(2), UCMJ, the Court of Military Appeals deferred to the judgment of the Coast Guard Court in construing Coast Guard regulations. In dicta, however, the court recognized that an appropriate military order could be used to control alcohol or drug abuse. Id. at fn. 2. In his dissent, Judge Cox found a valid military nexus for the order in the safety of the vessel and crew.

b. In United States v. Alexander, 26 M.J. 796 (A.F.C.M.R. 1988), the accused was convicted of failing to obey a lawful order from his first sergeant "not to write any checks." Held: The order was so broad in duration and words that it was not sufficiently connected with the morale, discipline, and usefulness of the military service.

c. A regulation, promulgated by an overseas commander, which established a six-month waiting period before an application for permission to marry by a member of that command would even be considered, was held to be unreasonable and, hence, unlawful.

> For a commander to restrain the free exercise of a serviceman's right to marry the woman of his choice for six months just so he might better reconsider his decision is an arbitrary and unreasonable interference with the latter's personal affairs which cannot be supported by the claim that the morale, discipline, and good order of the command require control of overseas marriages.

United States v. Nation, 9 C.M.A. 724, 727, 26 C.M.R. 504, 507 (1958). However, a military commander, at least in foreign areas, may impose reasonable restrictions on the right to marry, such as requiring an applicant to meet with a military chaplain, to present medical certificates, and to obtain consent from a parent or guardian if the applicant is under 21 years of age. United States v. Wheeler, 12 C.M.A. 387, 30 C.M.R. 387 (1961); United States v. Parker, 5 M.J. 922 (N.C.M.R. 1978).

d. The dictates of the accused's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Part IV, para. 14c(2)(a)(iii), MCM, 1984. United States v. Lenox, 21 C.M.A. 314, 45 C.M.R. 88 (1972); United States v. Stewart, 20 C.M.A. 272, 43 C.M.R. 112 (1971). United States v. Wilson, 19 C.M.A. 100, 41 C.M.R. 100 (1969); United States v. Noyd, 18 C.M.A. 483, 40 C.M.R. 195 (1969). Regulatory provisions of the services limit the type of duty to which one may be assigned while an application for conscientious objector status is pending. An order which contravenes one of these regulations would be illegal. United States v. Stewart, supra, at 276 n.1, 43 C.M.R. at 116 n.1; United States v. Austin, 27 M.J. 227 (C.M.A. 1988).

6. An order which imposes a punishment is unlawful unless issued under article 15, or pursuant to court-martial sentence.

-- Whether an order is issued for the purpose of punishment, or merely for training, will have to be determined in each case by a careful examination of the circumstances, including the nature of the duty to be performed, and the relationship between the duty and the deficiency sought to

be corrected. United States v. Trani, 1 C.M.A. 293, 3 C.M.R. 27 (1952). Some examples:

(1) The accused placed two parachutes on the deck in a manner which a petty officer considered improper. He initially stated that he would put the accused on report, but he then ordered the accused to pick up the parachutes, take them from shop to shop, put them down in the proper manner, and announce to all present that this was the correct way to handle and carry parachutes. The accused refused, stating that he would not make a laughing stock of himself. The Navy Board of Review held: "It is our opinion ... that Holler's order was issued as a punitive action for disciplinary purposes and that it was not designed, nor expected, or intended to advance accused's skill in handling parachutes or the instruction of possible spectators in the proper manner to handle parachutes. The order was issued as a punitive action and consequently was illegal." United States v. Raneri, 22 C.M.R. 694, 695 (N.B.R. 1956).

(2) The accused, while in pretrial confinement, was ordered to work in a rock quarry with sentenced prisoners. He refused to obey the order. Held: An unsentenced prisoner may be required to perform useful military duties to the same extent as a man who is not a prisoner. An unsentenced prisoner, however, cannot be given a punitive work assignment. Whether it was a punitive work order depended upon all the circumstances. Here, the accused was compelled to perform the same work and under identical conditions as sentenced prisoners. He wore the same prisoner uniform and was mingled on the job with sentenced prisoners. The stockade policy was to govern all by one set of working standards. This commingling constituted identical treatment requiring an unsentenced prisoner to serve a sentence before conviction. Therefore, the order was for punishment and was unlawful. United States v. Bayhand, 6 C.M.A. 762, 21 C.M.R. 84 (1956).

(3) Accused was convicted of a violation of article 92. He was transferred from a rear area to a fire base, "because he had been in some trouble" at the rear area. Accused was ordered to remain at the fire base, but returned to the rear area instead. Accused argued that the order was illegal because it imposed punishment or, alternatively, was void because it was merely an order to obey the law (i.e., not to go UA from the fire base). Held: "Arduous as two days' duty at a forward fire base may be, it is not per se punishment, restriction, nor unnecessarily broad," conviction affirmed. United States v. Nelson, 42 C.M.R. 877, 878 (A.C.M.R. 1970); United States v. Peoples, 6 M.J. 904 (A.C.M.R. 1979).

B. Specificity (Key numbers 679-681; 686). An order must be a specific mandate to do or not to do a specific thing. An exhortation to "obey the law" or to "do your duty" has no specific subject and consequently does not constitute an order, as contemplated by articles 90, 91, or 92. United States v. Bratcher, 19 C.M.A. 125, 39 C.M.R. 125 (1969). On the other hand, if the order is a positive command, the form in which it is expressed is immaterial. United States v. Mitchell, 6 C.M.A. 579, 20 C.M.R. 295 (1955).

1. In order to be a specific mandate, an order must particularize the conduct expected. An exhortation to obey the law or perform one's duties does not meet the specificity requirement. An order which "does not contemplate definite performance of any particular part of appellant's duties" is not a specific mandate. United States v. Oldaker, 41 C.M.R. 497, 498 (A.C.M.R. 1969).

2. Very often the requirement of specificity will raise close factual questions. Examples: A number of military appellate courts have held unenforceable an order "to train" as lacking specificity. United States v. Oldaker, supra (order "to train"); United States v. Orozco, 42 C.M.R. 408 (A.C.M.R. 1970) (order "to start training with his unit"). See United States v. Stallings, 42 C.M.R. 425 (A.C.M.R. 1970); United States v. Wohletz, 41 C.M.R. 728 (A.C.M.R. 1970); United States v. Gifford, 41 C.M.R. 537 (A.C.M.R. 1969). When the courts have been able to find some element of specificity (e.g., to go to a particular place or do a particular act) they have upheld the order, notwithstanding the fact that the order called for a performance which the accused was already under a duty to fulfill, provided the order was not for the purpose of increasing punishment. United States v. Bagby, 41 C.M.R. 729 (A.C.M.R. 1970) (order "to attend training," i.e., go to the area where training was being conducted); United States v. Patten, 43 C.M.R. 820 (A.C.M.R. 1971) (order "to put on his equipment and go to training"); United States v. Rose, 40 C.M.R. 591 (A.C.M.R. 1969) (order to be at ease); United States v. Herrin, 40 C.M.R. 960 (N.C.M.R. 1969) (order by brig officer to put on a prison uniform); United States v. Goguen, 42 C.M.R. 807 (A.C.M.R. 1970) (order "to put on a proper military uniform"). See United States v. Couser, 3 M.J. 561 (A.C.M.R. 1977), where an order to "resume training" was held to contain sufficient specificity. An order to "perform your normal dental care duties and see and treat such patients as *may be assigned*" was upheld in United States v. Yarbrough, 9 M.J. 882 (A.F.C.M.R. 1980), as was an order to an unauthorized absentee to return to base in United States v. Pettersen, 17 M.J. 69 (C.M.A. 1983) and to return to work in United States v. Landwehr, 18 M.J. 355 (C.M.A. 1984).

3. While the form of the order is immaterial, it must amount to a positive command in order for it to impose a duty to obey. United States v. Glaze, 3 C.M.A. 168, 11 C.M.R. 168 (1953); United States v. Thomas, 43 C.M.R. 691 (A.C.M.R. 1971). A regulation may, however, combine advisory with mandatory provisions without losing legal effect. United States v. Brooks, 20 C.M.A. 28, 42 C.M.R. 220 (1970). United States v. Blanchard, 19 M.J. 196 (C.M.A. 1985).

a. If the meaning of a communication is uncertain, or if it is merely advisory or permissive, then it is NOT a positive mandate and the accused has no duty to obey it. United States v. Green, 13 C.M.R. 673 (A.B.R. 1953); United States v. Hogsett, 8 C.M.A. 681, 25 C.M.R. 185 (1958). United States v. Warren, 13 M.J. 160 (C.M.A. 1982). Examples:

(1) "Jones, meet me in my office in five minutes." This is a positive command.

(2) "Jones, if you can, meet me in my office in five minutes." This gives the recipient a choice of action. It is a request and not a positive mandate. United States v. Pauley, 3 C.M.R. 827 (A.B.R. 1952).

b. Expressing an order in a courteous manner rather than in a peremptory form does not change its nature. United States v. Gallagher, 15 C.M.R. 911 (A.B.R. 1954). Example: "Jones, please meet me in my office in five minutes." See United States v. McLaughlin, 14 M.J. 908 (N.M.C.M.R. 1982). In this case, the court held that an order from an enlisted club manager to the accused containing the word "please" was still a positive mandate to carry out an order. Additionally, the court held that the delayed compliance defense was not available to the accused who argued with the club manager for five minutes before complying with the order by turning over her ID card.

c. On the contrary, verbal abuse, standing alone, has been held insufficient to vitiate a legitimate work order which was issued in an abusive manner. United States v. Cheeks, 43 C.M.R. 1013 (A.B.R. 1971).

C. Redundancy (Key numbers 679-681; 686). An order which merely restates an existing general order, while it may be lawful on its face, will not be enforced as a violation of article 90 where the "ultimate offense committed" is the violation of another order [article 92(1) or article 92(2)]. United States v. Wartsbaugh, 21 C.M.A. 535, 45 C.M.R. 309 (1972). In Wartsbaugh, the accused disobeyed an order from his company commander to remove a silver bracelet that he was wearing on his wrist. A violation of article 90 was charged. C.M.A. stated:

> ... [T]he Captain acknowledged that he was simply telling the appellant to obey an existing battalion directive relative to matters of wearing apparel, a directive which he was duty bound to obey .... [T]he offense should have been brought under Article 92(2), Code, supra, the "ultimate offense committed" ... [citing United States v Bratcher, supra]. Since as noted, the battalion directive was not introduced at trial, the appellant's conviction cannot be sustained.

See United States v. Sidney, 23 C.M.A. 185, 48 C.M.R. 801 (1974). Wartsbaugh, supra, is the unusual case, since the court held that an accused could not be convicted for the underlying offense. In most instances, the issue is whether the accused should be punished for the charged or the "ultimate" offense. For example, in United States v. Quarles, 1 M.J. 231 (C.M.A. 1975), it was held that a conviction for disobeying the lawful order of a superior to "go to colors" was not subject to being set aside on the grounds that the accused was not charged with his "ultimate offense," failure to go to his appointed place of duty, although the punishment would be so limited. See United States v. Chronister, 8 M.J. 533 (N.C.M.R. 1979) and United States v. Greene, 8 M.J. 796 (N.C.M.R. 1980). See note to Part IV, para. 16e, MCM, 1984.

1. If the sole purpose of repeated personal orders is to increase the punishment for an offense, disobedience of the repeated order is not a separate offense. United States v. Tiggs, 40 C.M.R. 352 (A.B.R. 1968). In United States v. Pettersen, supra, however, an accused, who was UA, refused to return to his duty when ordered to do so at his home by senior personnel. It was held that the accused could be punished both for the willful disobedience and the absence offense where there was no evidence that the order was given to increase the potential punishment of the accused. The court focused on the need to punish direct defiance of an order so as to enhance

military discipline. See also United States v. Landwehr, supra (accused told to report back to work by superior after being on "break" for over 20 minutes; court allowed punishment for both disobedience and failure to go to his unit).

2. Repeated personal orders are legitimate if given for the purpose of bolstering the persuasiveness of the first command. United States v. Bethea, 2 M.J. 892 (A.C.M.R. 1976).

3. Repeated orders are multiplicious for sentencing purposes. United States v. Bivins, 34 C.M.R. 527 (A.B.R. 1964).

D. Duty to obey (Key numbers 514, 515, 679-682, 686). In order to convict an accused of any order offense, it must be shown that he had a duty to obey the order.

1. The order must apply to the accused. A particular order may apply to all persons within an armed force or within a particular command, or it may apply merely to a specified class of persons within an armed force or within a particular command, or it may apply only to a particular person. Examples:

a. "All personnel will _____." (Everyone);

b. "All nonrated personnel will _____." (A class);

c. "All OOD's upon being relieved will _____." (A class);

d. "Any person involved in an automobile accident will _____." (A class);

e. "ENS Joe Blow will _____." (A specified person).

2. If, by its terms, an order is not applicable to the accused, then he has no duty to obey it. In United States v. Alexander, 22 C.M.A. 485, 47 C.M.R. 786 (1973), the Court of Military Appeals applied the strict construction rule applicable to all penal regulations. For example, in United States v. Webber, 13 C.M.A. 536, 33 C.M.R. 68 (1963), the accused, an airman third class, appropriated a C-47 aircraft and took off for a 2-hour flight. He was charged with a violation of an Air Force regulation for taxiing onto a runway without clearance, by taking off without prior clearance from the control tower, and by operating the plane with less than the prescribed minimum crew. Held: The regulation applied to qualified pilots in Air Force planes on ordinary flights and did not apply to one who was not a pilot and who took the plane without authority. On the other hand, United States v. Leverette, 9 M.J. 627 (A.C.M.R. 1980) held that a command relationship in the organizational sense is not fundamental to the application of a general regulation to an individual member of the service; accordingly, an accused who knowingly enters a military installation to which he is not assigned has a duty to obey regulations governing that installation.

-- While the prosecution must show that the accused had a duty to obey the order or regulation in question, the accused has the burden of production if he asserts that he falls within the purview of an exception to the order's regulatory scheme. United States v. Cuffee, 10 M.J. 381 (C.M.A. 1981).

3. The order must be punitive in nature

a. A regulation, issued by higher authority directed to major commanders, which merely states certain policy criteria for the guidance of major commanders and which is not intended to operate immediately upon personnel generally, but instead requires implementing directives to be issued by the major commanders, is not enforceable against an individual. United States v. Nardell, 21 C.M.A. 327, 45 C.M.R. 101 (1972); compare United States v. Baker, 18 C.M.A. 504, 40 C.M.R. 216 (1969) (holding that a MACV directive was informational only and did not apply punitively to the accused) with United States v. Benway, 19 C.M.A. 345, 41 C.M.R. 345 (1970) (finding that a similar MACV directive was basically regulatory and violations were punishable). See also United States v. Farley, 11 C.M.A. 730, 29 C.M.R. 546 (1960); United States v. Wilson, 12 C.M.A. 690, 31 C.M.R. 276 (1962); United States v. Ekenstam, 7 C.M.A. 168, 21 C.M.R. 294 (1956); United States v. Tassos, 18 C.M.A. 12, 39 C.M.R. 12 (1968); United States v. Grey, 1 M.J. 874 (A.F.C.M.R. 1976); United States v. Gonzales, 12 M.J. 747 (A.F.C.M.R. 1981).

b. United States v. Whitcomb, 1 M.J. 230 (C.M.A. 1975) and United States v. Wright, 48 C.M.R. 319 (A.C.M.R. 1974) provide good discussions of Nardell, Baker, Benway, and United States v. Scott, 22 C.M.A. 25, 46 C.M.R. 25 (1972). The Wright case stresses the requirement that a general regulation, which can result in a penal sanction, must be clearly punitive on its face. However, United States v. Kennedy, 11 M.J. 669 (C.G.C.M.R. 1981), held that the failure of an order to warn explicitly that its violation may subject violators to criminal sanctions does not foreclose prosecution if the prohibited conduct is described clearly. Further, appellate courts are willing to dissect written orders and regulations and to hold that some parts are punitive and some administrative in nature. United States v. Blanchard, 19 M.J. 196 (C.M.A. 1985); United States v. Bright, 20 M.J. 661 (N.M.C.M.R. 1985).

0402 VIOLATION OF GENERAL ORDERS OR REGULATIONS (Key Numbers 507-509, 679-686)

A. "Any person subject to this chapter who -- (1) violates or fails to obey any lawful general order or regulation ... shall be punished as a court-martial may direct." Article 92(1), UCMJ.

B. Essential elements: Part IV, para. 16(b)(1), MCM 1984.

1. That there was in effect a certain lawful general order or regulation;

2. that the accused had a duty to obey it; and

3. that he violated or failed to obey the general order or regulation.

C. First element: That there was in effect a certain lawful general order or regulation.

1. "In effect" means operative at the time of the alleged offense.

a. Generally, an order is effective as of the date it is published. The date "published" has been defined by the Court of Military Appeals as the date that the general order is received by the official repository for such publications on a base. United States v. Tolkach, 14 M.J. 239 (C.M.A. 1982). Part IV, para. 16c(1)(a), MCM, 1984.

b. In drafting a specification under article 92(1) and (2), be sure to allege the particular regulation or order, including its effective date (e.g., U. S. Navy Regulations, dated 26 February 1973) which was in effect at the time of the violation, even if it has since been canceled or superseded. But see below.

c. The fact that the specific alleged regulation was superseded before the accused's act is no defense if the same criminal prohibition was contained in a successor regulation, and the latter was in force at the time of the accused's crime. United States v. Grublak, 47 C.M.R. 371 (A.C.M.R. 1973).

2. Lawfulness: See Section 0401, infra.

3. Authority to issue "general orders and regulations."

a. The 1951 MCM provided: "A general order or regulation is one which is promulgated by the authority of a Secretary of a Department and which applies generally to an armed force or one promulgated by a commander which applies generally to his command." Para. 171a, MCM, 1951.

b. The earliest C.M.A. cases interpreted article 92(1) and paragraph 171a very liberally and held that a post, station, and even a ship commander could issue general orders and regulations. See United States v. Snyder, 1 C.M.A. 423, 4 C.M.R. 15 (1952); United States v. Wade, 1 C.M.A. 459, 4 C.M.R. 51 (1952). But see United States v. Bunch, 3 C.M.A. 186, 11 C.M.R. 186 (1953).

c. In subsequent cases, however, C.M.A. greatly restricted the classes of "commander" who may issue general orders and regulations. The term "commander," as used in paragraph 171a, MCM, 1951, was defined as meaning a "major commander" who occupies a substantial position in effectuating the mission of the service. United States v. Brown, 8 C.M.A. 516, 25 C.M.R. 20 (1957); United States v. Ochoa, 10 C.M.A. 602, 28 C.M.R. 168 (1959).

-- The holding of flag or general rank and the possession of GCM authority are some indications of a substantial position in the military establishment. United States v. Tinker, 10 C.M.A. 292, 27 C.M.R. 366 (1959); United States v. Keeler, 10 C.M.A. 319, 27 C.M.R. 393 (1959).

d. Commanders who have been held to have authority to issue general orders: Commanding General, Marine Corps Base, Camp Lejeune, North Carolina, United States v. Snyder, 1 C.M.A. 423, 4 C.M.R. 15 (1952) (Although Snyder was decided prior to the restrictive line of decisions, it is probably still valid. That command appears to meet all the tests announced.);

Headquarters, U.S. Army Forces Far East, United States v. Stone, 9 C.M.A. 191, 25 C.M.R. 453 (1958); Headquarters, U.S. Army Europe, United States v. Statham, 9 C.M.A. 200, 25 C.M.R. 462 (1958); U. S. Air Forces Europe, United States v. Silva, 9 C.M.A. 420, 26 C.M.R. 200 (1958); Commander, U. S. Forces, Azores, United States v. Tinker, 10 C.M.A. 292, 27 C.M.R. 366 (1959); U.S. Army Electronic Proving Ground, Fort Huachuca, Arizona, United States v. Porter, 11 C.M.A. 170, 28 C.M.R. 394 (1960); Commander, U.S. Naval Base, Subic Bay, Philippines, United States v. Chunn, 15 C.M.A. 550, 36 C.M.R. 48 (1965).

e. Commanders who have been held not to have authority to issue general orders: Commanding Officer, Tachikawa Air Force Base, Japan, a colonel who did not have GCM authority, United States v. Keeler, 10 C.M.A. 319, 27 C.M.R. 393 (1959); Commanding Officer, Naval Air Technical Training Center, Memphis, Millington, Tennessee, a Navy captain who did not have GCM authority. Further, C.M.A. said it was only a service school. United States v. Ochoa, supra. Commander U.S. Fleet Activities, Yokosuka, Japan. United States v. Lair, NCM 74-2853 (30 Jan 1976). Commanding Officer, Naval Hospital, Portsmouth, Virginia, United States v. Wedge, NCM 72-1323 (31 July 1976).

f. Some conclusions which can be drawn from case decisions

(1) While the law remains unsettled, C.M.A. has clearly interpreted article 92(1) to mean that only a major commander has the authority to issue general orders and regulations. In deciding if a commander is a major commander, most of the following criteria must be met:

(a) Occupies a substantial position in effecting the mission of the service;

(b) of flag or general rank;

(c) possesses GCM authority; and

(d) not many steps removed from department level.

g. The drafters of the 1984 Manual clearly indicate their intent to bestow authority to issue general orders and regulations upon a narrow group of individuals:

(1) An officer having GCM jurisdiction;

(2) a flag or general officer in command; or

(3) a commander superior to those in (1) and (2). Part IV, para. 16c(1)(a), MCM, 1984.

h. It remains to be seen whether C.M.A. will accept this bestowal as a matter within the power and authority of the President as Commander-in-Chief. In this connection, it is noted that C.M.A., in United States v. Ochoa, supra, held that while possession of GCM jurisdiction is an indication that a commander can issue general orders and regulations, that fact alone is not controlling.

4. Proof

a. The existence of the order or regulation in question is usually proved through the use of judicial notice. Mil.R.Evid. 201 permits a military judge to take judicial notice, whether requested or not, of an "adjudicative fact" that is "either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

b. Prior case law was unclear whether a military judge could take judicial notice without being asked, and whether the findings could be affirmed in absence of any indication that he did take notice. Compare United States v. Hayes, 45 C.M.R. 669 (A.C.M.R. 1972) with United States v. Levesque, 47 C.M.R. 285 (A.F.C.M.R. 1973), petition denied, 48 C.M.R. 1000 (C.M.A. 1973); United States v. Atherton, 1 M.J. 581 (A.C.M.R. 1975). C.M.A., however, in the case of United States v. Williams, 3 M.J. 155 (C.M.A. 1977), held that the existence and content of the regulations could not be presumed but must be established expressly by judicial notice or other evidence. It now appears that the military judge can take judicial notice without being asked, so long as it is made a part of the record. Mil.R.Evid. 201(c).

D. Second element: That the accused had a duty to obey the order. See 0401.D above.

E. Third element: That the accused violated or failed to obey the general order or regulation.

1. An order is violated when the infraction involves an act of commission on the part of the accused. Example: Article 1150, U.S. Navy Regulations, 1973, prohibits the possession of alcoholic beverages aboard ship for beverage purposes (except under certain conditions). Seaman Eli has a bottle of VO in his locker. By his act of commission, he has violated the regulation.

2. An accused has failed to obey an order when the infraction involves an act of omission on his part. Example: A regulation requires the OOD to make certain log entries every time the ship changes course. If the OOD does not make the appropriate entries, then his omission is a failure to obey.

3. The terms "violate or fail to obey" are almost synonymous and, although the pleader should try to be precise, misuse of these two terms will not result in error.

4. As previously noted, sometimes an order or regulation prohibits certain acts, but provides certain exceptions under specified conditions. Generally, it is not necessary for the prosecution to establish prima facie that the accused was not within any of the exceptions stated in the order. United States v. Cuffee, 10 M.J. 381 (C.M.A. 1981).

a. The accused has the burden of proceeding in this area. Stated otherwise, it is for the accused to raise such an issue by some evidence indicating that his acts fall within one of the exceptions stated in the order or regulations. United States v. Mallow, 7 C.M.A. 116, 21 C.M.R. 242 (1956).

If he does raise such an issue, then the government must overcome it by evidence beyond a reasonable doubt (i.e., that the accused was not within that exception). United States v. Cuffee, supra, and United States v. Pollack, 9 M.J. 577 (A.F.C.M.R. 1980).

b. An example of a regulation where the exception must be negated in the government's case-in-chief with a good discussion of this problem is United States v. LaCour, 17 C.M.R. 559 (A.B.R. 1954). In LaCour, supra, an Air Force general regulation, designed to control black market operations in Korea, prohibited the possession (in excess of any amount reasonably necessary for personal use) of goods, wares, merchandise, and property of any kind and from any source, except goods manufactured, in whole or in part, in Korea, or introduced into Korea by an importer licensed by the Republic of Korea. Issue: Must the specification negate this exception? Held: Yes. An "allegation to the effect that the exceptive facts do not exist is an essential part of the specification where the exception is embodied in the language of the enacting clause, and therefore is an integral part of the verbal description of the offense. Id. at 566. In this particular case, the possession of excessive quantities of any property may have been innocent or culpable, depending upon the source of the property and the manner of its entry into the country. Therefore, the exceptions defined characteristics which determined the essence of the offense. The pleading must aver that the exceptive facts do not exist; it must negate the exception.

c. Of course, the government must prove, as part of its case-in-chief, that the accused's conduct is covered by the regulation in question. For example, in United States v. Lewis, 8 M.J. 838 (A.C.M.R. 1980), it was held that, absent proof in the record that questioned loans were to be repaid, or were in fact repaid, within the time period bringing it within the regulation, a conviction for violating regulations prohibiting usurious loans could not be upheld.

F. Knowledge: Knowledge of a general order need not be alleged or proved. Knowledge is not an element of this offense and a lack of knowledge does not constitute a defense. Part IV, para. 16c(1)(d), MCM, 1984; United States v. Tinker, 10 C.M.A. 292, 27 C.M.R. 366 (1959). Although the accused does not have to have knowledge of the article 92 regulation violated, there must be some proper form of publication before knowledge is presumed or there will be a violation of constitutional due process. The court held that "publication" occurs when a general regulation is received by the official repository for such publications on a base, such as the master publications library. United States v. Tolkach, 14 M.J. 239 (C.M.A. 1982)

1. Note, however, that due process requires that, when the requirements of a challenged regulatory scheme are "purely passive," there be some showing of the probability of knowledge. Lambert v. California, 355 U.S. 225 (1957). See United States v. Leverette, 9 M.J. 627 (A.C.M.R. 1980).

2. Occasionally, the accused must be shown to have actual knowledge of some underlying fact in order to convict him of an orders violation. For example, in order to prosecute someone for a conflict of interest in violation of SECNAVINST 5370.2 (series), it must be shown that they had actual knowledge of the existence of the interest.

3. In United States v. Foster, 14 M.J. 246 (C.M.A. 1982), the court held that, to be guilty of attempted violation of a general regulation (as opposed to a violation of a general regulation), the accused does not have to have actual knowledge of the regulation in issue. Foster overruled earlier C.M.R. decisions holding that, since attempts required specific intent, an attempt to violate an order would require specific knowledge of the order. See, e.g., United States v. Silvas, 11 M.J. 510 (N.C.M.R. 1981). The specific intent necessary is only to do the act.

G. Pleading (See Part IV, para. 16f(1), MCM, 1984)

1. The general order or regulation need not be quoted verbatim

-- It is sufficient to identify it by article number, section or paragraph, title and date. Example: Article 1151, U.S. Navy Regulations, dated 26 February 1973.

2. The failure to allege that the order was a "general" order renders the specification fatally defective. Additionally, an LIO of violating "an other lawful order" [92(2)] cannot be made out if knowledge has not been alleged. United States v. Koepke, 18 C.M.A. 100, 39 C.M.R. 100 (1969); United States v. Baker, 17 C.M.A. 346, 38 C.M.R. 144 (1967). But see United States v. Watson, 40 C.M.R. 571 (A.B.R. 1969) (Army Regulation, by its nature and applicability, fairly implies that it is a general order).

3. The manner in which the accused violated or failed to obey the order should be alleged. Example: Accused did, on or about a specified date and at a certain place, violate a lawful general order, paragraph 2, Far East Command Circular No. 38, dated 27 August 1951, "by wrongfully having in his possession one (1) hypodermic syringe and one (1) needle." United States v. Gohagen, 2 C.M.A. 175, 7 C.M.R. 51 (1953).

4. When an order prohibits certain acts except under specified conditions, generally it is not necessary to allege that the accused does not come within the terms of the exceptions. United States v. Gohagen, supra; United States v. Cuffee, supra. Caveat: It may be necessary when alleging a violation of some unusual general regulation to negative the exception. United States v. LaCour, supra.

5. It is not absolutely necessary to allege that an accused "wrongfully" violated a lawful general regulation or order, since merely alleging a violation implies the unlawful nature of the conduct. United States v. Torrey, 10 M.J. 508 (A.F.C.M.R. 1980).

H. Sample specification:

> In that [Name, etc., and personal jurisdiction data] did, [at/on board (location)], on or about [date], violate a lawful general regulation, to wit: Article 1150, U.S. Navy Regulations, dated 26 February 1973, by wrongfully possessing alcoholic liquors for beverage purposes aboard a United States Navy ship, to wit: USS _____.

I. Sample Instructions: See Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-27.

0403 VIOLATION OF AN "OTHER LAWFUL ORDER" (OTHER THAN "GENERAL" ORDERS) (Key numbers: 507-509, 679-686)

A. Text of Article 92(2), UCMJ:

> Any person subject to this chapter who ... having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same ... shall be punished as a court-martial may direct.

B. Essential elements of an article 92(2) offense. Part IV, para. 16b(2), MCM, 1984.

1. That a lawful order was issued by a member of the armed forces;

2. that the accused knew of the order;

3. that it was the duty of the accused to obey the order; and

4. that the accused failed to obey the order.

C. First element: That a lawful order was issued by a member of the armed forces.

1. Lawfulness. See section 0401 of this chapter.

a. Orders issued by a superior officer, or a superior warrant, noncommissioned, or petty officer in the execution of his office may be inferred to be lawful. See United States v. Keenan, 18 C.M.A. 108, 39 C.M.R. 108 (1969); United States v. Schultz, 18 C.M.A. 133, 39 C.M.R. 133 (1969); United States v. Kinder, 14 C.M.R. 742 (A.B.R. 1954).

b. What if the order was issued by one not a superior? In certain situations, subordinates are authorized to give orders to superiors. Such orders are lawful and the superior must obey them. United States v. Stovall, 44 C.M.R. 576 (A.C.M.R. 1971). Some examples:

(1) Sentry -- Article 0830, U.S. Navy Regulations, 1973.

(2) Shore Patrol -- Article 0922, U.S. Navy Regulations, 1973.

(3) CO has authority over all persons in his command, whatever their rank -- Article 0816, U.S. Navy Regulations, 1973.

c. Query: May an order to a superior by a subordinate be inferred to be lawful? The MCM is silent. The prosecution must affirmatively establish legality in each such case. TC may establish lawfulness by showing the status of the persons giving and receiving the order, the surrounding circumstances, and the specific authority of the person giving the order. United States v. Stovall, 44 C.M.R. 576 (A.C.M.R. 1971).

2. Issuance. Same as previously discussed; that is, the order must have been issued by a member of the armed forces. United States v. Cassell, supra. The order may be either oral or written. No particular form is required.

3. In effect. Same as previously discussed; that is, the order must be in effect at the time of the alleged violation.

D. Second element: The prosecution must prove in its case-in-chief that the accused had actual knowledge of the order.

1. Actual knowledge may be proved either by direct or circumstantial evidence.

a. Example of direct evidence: Statements by accused admitting knowledge.

b. Examples of circumstantial evidence of knowledge: Testimony that the order was read at quarters which was attended by the accused; testimony that the order was clearly posted on the bulletin board where accused passed daily. In United States v. Jack, 10 M.J. 572 (A.F.C.M.R. 1980), however, the accused's conviction for unlawfully entering a female barracks during nonvisiting hours in violation of a local regulation was set aside even though the authorized visiting hours were noted on a sign at the building's entrance. The court held that the accused lacked the actual knowledge required because the sign did not designate the authority issuing the order.

2. Constructive v. actual knowledge. The distinction between constructive knowledge and actual knowledge proved by circumstantial evidence is often troublesome. One way to draw the distinction is as follows. Since constructive knowledge is equivalent to saying that the accused should have known, it would not be a complete defense for the accused to prove that he did not in fact know. On the other hand, where actual knowledge is required and circumstantial evidence is offered to prove actual knowledge, it is open to the accused to offer evidence that he did not have actual knowledge. Thus, in the latter case, where an order was announced at quarters (or formation) at which the accused was in attendance, there was circumstantial evidence to prove actual knowledge. However, the accused could put lack of actual knowledge in issue by evidence that he could not hear (perhaps because of where he was standing or because of loud background noise). The trier(s) of fact would then have to decide the issue in light of the evidence presented at the trial. One may not, however, willfully and intentionally remain ignorant of a fact material to the accused's conduct in order to escape the consequences of criminal law. Deliberate avoidance of positive knowledge is the equivalent of actual knowledge. United States v. Newmann, 14 M.J. 478 (C.M.A. 1983).

E. Third element: That it was the duty of the accused to obey the order. If the order is lawful and issued by a person authorized under the circumstances to issue such an order, and if it is applicable to the accused, then he has a duty to obey the order. See 0401.D above.

F. Fourth element: That the accused failed to obey the order.

1. "Failure to obey," as the term is used in article 92(2), includes both acts of commission and acts of omission.

2. The "failure to obey" may be willful, but it is sufficient to constitute an offense if the failure is the result of forgetfulness or simple negligence. United States v. Pinkston, 6 C.M.A. 700, 21 C.M.R. 22 (1956); United States v. Jordan, 21 C.M.R. 627 (A.F.B.R. 1955).

G. Pleading, sample specifications, and instructions. See Part IV, paras. 16f(2) and (3), MCM, 1984.

1. "The particular order, or specific portion thereof, the accused is charged with having violated should be set forth in the specification ...." Discussion, R.C.M. 307c. But, a comparison between Part IV in paras. 16f(2) and (3), MCM, 1984, suggests that a verbatim quotation of the article 92(2) order allegedly violated is required only in the case of oral orders. However, it is recommended that the particular order, or the specific portion thereof allegedly violated, including both oral and written orders, be set forth verbatim in article 92(2) specifications. The allegation of the language of an oral or written order should always be qualified by the phrases "or words to that effect."

2. Knowledge of the order must be alleged. A specification which alleges violation of any order other than a general order, but fails to include an allegation of knowledge, results in a fatally defective specification (i.e., it does not allege an offense). United States v. Tinker, 10 C.M.A. 292, 27 C.M.R. 366 (1959). United States v. Bunch, 3 C.M.A. 186, 11 C.M.R. 186 (1953); United States v. Meekins, 26 C.M.R. 875 (A.B.R. 1958), petition denied, 26 C.M.R. 516 (C.M.A. 1958).

3. The specification must include an allegation that it was "an order which it was his/her (accused's) duty to obey." United States v. Bunch, supra.

4. The specification should expressly allege the ultimate fact (i.e., that the accused did "fail to obey the same"). Although it is very poor practice to fail to allege this expressly, such failure does not necessarily render the specification fatally defective. For example: A specification alleged that, "having knowledge of a certain lawful order which it was his duty to obey, (accused) did transfer ... Military Payment Certificates to a Korean National, a person not authorized to receive them." Held: This sufficiently implied that he failed to obey the order. "Since no objection was made at the trial and it clearly appears that the accused was not misled, we find no material prejudice to the substantial rights of the accused." United States v. Haney, 9 C.M.R. 386, 390 (A.B.R. 1953).

5. Ordinarily, the manner in which the order was violated need not be alleged, unless the order can be violated in more than one way or the specific language of the order is not quoted verbatim.

a. Since the order has previously been quoted verbatim, the statement that the accused did "fail to obey the same" is sufficient to appraise

him of his act of commission or omission. Compare the earlier discussion of general orders, where it is necessary to allege the manner in which the accused violated or failed to obey the order since the general order or regulation has not previously been quoted in the specification.

b. Even when the article 92(2) order has been quoted in the specification, if the order as quoted regulates more than one kind of conduct, or, if the order could be violated in more than one way, then the specific manner in which it was violated should be alleged. For example: An order prohibited the possession, use, transfer, disposition, or sale of several kinds of items. When alleging violation of such an order, the particular method by which it was violated should be alleged. Simply add the appropriate additional allegation at the end of the form in para. 16(f)(3) specification (e.g., "fail to obey the same by wrongfully having in his possession one hypodermic syringe and one needle"). Compare United States v. Gohagen, 2 C.M.A. 175, 7 C.M.R. 51 (1953) with United States v. Blau, 5 C.M.A. 232, 17 C.M.R. 232 (1954).

6. Sample specification

a. Oral order: In that [Name, etc., and personal jurisdiction data], having knowledge of a lawful order issued by Lance Corporal Stanley N. Kowalski, U.S. Marine Corps, in the execution of his office as a military policeman, to "stop the car" or words to that effect, an order which it was his duty to obey, did, [at/on board (location)], on or about [date], fail to obey the same.

b. Written order: In that [Name, etc. and personal jurisdiction data], having knowledge of a lawful order issued by the Commanding Officer, USS Tubb, to wit: Paragraph 3d (3), USS Tubb Instruction 1020.3E, dated 2 January 19__, an order which it was his duty to obey, did, [at/on board (location)], on or about [date], fail to obey the same by wrongfully possessing food in a berthing space.

7. Sample instruction. See Military Judges' Benchbook, DA-Pam 27-9 (1982), Inst. Nos. 3-28 and 3-29.

0404 WILLFUL DISOBEDIENCE OF AN ORDER (Key numbers 697-686)

A. Text of Article 90(2), UCMJ

> Any person subject to this chapter who ... willfully disobeys a lawful command of his superior commissioned officer ... shall be punished as a court-martial may direct.

B. Elements

1. That the accused received a lawful command from a certain commissioned officer;

2. that the person who issued the order was the superior commissioned officer of the accused;

3. that the accused knew that the command or order was from his/her superior commissioned officer; and

4. that the accused willfully disobeyed the command or order.

C. First element: That the accused received a lawful command from a certain commissioned officer.

1. Lawfulness: Discussed in section 0401.A above and Part IV, para. 14C(2)(a).

2. There is no distinction between "command" and "order." The terms are synonymous. Winthrop, Military Law and Precedents, 571 and 473, (2nd ed. 1920).

3. The order must be directed to the subordinate personally. It does not include violations of regulations, standing orders, or routine duties. See United States v. Wartsbaugh, 21 C.M.A. 535, 45 C.M.R. 309 (1972); Part IV, para. 14c(2)(b), MCM, 1984.

a. Example: "Jones, report to the OOD at once."

b. Contra example: Division officer announces at quarters, which Seaman (E-3) Jones attended: "All nonrated personnel will report for a physical exam tomorrow." This is not an order directed to a subordinate (Seaman Jones) personally. However, it is a lawful order to a class of persons, of which Seaman Jones is a member. Hence, although Seaman Jones cannot be convicted of violating article 90(2), even though he willfully failed to report for the physical, he could be convicted of violating article 92(2), failing to obey "an other lawful order."

c. Example: Division officer at quarters states: "The following named men will report immediately to the Executive Officer: Jones, Brown, Smith, Jackson, etc." Jones deliberately failed to report. Query: Can Jones properly be charged with violation of article 90? Answer: Yes. This order was directed to him personally, as well as to the others.

d. Example: Petty Officer Brown tells Seaman Jones, per order of the division officer: "Jones, the division officer told me to tell you, Smith, and Jackson to report to him at once." Query: Is this order directed to Jones personally, rather than to him simply as a member of a class? Yes.

-- Note that the accused in the above example is guilty of violating the order of the division officer, not the petty officer. United States v. Marsh, 3 C.M.A. 48, 11 C.M.R. 48 (1953). However, an intermediate may, by placing his authority behind the order, become the one whose order is violated; but, to do this, the intermediate must have the authority to issue such an order in his own name and it must be issued as his order, not as the representative of the superior. United States v. Marsh, supra; United States v. Sellers, 12 C.M.A. 262, 30 C.M.R. 262 (1961).

4. Even a deliberate failure to comply with a general order or regulation or with a standing order of a command is NOT a violation of article 90(2) nor 91(2), but it is an offense under article 92. Such orders cannot be directed to the subordinate personally. United States v. Wartsbaugh, 21 C.M.A. 535, 45 C.M.R. 309 (1972).

5. Nonperformance by a subordinate of a mere routine duty is not a violation of article 90(2) or article 91(2). The willful disobedience contemplated is such as shows an intentional defiance of authority, as when an enlisted person is given a lawful command by a commissioned officer to do or cease doing a particular thing at once and refuses or deliberately omits to do what is ordered. Part IV, para. 14c(2)(f), MCM, 1984. However, the fact that the act so ordered is of a "routine" nature would not give rise to a defense to the willful disobedience of a personally communicated order to be complied with immediately. United States v. Stout, 1 C.M.A. 639, 5 C.M.R. 67 (1952); United States v. Wartsbaugh, supra.

6. Received order

a. Actual knowledge of the order is required; see discussion at Section 0403.D, supra.

b. The form of the order is immaterial so long as it amounts to a positive mandate and is understood as such by the interested parties. Section 0401.B, supra.

D. Second element: That the person who issued the order was the superior commissioned officer of the accused.

1. Superior commissioned officer. Defined as one who is superior either in rank or command. Article 1(5), UCMJ; Part IV, para. 13c(1)(a), MCM, 1984.

a. Superior in rank: An officer is superior in rank to an accused for the purpose of this offense if he is senior by one or more paygrades and is a member of the same armed force as the accused.

(1) Personnel of the Navy and Marine Corps are of the same armed force. Article 1(2), UCMJ. Therefore, willful disobedience by a Marine private of an order issued by a Navy ensign is a violation of article 90(2).

(2) Personnel of the Coast Guard are of the same armed force as the Navy and Marine Corps only when operating as a service in the Navy. Article 1(2), UCMJ.

(3) Note: 10 U.S.C. 101(19) (1976), as amended, provides: "'Rank' means the order of precedence among members of the armed force." If this definition of rank were applied to the term as found in the MCM, 1984, then "rank" would depend on precedence as provided in U.S. Navy Regulations and in the Naval Military Personnel Manual and the Marine Corps Promotional Manual, and in the publications of the other armed forces. The title 10 definition of "rank" was promulgated after the 1951 MCM definition, the same as the current definition, was published; it does not purport to interpret the MCM provision. The term "rank" does not appear in Article 90, UCMJ.

Instead, article 90 uses the term "superior." It is believed that the term "rank," as it is used in the MCM, 1984, is synonymous with the term "grade" (i.e., ensign, commander, major, lieutenant colonel, sergeant, seaman, etc.) also defined in title 10 101 (18): "'Grade' means a step or degree, in a graduated scale of officer or military rank ...." While there appears to be no definite answer to this question, it is submitted that this is the safest approach.

b. Superior in command: An officer is "superior in command" to an accused if he is superior in the chain of command.

(1) An officer may be superior in command and, hence, be one's "superior" even though he is a member of another armed force. Example: A Navy/Marine officer serving on the staff of a joint command.

(2) The "command" concept takes precedence over the "rank" concept (i.e., one who is superior in command is the superior of a person under his command, even though that other person is higher in grade). For example: CO of a ship is a Navy commander and the medical officer is a Navy captain. The CO is superior in the chain of command. Disobedience of the CO's order by the Navy captain could be disobedience of the order of a superior officer, a violation of article 90.

(3) The victim is the accused's "superior commissioned officer" if the victim, not being a medical officer or chaplain, is senior in grade to the accused and both are detained by a hostile entity so that recourse to the normal chain of command is prevented. Part IV, para. 13c(1)(b), MCM, 1984.

c. An officer normally has no authority over members of another service, absent the "command" concept. In such cases, a charge cannot be brought under article 90 because the victim of any disobedience would not be "superior." Nor would 92(2) be available, since the duty to obey the order could not be shown. Part IV, para. 16c(2)(c) MCM, 1984.

E. Third element: That the accused knew that the order was from his superior commissioned officer. Part IV, para. 14b(2), MCM, 1984, includes actual knowledge of the status of the victim as an element of proof. Prior to the promulgation of the Manual, however, much controversy existed in this area. Consequently, do not be misled by old case law. Knowledge is now clearly an element.

F. Fourth element: That the accused willfully disobeyed the (command) or (order).

1. "Willful" connotes a "specific intent," a deliberate flouting of authority. United States v. Miller, 2 C.A. 194, 7 C.M.R 70 (1953). United States v. Young, 18 C.M.A. 324, 40 C.M.R. 36 (1969). A discussion of willfulness is provided in chapter I, infra.

2. "The willful disobedience contemplated is such as shows an intentional defiance of authority." Part IV, para. 14c(2)(f), MCM, 1984. A failure to comply with an order through heedlessness, remissness, or forgetfulness is not willful disobedience. However, it is an offense under article 92(2).

On the other hand, so long as the disobedience is willful, it matters not what motivated the disobedience unless the motivation amounts to a defense. The disobedience need not be accompanied by disrespect. United States v. Ferenczi, 10 C.M.A. 3, 27 C.M.R. 77 (1958).

3. Willful disobedience may be manifested by deliberately omitting to do that which is ordered, by expressly refusing to obey, or by doing the opposite of what is ordered.

4. Disobedience is a failure to comply at the time performance is required, not a declaration of future intent. If the order is to be executed in the future, a statement by the accused that he intends to disobey it is not disobedience. United States v. Squire, 47 C.M.R. 214 (N.C.M.R. 1973). An order cannot be disobeyed until the time for performance has arrived. United States v. Stout, 1 C.M.A. 639, 5 C.M.R. 67 (1952); United States v. Williams, 18 C.M.A. 78, 39 C.M.R. 78 (1968). In United States v. Jordan, 21 C.M.R. 627 (A.B.R. 1955), the accused was convicted of willful disobedience of the order of his CO, "the next time you have to urinate you are to give the OSI a specimen .... " Accused immediately refused. Defense argued that the order was one to be executed in the future. Board held that immediate compliance was indicated and differentiated 3 types of orders:

a. Those intended for, and those capable of, immediate execution in full;

b. those not capable of being fully and immediately executed, but requiring certain preparatory steps, capable of being commenced immediately; and

c. those not intended to require any action until some specified future time, regardless of whether present action is possible or not.

As to (a) and (b), refusal evincing intentional defiance is a violation of article 90. As to (c), the offense is not complete until the expressed intention to disobey is carried out; if there is ultimate obedience at the prescribed time, regardless of prior expression of intent to disobey, the offense is not complete. United States v. Jordan, 7 C.M.A. 452, 22 C.M.R. 242 (1957). See United States v. Turpin, 35 C.M.R. 539 (A.B.R. 1964). The time in which compliance is required is a question of fact. United States v. Woodley, 20 C.M.A. 357, 43 C.M.R. 197 (1971). If an order does not indicate the time within which it is to be complied with, either expressly or by implication, then a "reasonable" delay in compliance is not a crime. United States v. Bartee, 50 C.M.R. 51 (N.C.M.R. 1974); United States v. Clowser, 16 C.M.R. 543, (A.F.B.R. 1954).

G. Pleading and instructions

1. Sample specification for an article 90(2) offense -- willful disobedience of superior officer. Part IV, para. 14f(4), MCM, 1984:

> In that [name, etc., and personal jurisdiction data], having received a lawful command from Captain John R. Bones, U.S. Marine Corps, his superior commissioned officer, and known by the said Jones to be

his superior commissioned officer, to "get into that truck," or words to that effect, did [at/on board (location)], on or about [date], willfully disobey the same.

2. Recitation of the entire order which the accused is charged with disobeying is not required. United States v. Yarbrough, 9 M.J. 882 (A.F.C.M.R. 1980).

3. Sample instruction. See Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-23.

H. Text of Article 91(2), UCMJ

Any warrant officer or enlisted member who ... willfully disobeys a lawful order of a warrant officer, noncommissioned officer or petty officer ... shall be punished as a court-martial may direct.

I. Elements

1. That the accused was a warrant officer or enlisted member;

2. that the accused received a certain lawful order from a certain warrant, noncommissioned, or petty officer;

3. that the accused then knew that the person giving the order was a warrant, noncommissioned, or petty officer;

4. that the accused had a duty to obey the order; and

5. that the accused willfully disobeyed the order.

J. First element: that the accused was a warrant officer or enlisted member.

-- By its terms, article 91 can only be violated by a warrant officer or an enlisted member. "Warrant Officer," as used in this article, means a warrant officer (W-1) who is not a commissioned warrant officer. Enlisted member includes any person in paygrades E-1 through E-9.

K. Second element: That the accused received a lawful order from a certain WO, NCO, or PO.

1. Lawfulness: Discussed in section 0401 above.

2. The discussion of form, transmission, personal nature and knowledge of the order at section 0404C above applies equally to this offense.

3. This article does not protect "acting" noncommissioned officers or "frocked" petty officers. Part IV, para. 15(C)(1). United States v. Lumbus, 23 C.M.A. 231, 49 C.M.R. 248 (1974).

L. Third element: That the accused knew that the order was from a WO, NCO, or PO. Part IV, para. 15b(2), MCM, 1984, includes actual knowledge of the status of the victim as an element of proof. Do not be misled by case law preceding the effective date of the 1969 Manual (1 August 1969). Knowledge is now clearly an element.

M. Fourth element: that the accused had a duty to obey the order.

1. Notice that article 91 has no element of superiority. Accordingly, the victim of willful disobedience under article 91 may be junior in rank and command to the accused. Remember, however, that the accused must have a duty to obey the order. It is difficult, though not impossible, to imagine a situation in which the accused would have a duty to obey and yet be senior in both rank and command. One example is provided as an illustration:

> BM3 Smith is standing duty as a gate guard at NETC. LN1 Shultz, attached to the Naval Justice School, is driving onto the base. Petty Officer Smith tells Petty Officer Shultz to show his ID card. Shultz refuses and drives on to work. Has Petty Officer Shultz violated article 91?

The answer is yes, even though Smith is not senior in rank or command. Smith (an E-4) is junior in rank to Shultz (an E-6). Smith is not senior in command, since Shultz is not a member of the same command. Shultz does have a duty to obey all lawful orders of military law enforcement personnel, regardless of rank. Accordingly, Shultz is guilty of willful disobedience of a petty officer under article 91. A petty officer acting as cockswain in a boat would have authority to issue necessary orders to more senior personnel.

2. This concern over the absence of an element of superiority in article 91 is an undeveloped area of law due to the fact that, in the MCM 1969 (Rev.), the drafters included superiority as an element. Paragraph 170a, MCM, 1969 (Rev.), provided: "The offenses denounced by this article [91] are those committed by a subordinate in his relations to one senior to him." (Emphasis added.) The drafters of the 1984 MCM noted that seniority is not mentioned at all in the text of article 91 in the UCMJ. Therefore, in the explanatory section of the 1984 MCM (Part IV, para. 15), all references to superiority and seniority were deleted. Under the law as described in the 1969 MCM, Petty Officer Shultz, in our example, would not have been charged under article 91 due to the absence of superiority. Instead, he would have been charged under article 92(2) for a violation of an other lawful order. This distinction is of great importance to Shultz since, if charged under article 92(2), his maximum permissible punishment is reduced from a BCD and 1 year confinement to a BCD and 6 months confinement.

N. Fifth element: that the accused willfully disobeyed the order. This element is identical to the willful disobedience concepts under article 90, and is fully discussed at sections 0404.F and 0102.C.2.e.

O. Pleading and instructions

1. Sample specification for an article 91(2) offense -- willful disobedience of WO, NCO, or PO. Part IV, para. 15f(2), MCM, 1984.

> In that [name, etc. and personal jurisdiction data], having received a lawful order from Yeoman Third Class John B. Smith, U.S. Navy, a petty officer, and known by the said Jones to be a petty officer, to "empty that waste basket," or words to that effect did, [at/on board (location)], on or about [date], willfully disobey the same.

2. Sample instruction. See Military Judges' Benchbook, DA Pam 27-9, Inst. 3-25 (1982).

P. LIO's of 90(2) and 91(2)

1. Article 92(2) -- Failure to obey an "other" lawful order. This LIO exists when:

a. Evidence indicates that the failure to obey was NOT willful, but was through neglect [see United States v. Darden, 1 M.J. 574 (A.C.M.R. 1975)];

b. evidence indicates that the accused lacked knowledge of the status of the person giving the order; or

c. evidence indicates that the order was not personally directed toward the accused.

2. Part IV, paras. 14d(3) and 15d(2) include attempted willful disobedience as LIO's. The Navy Court of Military Review was questioned whether such offenses actually exist. United States v. Pickens, 8 M.J. 556 (N.C.M.R. 1979).

Q. The "ultimate offense" doctrine

1. One of the principles of military justice commonly encountered in willful disobedience cases is that of the "ultimate offense." In general, this concept means that an accused should be punished for his underlying misconduct if there was a pre-existing order or duty, even though he may have simultaneously disobeyed an order of a superior. For example, if the accused is under a pre-existing obligation to appear in a correct uniform, his failure to do so should be punished as a violation of that obligation, if, when the superior ordered him to comply, he or she was merely relying on the pre-existing duty. United States v. Wartsbaugh, 21 C.M.A. 535, 45 C.M.R. 309 (1972); United States v. Sidney, 48 C.M.R. 801 (A.C.M.R. 1974).

2. Under these facts, the accused may be convicted of the orders violation, but may only be punished for the "ultimate offense." United States v. Quarles, 1 M.J. 231 (C.M.A. 1975). Note to paragraph 16e, maximum punishment provisions.

3. Some common examples

a. Orders reinforcing article 86: United States v. Moorer, A.C.M. 12938 (A.C.M.R. 1978) (Unpublished); United States v. Barnes, 49 C.M.R. 108 (N.C.M.R. 1974); United States v. Chronister, 8 M.J. 533 (N.C.M.R. 1979). But see United States v. Rector, 49 C.M.R. 117 (N.C.M.R. 1974). (An order to return to a previous assignment was not a mere reminder or admonition to obey the law, but an independent exercise of the NCO's authority, and punishable under article 91.)

b. Orders imposing the condition of restraint: United States v. Nixon, 21 C.M.A. 480, 45 C.M.R. 254 (1972) (Officer's order to proceed to stockade was the first step of apprehension. Disobedience should have been prosecuted under article 95 rather that article 90.); United States v. Burroughs, 49 C.M.R. 404 (A.C.M.R. 1974); United States v. Jessie, 2 M.J. 573 (A.C.M.R. 1977).

4. What is left of the "ultimate offense" doctrine? In United States v. Pettersen, 17 M.J 69 (C.M.A. 1983), C.M.A. upheld the separate convictions of the accused for UA and for refusing to obey an NCO's order to return from UA. The court held that the two offenses were separately punishable. The language of the case indicates that the court will apply the ultimate offense doctrine in future cases where it appears that the subsequent order is given only for the purpose of increasing the maximum punishment.

> The issuance of a direct order to return to the base was within the legal authority of Master Sergeant Shank and represented a measured attempt to secure compliance with those preexisting obligations. There is no evidence of any intent to issue the orders for the purpose of increasing the potential punishment of the accused ... While we must insure that the use of orders in not improperly designed to increase punishment in a given instance, we also must not erode the comment structure upon which the military organization is based.

Pettersen, Id. at 72 (footnotes and citations omitted).

5. In United States v. Landwehr, 18 M.J. 355 (C.M.A. 1984), C.M.A. stated that the ultimate offense doctrine was never intended to limit punishment for willful disobedience. They said the doctrine was only meant to apply to article 92 violations and that no authority or power exists to extend it to other articles. Therefore, where the accused's company commander ordered the accused to return to his appointed place of duty, the accused could be punished for both the willful disobedience and the UA. The court looked at the following factors:

a. The order was an independent exercise of authority;

b. there was no express reliance or reminder of a pre-existing order; and

c. the order was not given to aggravate punishment.

Compare this result to United States v. Peaches, 25 M.J. 364 (C.M.A. 1987), where the accused was prosecuted for willful disobedience of an order to report for duty on the morning following his release from detention. The court held that this was a mere failure to report for routine duties as prescribed by routine orders punishable under article 86(1). Here, there was no "...environment of defiance..." (Id. at 366) nor was the person giving the order making a measured attempt to secure compliance with a previously defied routine order. In this case, the court applied the ultimate offense doctrine to reverse the conviction of the accused for willful disobedience. The ultimate offense doctrine is alive and well and may be used to set aside findings of guilty as well!

SECTION TWO

0405 DERELICTION IN THE PERFORMANCE OF DUTY
(Key number 687-692)

A. Text of Article 92(3), UCMJ: "Any person subject to this chapter who ... is derelict in the performance of his duties; shall be punished as a court-martial may direct."

B. Dereliction

> The term, dereliction, is so broad that it literally covers the whole field of infractions of duties, and must be interpreted, in its setting in Article 92(3) of the Code, to cover only those delinquencies not covered by other articles which deal with specific offenses relating to duties. Thus, where the accused has not only failed to perform his duty but has either not appeared at all or has appeared tardily at his place of duty, his offense should be charged as absence without leave under Article 86; where he inefficiently performs his duty as a sentinel or lookout because he is drunk or falls asleep or leaves before being relieved, his offense should be charged as misbehavior of a sentinel or lookout under Article 113; and where he fails to obey or disobeys a duty imposed by a lawful order, his offense should be charged under Articles 90(2), 91(2), 92(1), or 92(2), as the nature of the order and the qualification of the person giving the order may indicate, unless the duty is of a routine character or it becomes impracticable to allege the specific order of a superior.

Snedeker, Military Justice Under the Uniform Code 617 (1953).

C. Elements

1. That the accused had certain prescribed duties;

2 that the accused knew, or reasonably should have known, of the duties; and

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

D. First element: That the accused had certain prescribed duties.

1. "A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." Part IV, para. 16c(3)(a), MCM, 1984. A directive that sets forth general standards of performance may impose a duty even though the order is not so specific that a failure to follow its terms could be charged as a violation of the order. United States v. Moore, 21 C.M.R. 544 (N.B.R. 1956); United States v. Heyward, 22 M.J. 35 (C.M.A. 1986).

2. The "duty" contemplated by article 92(3) is any military duty either assigned or incidental to a military assignment. The term does not include tasks voluntarily performed for additional pay after regular working hours. For example: Accused was secretary-treasurer of a commissioned officers' open mess. He performed this work after regular hours for extra pay. Held: This was not a military duty in the sense of article 92(3). United States v. Garrison, 14 C.M.R. 359 (A.B.R. 1954).

3. A general regulation, which requires a servicemember to report drug abuse of which he or she is aware, can create a duty and is not a violation of the fifth amendment. Where the witness to the offenses is already a principal or accessory to the drug abuse, however, the privilege against compelled self-incrimination excuses noncompliance, and such failure is not dereliction. United States v. Thompson, 22 M.J. 40 (C.M.A. 1986); United States v. Heyward, supra. It has been held, for example, that an accused could not be found guilty of dereliction of duty in failing to report drug use by prisoners in his custody where the evidence showed that the accused was involved in smoking marijuana with the prisoners and his own misconduct was therefore so intertwined with that of the prisoners that his right against self-incrimination excused him from any duty to report the prisoners' misconduct. United States v. Dupree, 24 M.J. 319 (C.M.A. 1987).

E. Second element: That the accused had knowledge of the duties.

1. Change 2 to the 1984 MCM makes constructive knowledge of the duties the second element of the offense. Part IV, para. 16c(3)(b), MCM, 1984.

2. Article 92, UCMJ, does not, in its text, contain any language suggesting knowledge as an element. Both the 1951 and 1969 Manuals for Courts-Martial list only two elements of the offense. Paragraph 171c, MCM, 1969 (Rev.) says: a) that the accused had certain duties; and b) that he was derelict in the performance of them. Constructive knowledge was generally considered sufficient proof of knowledge. On 1 August 1984, the new Manual clearly required actual knowledge to be proven in every offense where knowledge was an element or in issue. See Note 1 to Instruction 3-30, Military Judges' Benchbook, DA Pam 27-9 (1982). The Analysis in Part IV. para. 16c(3)(b), MCM, 1984, cites United States v. Curtain, 9 C.M.A. 427, 26 C.M.R. 207 (1958), as the authority for this actual knowledge requirement.

On 15 May 1986, Change 2 to MCM, 1984, added the objective standard of constructive knowledge to the dereliction offense. The current analysis explains that this change is appropriate, since the drafters' reliance upon Curtain, supra, was misplaced. Curtain is an orders violation. The current Benchbook does not yet reflect this change. All of this creates two anomalies.

a. Article 92(3), discussed at para. 16c(3)(b), is one of only two places in the Manual where constructive knowledge is sufficient. The other is article 102, forcing at safeguard at Part IV, para. 26, MCM, 1984.

b. It now appears possible to convict a person for willful dereliction of a duty of which he/she was only constructively aware. If the prosecution can show that the accused deliberately failed to perform some duty of which (s)he should have known, conviction is now appropriate, though logically difficult to accept. But see United States v. Shelley, 19 M.J. 325 (C.M.A. 1985) (where duties are imposed by unit order, the accused must have actual knowledge of the directive). United States v. Heyward, 22 M.J. 35 (C.M.A. 1986).

F. Third element: That the accused was derelict in the performance of his duties.

1. Derelict. "A person is derelict in the performance of his duties when he willfully or negligently fails to perform them or when he performs them in a culpably inefficient manner." Part IV, para. 16c(3)(c), MCM, 1984.

a. "'Willfully' means intentionally. It refers to the doing of an act knowingly and purposefully, specifically intending the natural and probable consequences of the act." Part IV, para. 16c(3)(c), MCM, 1984.

b. "'Negligently' means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." Id.

(1) "The standard to be applied is whether the conduct of the accused was adequate and proper in the light of circumstances prevailing at the time of the incident. In testing for negligence, the law does not substitute hindsight for foresight." United States v. Ferguson, 12 C.M.R. 570, 576 (A.B.R. 1953).

(2) An accused cannot be convicted of dereliction in the performance of duty based upon the negligence of another under his control if the accused has not been negligent himself. For example: Accused, riding as a passenger, was the NCO in charge of a truck. He did not know how to drive and, from where he was sitting, he could not see the speedometer. When the truck was about three-fourths of the way down a hill, he realized that it was going too fast and told the driver to slow down. It was too late. The vehicle went out of control and crashed into a bridge. Held: The driver may have been negligent when starting down the hill, but there was no evidence that the accused was aware of this until it was too late. There was no evidence that the accused was negligent. United States v. Flaherty, 12 C.M.R. 466 (A.B.R. 1953)

c. "Culpable inefficiency is inefficiency for which there is no reasonable or just excuse." Part IV, para. 16c(3)(c), MCM, 1984. If an accused has the ability and the opportunity to perform his duties efficiently and doesn't, he is culpably inefficient.

2. Dereliction distinguished from ineptitude

a. If the accused's failure in the performance of his duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, then he is not guilty of this offense. Part IV, para. 16c(3)(d), MCM, 1984.

b. Ineptitude is a genuine lack of ability properly to perform the duty despite diligent efforts to do so. For example: A recruit earnestly applies himself during rifle training, but fails to qualify. Since his failure is due to ineptitude, he is not derelict in the performance of his duties. Id.

3. Examples of dereliction in the performance of duty

a. Accused, a major general, recorded classified information, some of which was top secret, in his personal diary. He then treated the diary "as he would a copy of the Saturday Evening Post." Excerpts from the diary were photostated by unknown persons and subsequently appeared in a Communist publication. Held: The failure of the accused to exercise ordinary care to safeguard this information constituted a dereliction in the performance of his duties. United States v. Grow, 3 C.M.A. 77, 11 C.M.R. 77 (1953); United States v. Sievert, 29 C.M.R. 657 (N.B.R. 1959) (where it was held that evidence was sufficient to support a dereliction of duty charge where a ship was run aground while the accused navigator was attempting to navigate a narrow passage on a dark night, using only one radar when others were available, and he failed to check his position even though he had been put on notice of possible error by combat information center report).

b. As athletic officer, the accused accompanied a basketball team to a tournament. He had been given $550 to pay for their return by commercial aircraft if government air transportation was not available. After the tournament, he took the team a short way by train and then turned $60 over to one member of the team with instructions to "see that the fellows get home" from San Francisco to Seattle. The team returned to their base without him, by train, subsisting for two days on sandwiches. Held: Accused was derelict in the performance of his duties. United States v. Voelker, 7 C.M.R. 102 (A.B.R. 1953); United States v. Stuart, 17 C.M.R. 486 (A.B.R. 1954).

c. The accused, a commanding officer, was required by Army regulations to forward efficiency reports on his officers on certain specific dates. He failed to do so until about 3 months after an investigation was started. Held: He was derelict in the performance of his duties. It was the accused's failure to complete the efficiency reports of the officers named which caused the unreasonable delay in their transmittal. "In the absence of any evidence that the failure was unavoidable or was caused by ineptitude rather than by negligence, we conclude that the record supports the finding of guilty." United States v. Neville, 7 C.M.R. 180, 189 (A.B.R. 1952); United States v. Taylor, 13 C.M.R. 201 (A.B.R. 1953).

d. Air Force staff sergeant, having custody of postal clerks' fund as part of his job, is charged with negligent dereliction in fiscal control, resulting in loss of $3,000.00. On appeal, he argues that, as he repaid sum out of his own funds before being charged, the government cannot show a "loss" and cannot punish him. Held: actual loss is not an element. United States v. Nickels, 20 M.J. 225 (C.M.A. 1985).

4. Examples where evidence held insufficient to support dereliction of duty charges

a. United States v. Flaherty, supra.

b. United States v. Cansdale, 1 M.J. 894 (A.F.C.M.R. 1976). Evidence, which only showed accused in possession of property stolen from a "no lone" zone, was insufficient to prove that the accused was derelict in his duty not to enter the zone alone.

c. United States v. Shelley, supra.

G. Pleading

1. Generally, the specification need not set forth the particular regulation, order, or custom which the accused violated [United States v. Moore, 21 C.M.R. 544 (N.B.R. 1956)]; nor must it assert that the accused was responsible for a certain duty of performance [United States v. Thacker, 36 C.M.R. 954 (A.B.R. 1966)]; but, it must detail the nature of the inadequate performance [United States v. Kelchner, 16 C.M.A. 27, 36 C.M.R. 183 (1966)].

2. The inadequacy of performance proved at trial must be substantially identical to that alleged in the specification. United States v. Smith, 18 C.M.A. 604, 40 C.M.R. 316 (1969); United States v. Swanson, 20 C.M.R. 416 (A.B.R. 1955).

3. Don't forget to plead at least constructive knowledge. Some older forms omitted this element.

4. Sample specification. Part IV, para. 16f(4), MCM, 1984.

> In that [name, etc., and personal jurisdiction data], who (knew) (should have known) of his/her duties [at/on board (location)], on or about [date], was derelict in the performance of those duties in that she negligently failed to wind and compare all chronometers aboard USS Tubb, as it was her duty to do.
>
> Note: A specification under 92(3) can allege either willfullness, negligence, or culpable inefficiency.

H. Sample instructions: Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-30. Remember that actual knowledge is not required in all cases despite the language of the instruction.

0406 DISRESPECT TO SUPERIORS (Key Number 693-698)

A. Text of Article 89, UCMJ

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

B. Text of Article 91(3), UCMJ

> Any warrant officer or enlisted member who ... 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.

C. Elements of article 89. Part IV, para. 13b, MCM, 1984:

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

2. that such behavior or language was directed toward that officer;

3. that the officer toward whom the acts, omissions, or words were directed was the superior commissioned officer of the accused;

4. that the accused then knew that the commissioned officer toward whom the acts, omissions, words were directed was the accused's superior commissioned officer, and

5. that, under the circumstances, the behavior or language was disrespectful to that commissioned officer.

D. Elements of article 91(3). Part IV, para. 15b(3), MCM, 1984:

1. That the accused was a warrant officer or enlisted member;

2. that the accused did or omitted certain acts, or used certain language;

3. that such behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer;

4. that the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;

5. that the victim was then in the execution of office; and

6. that, under the circumstances, the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned, or petty officer.

Note: If the victim was the superior noncommissioned or petty officer of the accused, add the following elements:

7. That the victim was the superior noncommissioned or petty officer of the accused; and

8. that the accused then knew that the person toward whom the behavior or language was directed was the accused's superior noncommissioned or petty officer.

E. Superior commissioned officer of the accused or a WO, NCO, or PO: Generally, the same as previously discussed under articles 90(2) and 91(2) regarding willful disobedience. See United States v. Merriweather, 13 M.J. 605 (A.F.C.M.R. 1982). (Can't convict Air Force enlisted man of disrespect to two Navy officers, since different services, but could find him guilty of LIO of disorderly conduct.)

1. Note the distinction in the text of the two articles with regard to this element. Article 89 requires the victim to be a superior, but article 91(3) does not. Note also, however, that superiority of the victim under article 91 will increase the maximum punishment for disrespectful conduct.

2. "Acting" (frocked) commissioned officers, WO's, NCO's, and PO's are not "superior" within the meaning of these two articles. United States v. Lumbus, 23 C.M.A. 231, 49 C.M.R. 248 (1974).

F. Knowledge of the status of the victim. Same as previously discussed regarding willful disobedience under articles 90(2) and 91(2). The accused's knowledge of the victim's status is usually proved by circumstantial evidence. For example, in United States v. Fetherson, 8 M.J. 607 (N.C.M.R. 1979), the court held that evidence that the victim was attired in his uniform and was from the same company as the accused was sufficient to show knowledge.

G. The disrespect

1. Article 89 proscribes "disrespect" and article 91(3) proscribes "disrespect" and "contempt." "Contempt" includes "disrespect" and also connotes "scorn." Hence in this regard, there is no real difference between Articles 89 and 91(3); in effect, they both prohibit the same thing. Military Judges' Guide, DA Pam 27-9 (1982), 3-19 and 3-26.

2. The disrespectful behavior or language contemplated is that which detracts from the respect which is due to the authority and person of the superior.

3. Disrespect may consist of words, acts, or a failure to act

a. "Disrespect by words may be conveyed by opprobrious epithets or by any other contemptuous or denunciatory language." Part IV, para. 13c(3), MCM, 1984. United States v. Lewis, 12 M.J. 205 (C.M.A. 1982), where the court held that a statement made by the accused that he did not have to respect the flag was disrespectful to an officer who asked the accused

why he did not stand at attention during colors. The remark, "Hi sweetheart," to a female officer is disrespectful, absent extraordinary circumstances tending to negate implied sexist familiarity from an enlisted person to an officer. United States v. Dornick, 16 M.J. 642 (A.F.C.M.R. 1983).

b. Disrespect by acts. For example: Subordinate contemptuously turns and walks away from a superior while he is talking to him. United States v. Ferenczi, 10 C.M.A. 3, 27 C.M.R. 77 (1958).

c. Disrespect by failure to act. For example: Purposely or intentionally failing to give the customary salute. Part IV, para. 13c(3), MCM, 1984.

4. The disrespect may refer to the victim as an officer (WO, NCO, or PO) or as a private individual. Id.

a. Official capacity: "As a man you are 4.0, but as a gunnery officer you stink." -- An offense.

b. Individual capacity: "As a gunnery officer you are 4.0, but as a man you stink." -- An offense.

5. Whether the behavior in question is disrespectful will depend upon all the circumstances of the particular case.

a. Under certain circumstances, one may be privileged to engage in a greater degree of familiarity than is usually the rule; but, this privilege must not be abused. For example: Several officers are playing poker. While the subordinate may be somewhat more familiar than is usually the rule, he may not use obscene and abusive language towards a fellow player who is his superior. United States v. Montgomery, 11 C.M.R. 308 (A.B.R. 1953); United States v. Barber, 8 M.J. 153 (C.M.A. 1979). ("If you have something to say about me, say it to my face.")

b. The fact that no disrespect was intended by the accused, or so understood by the superior, is a circumstance to be considered in applying this test. United States v. Noriega, 7 C.M.A. 196, 21 C.M.R. 322 (1956); United States v. Ransome, 1 M.J. 1005 (N.C.M.R. 1976).

6. Truth is no defense. For example: Accused tells his superior officer, "You are a dirty, fat bastard." At his trial, the accused proves that the officer was at the time caked with dirt, grossly obese, and the son of an unwed mother. It is nevertheless disrespectful for a subordinate to so state.

H. Presence of the superior

1. Disrespect to a superior commissioned officer. Article 89, UCMJ.

a. It is immaterial whether or not the disrespectful behavior occurred within the presence of the superior officer. Example: Seaman Rollo returns from leave and, at morning quarters, learns that his division officer,

who is now on leave at his home, has received orders to Outer Mongolia. In his exuberance, Rollo yells, "Hurray! At last I'm free of that S.O.B." He is guilty of disrespect, even though the officer was not present and didn't hear it.

b. In general, it is considered objectionable and inappropriate to hold one accountable under this article for what was said or done by him in a purely private conversation. Part IV, para. 13c(4), MCM, 1984. A purely private conversation is believed to be one carried on privately, and not publicly, between the accused and some person other than the superior officer concerned and not made during the conduct of government business. Examples:

(1) Two sailors are conducting a personal gripe session in low voices in a bar. One says, "If brains were ink, Ensign Jones wouldn't have enough to dot an 'i'." This is a purely private conversation and should not be prosecuted.

(2) Same situation as above, except that the sailors talk in loud voices so that others in the bar hear them. This would not be a purely private conversation.

(3) Accused, trying to collect travel money, tells a chief yeoman in the disbursing office, "Your stupid disbursing officer is cheating me out of $60.00." No one else hears him. This is not a purely private conversation.

(The difference between example (1) and examples (2) and (3) is that, in the latter, parties with whom the accused is unacquainted and share no expectation of privacy are made aware of the communication.)

(4) Accused, a 1stLt, was in a poker game with several other officers. During the course of the game, the accused failed to adhere to certain rules and, upon being corrected by another player, a major, he replied with abusive and disrespectful language. Held: While a poker game cannot be considered a public affair, it does not have the characteristics of a private transaction as the term is used in the Manual. This was not a purely private conversation. United States v. Montgomery, supra.

2. Disrespect to a warrant officer, noncommissioned officer, or petty officer. Article 91(3).

a. To constitute an offense under article 91(3), disrespect to a WO, NCO, or PO, the disrespectful behavior or language must be within the sight or hearing of the WO, NCO, or PO. It is in this regard that article 91(3) differs from article 89 (i.e., the disrespect does not have to occur within the sight or hearing of a commissioned officer). United States v. VanBeek, 47 C.M.R. 98 (A.C.M.R. 1973).

b. Therefore, if the WO, NCO, or PO does not actually see or hear the disrespectful behavior or language, an offense has not been committed under article 91(3). Example: A superior NCO gave an order to an accused, turned and walked away. Accused mutters a disrespectful remark in a

low voice when the superior NCO is 30-40 feet away. The superior NCO did not hear the remark, but it is overheard by another NCO standing near the subordinate. Held: Not an offense under article 91(3). United States v. Pippins, No. 6391173, (N.B.R. 18 Oct 1963) (Unpublished).

c. In United States v. Whitaker, 5 C.M.R. 539, 556 (A.B.R. 1952), the board stated: "...[T]he words used, '... to Hell with it,' definitely excludes any reference to Corporal Van Alstyne personally and indicates, rather, a reference to the act, the accused's act of signing [a shipping questionnaire]. If the accused had intended to refer to Corporal Van Alstyne personally, it would at least normally be expected that he would have said ... 'to Hell with you.' ... The language could reasonably be construed as not being directed 'toward' anyone at all...." Compare United States v. Alexander, 11 M.J. 726 (A.C.M.R. 1981), which held act of throwing clothing at feet of NCO was disrespectful, with United States v. Sorrells, 49 C.M.R. 44 (A.C.M.R. 1974).

I. Duty status of the victim at time of the disrespectful behavior

1. Disrespect to a superior commissioned officer. Article 89. To constitute this offense, the superior commissioned officer need not be in the execution of his office at the time of the disrespectful behavior. United States v. Montgomery, supra.

2. Disrespect to a WO, NCO, or PO. Article 91(3). It is an essential element of this offense that the WO, NCO, or PO be in the execution of his office at the time of the disrespectful behavior.

a. In this regard, article 91(3) differs from article 89 (i.e., as to a commissioned officer, the disrespect does not have to occur while he is in the execution of his office). Indeed, it does not even have to occur within the commissioned officer's presence to constitute this offense.

b. The WO, NCO, or PO is ordinarily in the execution of his office if he is on duty or is performing some military function. United States v. Brooks, 44 C.M.R. 873 (A.C.M.R. 1971); United States v. Jackson, 8 M.J. 602 (A.C.M.R. 1979); United States v. Fetherson, supra.

3. See discussion of "abandonment of rank" in section three of this chapter.

J. Pleadings

1. The disrespectful behavior or language must be alleged. If the words or acts which constitute the disrespectful conduct are innocuous, the pleadings will be fatally defective unless circumstances surrounding the behavior are alleged to detail the nature of the insubordination. United States v. Sutton, 48 C.M.R. 609 (A.C.M.R. 1974); United States v. Smith, 43 C.M.R. 796 (A.C.M.R. 1971).

2. Failure to allege victim's status as "his superior commissioned officer" may be fatal. The omission of the pronouns "his" or "her" may also affect the validity of a specification. United States v. Showers, 48 C.M.R. 837

(A.C.M.R. 1974); United States v. Carter, 42 C.M.R. 898 (A.C.M.R. 1970). But see United States v. Ransome, 1 M.J. 1005 (N.C.M.R. 1976) and United States v. Ashby, 50 C.M.R. 37 (N.C.M.R. 1974).

3. The accused's knowledge of the superiority or status of victim need not be alleged. United States v. Ashby, supra, United States v. Sell, 3 C.M.A. 202, 11 C.M.R. 202 (1953); United States v. McGrath, NMCM 77-1617 (16 Oct 1978); United States v. Anderson, NMCM 73-1145 (10 Jul 1973). Nonetheless, it is recommended that knowledge be alleged in order to avoid any challenges.

4. Note that superiority is not an essential element of article 91. If the superiority is pled and proved, however, it will increase the maximum authorized punishment. Disrespect to a superior WO, NCO, or PO carries a maximum punishment of a BCD and six months' confinement. If superiority is not pled and proved, the maximum is three months' confinement. Part IV, paras. 15e(7) and (8), MCM, 1984.

5. Sample specifications

a. Article 89

> In that [name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], behave himself with disrespect towards Ensign Joseph E. Benzer, U.S. Naval Reserve, on active duty, his superior commissioned officer, and known by said Jones to be his superior commissioned officer, by saying to him "You are even more stupid than the last division officer," or words to that effect.

b. Article 91(3)

> In that [name, etc. and personal jurisdiction data], [at/on board (location)], on or about [date], was disrespectful in deportment towards Boatswain's Mate First Class John H. Small, U.S. Navy, his superior petty officer, and known by the said Jones to be his superior petty officer, who was then in the execution of his office, by contemptuously turning from and leaving him while he, the said John H. Small, was talking to the said accused.

K. Disrespect as a lesser included offense to other offenses

1. To disobedience of a superior. United States v. Lirgiito, 22 C.M.A. 394, 47 C.M.R. 331 (1973). In some instances, disrespect and disobedience may be separate offenses. United States v. Cahill, 22 M.J. 548 (N.M.C.M.R. 1986).

2. To assault. United States v. VanBeek, 47 C.M.R. 98 (A.C.M.R. 1973).

3. To communicating a threat. United States v. Ross, 40 C.M.R. 718 (A.C.M.R. 1969).

L. Sample instructions

1. Article 89. Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-19.

2. Article 91. Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-26.

SECTION THREE

0407 COMPARISON AND RELATIONSHIP OF OFFENSES AGAINST AUTHORITY

A. Orders offenses

1. General order or regulation. Article 92(1).

a. To be a general order or regulation, the commander must have the authority to issue such an order and it must be applicable generally to an armed force or throughout the command.

b. The violation or failure to obey may be willful or merely the result of negligence, carelessness, or forgetfulness.

2. Any other lawful order. Article 92(2).

a. This covers any lawful order which is not a general order, which the accused had a duty to obey but which he failed to obey.

b. The failure to obey may be willful or a result of negligence, carelessness, or forgetfulness.

c. Knowledge is an element and must be proved. In this respect, it differs from a general order.

d. Knowledge must be expressly alleged. As to general orders, knowledge need not be alleged, since lack of knowledge is wholly immaterial.

e. The maximum punishment for violation of an other lawful order is BCD, confinement for 6 months, etc. Whereas, the maximum punishment for violation of a general order is DD, confinement for 2 years, etc. Part IV, para. 16e, MCM, 1984.

f. Article 92(2) may be an LIO of the willful disobedience offenses, articles 90(2) and 91(2), if there is a lack of proof of "knowledge of status" or "willfulness" or "a personally directed order." "Knowledge of the order" and "duty to obey" are sufficiently implied in the form specifications of the higher disobedience offenses to permit a finding of the LIO, article 92(2), by exceptions and substitutions.

g. However, these two elements, "knowledge of the order" and "duty to obey," are apparently not sufficiently implied within the form specification found at Part IV, para. 16f(1), MCM, 1984 (the general orders form), to permit a finding of article 92(2) by exceptions and substitutions, under a charge of article 92(1), unless the pleader alters the form by expressly including those two elements.

3. Willful disobedience. Articles 90(2) and 91(2).

a. Victim: Under article 90(2), the victim is a superior commissioned officer; whereas, under article 91(2), the victim is any WO, NCO, or PO.

b. Accused: Under article 90(2), the accused can be any person subject to the UCMJ; whereas, under article 91(2), the accused must be a WO or enlisted person.

c. Superiority

(1) Under article 90(2), a commissioned officer is "superior" if --

(a) He is higher by at least one grade and is a member of the same armed force as the accused; or

(b) he is in command of the accused, he is his "superior" whether or not they are of the same armed force and regardless of who is higher in grade.

(2) Article 91(2) refers to a WO, NCO, or PO and does not contain the "his superior" language.

c. Under articles 90(2) and 91(2), the order must be directed to the accused personally; whereas, under article 92(2), it may be directed to him personally or as a member of a class and, under article 92(1), it must never be personally directed.

B. Dereliction in the performance of duty. Article 92(3).

-- The act which constitutes a dereliction of duty may also constitute an article 92(1) or (2) offense.

a. It is not necessary to establish a specific violation of a particular order in order to prove the offense of dereliction of duty.

b. Article 92(3) is primarily intended to cover those instances when it appears that the accused had a duty, usually a general or routine duty to perform, and he either failed to perform it (willfully or negligently) or he performed it in a culpably inefficient manner.

C. Disrespect. Articles 89 and 91(3).

1. Victim. Under article 89, the victim is a superior commissioned officer; whereas, under article 91(3), the victim is a WO, NCO, or PO.

2. Accused. Same as for articles 91(2) and 90(2).

3. "Superiority." For article 89, same as for article 90(2). For article 91(3), superiority is not an essential element, but is an aggravating fact if pled and proved.

4. Presence. Under article 91(3), the disrespect must occur within the sight or hearing of the victim; whereas, under article 89, the victim need not know about or be present at the time of the disrespect.

5. Execution of his office. Under article 91(3), the victim must be in the execution of his office; whereas, this is not required for an article 89 offense.

OFFENSES AGAINST AUTHORITY

		Article	Offense	Perpetrator	VictimKnowledge	
DISRESPECT		89	Disrespect to superior comm'd off'r	Anyone junior to the victim	Need not be present nor in execution of office	Of superior status
		91(3) (superior = aggravation)	Disrespect to WO, NCO, PO	Enlisted or WO	Must be present and in execution of office	Of status
ORDERS	VIOLATIONS	92(1)	General order	Anyone		Need not be pleaded nor proved
		92(2)	Other lawful order	Anyone		Must be pleaded and proved
		92(3)	Dereliction of duty	Anyone		Must plead and prove that accused knew of duty
WILLFUL	DISOBEDIENCE	90(2)	Willful disobedience of superior comm'd off'r	Anyone junior to the victim	comm'd off'r	Of superior status of victim and of order
		91(2)	Willful disobedience of WO, NCO, PO	Enlisted or WO	WO, NCO, PO	Of status of victim and of order
ASSAULT		90(1)	Assault on superior comm'd off'r	Anyone junior to the victim	Must be in execution of office	Of superior status
		91(1) (superior = aggravation)	Assault on WO, NCO, PO	Enlisted or WO	Must be in execution of office	Of status
		128	Assault on comm'd, WO, PO	Anyone	Need not be in execution of office or superior	Of comm'd, WO, NCO, PO status

0408 SOME DEFENSES TO OFFENSES AGAINST AUTHORITY
(Key numbers: 34, 679-682, 686-688,693-695, 832-835, 837-841)

A. Abandonment of rank

-- "A superior can abandon his rank and position of authority in dealing with subordinates." United States v. Richardson, 7 M.J. 320 (C.M.A. 1979). The concept of abandonment of rank applies to disrespect, disobedience, and assault where rank is an aggravating factor.

a. Held to be abandonment

(1) Invitation to "put me on my back" defense to assault upon a superior commissioned officer in the execution of his office in violation of article 90. United States v. Struckman, 20 C.M.A. 493, 43 C.M.R. 333 (1971).

(2) Use of racial slurs. United States v. Richardson, supra.

(3) Excessive profanity towards accused. United States v. Cheeks, 43 C.M.R. 1013 (A.F.C.M.R. 1971).

(4) Illegal arrest. United States v. Rozier, 1 M.J. 469 (C.M.A. 1976).

(5) Encouraging the accused to get drunk and acting as a bartender. United States v. Noriega, 7 C.M.A. 196, 21 C.M.R. 322 (1956).

b. Held not to be abandonment

(1) Physically placing accused in his cubicle to quiet barracks disturbance. United States v. Vallenthine, 2 M.J. 1170 (N.C.M.R. 1975).

(2) Dousing a drunk in a cold shower. United States v. McDaniel, 7 M.J. 522 (A.C.M.R. 1979).

(3) Improperly or irregularly conducted searches. United States v. Lewis, 7 M.J. 348 (C.M.A. 1979).

(4) Use of term "boy" when not used as racial slur (victim and accused were of same race). United States v. Allen, 10 M.J. 576 (A.C.M.R. 1980).

B. Impossibility of compliance with orders. R.C.M. 916(i), MCM, 1984.

1. Impossibility, referred to as "inability" in R.C.M. 916(i), MCM, 1984, of compliance is an affirmative defense in the nature of a legal excuse. The impossibility may be a physical incapacity, in which event it may be caused by a temporary or permanent physical inability, or it may be the result of outside physical interference. Impossibility of compliance may also be due

to financial incapacity. Regardless of the cause, if the condition rendering it impossible existed at the time when the order was given, that condition is a legal excuse for noncompliance with any order. United States v. Pinkston, 6 C.M.A. 700, 21 C.M.R. 22 (1956).

2. If the condition arose through his own fault after the order was given, however, such a condition is not a valid defense to a charge of failure to obey under article 92. Reason: Failure to obey under article 92 may be simply the result of negligence. Therefore, if the impossibility arises through the accused's negligence, he has, nevertheless, violated article 92 by failing to obey as a result of his own fault (i.e., negligence).

3. Impossibility, arising due to negligence after the order, is a valid defense to an article 90 and article 91 disobedience offense even though the condition arose through his own fault. Reason: It is essential to an article 90 and article 91 disobedience offense that the noncompliance be willful. Nothing less, including negligence, will suffice to constitute this offense. On the other hand, if the "impossibility" is deliberately created by the accused for the purpose of avoiding compliance, such a condition is not a valid defense; in fact, it is the means of accomplishing the offense.

4. Physical inability to carry out an order is a valid affirmative defense. R.C.M. 916(i), MCM, 1984. For example, accused, who had received a substantial injury to his hand 8 days before, was ordered to tie sandbags. At his trial, accused maintained that he was unable to perform the assigned task. Held: The issue of physical incapacity was reasonably raised by the evidence and required, sua sponte, an instruction on the affirmative defense of impossibility of compliance. United States v. Heims, 3 C.M.A. 418, 12 C.M R. 174 (1953). See United States v. King, 5 C.M.A. 3, 17 C.M.R. 3 (1954).

5. An accused who, through no fault of his own, was physically prevented from complying with the order may assert impossibility of compliance as a defense. For example: In United States v. Clowser, 16 C.M.R. 543 (A.B.R. 1954), the accused was ordered to go to his barracks; but, before he could comply with the order, through no fault of his own, while waiting for a bus, he was taken into custody by the Air Force Police. Held: Under the circumstances, the failure to obey was excused.

6. Financial incapacity. There are many situations in which a person can be given a lawful order which involves the expenditure of his personal funds (e.g., get a haircut, get uniform cleaned, replace worn-out uniforms); however, if, at the time such an order is given, the accused is financially incapacitated (i.e., he neither has sufficient funds nor is able to obtain them), then the affirmative defense of impossibility is raised. R.C.M. 916(i), MCM, 1984. Examples: United States v. Pinkston, 6 C.M.A. 700, 21 C.M.R. 22 (1956). See United States v. Gordon, 3 C.M.R. 603 (A.B.R. 1952).

7. Delayed compliance. United States v. Thompson, 47 C.M.R. 565 (N.C.M.R. 1973) and United States v. Williams, 18 C.M.A. 78, 39 C.M.R. 78 (1968) discuss this defense.

C. Noncompliance because of a subsequent conflicting order

1. What should a subordinate do when he receives an order from a superior officer which amends, suspends, or modifies a previous order received from another superior or a pre-existing duty? Answer: Fully inform the last superior of the requirements of the original order or duty and, if the last superior insists upon execution of his order, carry out that (last) order. Then report the circumstances ASAP to the superior who issued the original order. See Article 0815, U.S. Navy Regulations, 1973.

2. Query: Is the failure to carry out the original order a violation of the UCMJ? Answer: No. Noncompliance as a result of a subsequent, apparently lawful, order is an affirmative defense constituting a legal excuse. Failure to comply with either order, however, is to defense. In United States v. Hill, 26 M.J. 876 (N.M.C.M.R. 1988), the accused was required to be in two places at the same time; the enlisted dining facility for routine daily assignment, and the quarterdeck for a restricted mens muster. His decision to go to neither place, but to remain in his rack instead, amounted to a violation of both responsibilities.

3. Example: Accused carried out an order which involved violation of an Air Force Regulation, for which he was tried and convicted. He requested, but was denied, an instruction that obedience to an order which was not palpably illegal is justification for acts done in compliance with that order. Held: Failure to instruct was prejudicial error. United States v. Whatley, 20 C.M.R. 614 (A.B.R. 1955).

D. The accused can raise the existence of an exception to an order as an affirmative defense. For example: Order prohibits possession of hypodermic needles except for the treatment of diseases. The prosecution has established issuance and knowledge of the order and accused's possession of one hypodermic needle -- a prima facie case of violation of article 92. Accused introduced substantial evidence indicating that he had a disease requiring treatment by frequent injections, which he administered to himself pursuant to a doctor's instructions, and that this was the reason for his possession. His theory of defense then is that his possession comes within an exception to the prohibition. The prosecution must now establish beyond a reasonable doubt that he did not possess the syringe for the treatment of a disease. See United States v. Jenkins, 22 C.M.A. 365, 47 C.M.R. 120 (1973); United States v. Mallow, 7 C.M.A. 116, 21 C.M.R. 242 (1956); United States v. Blau, 5 C.M.A. 232, 17 C.M.R. 232 (1954); United States v. Gohagen, 2 C.M.A. 175, 7 C.M.R. 51 (1953).

CHAPTER V

ARTICLE 134 -- THE GENERAL ARTICLE

0501 INTRODUCTION (Key Numbers 753-764, 771-776)

Articles 133 and 134 are referred to as the "General Articles." They are statutes which encompass many different types of offenses. Time and space do not permit all of the acts that could potentially violate these articles to be discussed fully, but the more common forms of misconduct that run afoul of article 133 and of article 134's three "clauses" will be examined. In addition to analyzing certain specific offenses, this chapter will also illustrate practical application of the "General Articles."

A. Study points. Various cases which have held certain conduct to be beyond the scope of article 134 (and 133) will be examined. These cases will help to clarify the limits of article 134.

1. Other chapters of this text also discuss article 134 offenses. For example, each group in Chapter VII, "Miscellaneous Groups of Offenses," contains a discussion of at least one article 134 offense.

2. As used in this chapter, the word "listed" refers to those offenses which were specifically delineated as article 134 offenses by the drafters of the Manual for Courts-Martial, in Part IV, paras. 61-113, MCM, 1984. Similarly, the word "established" refers to either a listed offense or to one which has been approved in the case law. Conversely, "unestablished" or "unlisted" offenses are those which might be prosecuted under article 134, but which are not delineated in the MCM or discussed in case law. Whether these types of offenses will be upheld by reviewing authorities as constitutional is an unanswered question. This chapter will also discuss unsuccessful attempts to create offenses under article 134.

B. Text of Article 134, UCMJ:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces; and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

C. Categories of article 134 offenses. Article 134 proscribes three distinct categories of offenses, which are often referred to as "Clauses 1, 2, and 3":

Clause 1: Prejudice of good order. Disorders and neglects to the prejudice of good order and discipline in the armed forces. (Abbreviated as "C to P" in this text.)

Clause 2: Service discrediting. Conduct which tends to bring discredit upon the armed forces. (Abbreviated as "SD," or "service discrediting conduct," in this text.)

Clause 3: Other Federal noncapital crimes. Crimes and offenses not capital, not otherwise proscribed by the UCMJ, but which are Federal crimes. (Abbreviated as CONC in this text.)

NOTE: While the following examples are offered as illustrations of conduct which is prejudicial to good order and discipline, it should be noted that the same conduct could well be "service discrediting," depending on the circumstances. There is no definitive line delineating the two types of misconduct. What constitutes one often defines the other. Consequently, one should not attempt to determine specific categories of exclusive "C to P" or "SD" conduct.

D. Scope. To whom does the General Article apply?

1. The phrase "persons subject to this chapter" includes all armed forces personnel, both officer and enlisted, over whom a court-martial can assert jurisdiction. Article 133, which states that "[A]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct," applies only to officers and officer candidates (midshipmen, cadets). Article 134, on the other hand, has no such limitation. Often the same misconduct is prohibited by both articles. If the accused is an officer, he would probably be prosecuted under article 133. But see United States v. Scott, 21 M.J. 345 (C.M.A. 1986).

2. A civilian, serving in the field with the armed forces, may be convicted of offenses in violation of the General Article if the court has jurisdiction over his person. (NOTE: In most instances there will be no jurisdiction over the civilian.) See Article 2, UCMJ.

a. Example: Marker was a civilian employed by the Army in Japan. He abused his position by obtaining gifts from a corporation doing business with the Army. He was charged with such misconduct in violation of the General Article. C.M.A. stated: "In view of the nature and peculiar circumstances of his employment ... [he is] held to a similar high standard of conduct." Although not in uniform, "his official status as a representative of the Army was well known. Any improper acts of is -- and particularly those related to his official duties -- would therefore reflect directly on the military service." United States v. Marker, 1 C.M.A. 393, 398, 3 C.M.R. 127, 132 (1952).

b. In United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (1970), however, it was held that a civilian employee of the Army in Vietnam was not amenable to trial by court-martial. The charges in Averette were not laid under article 134, but the case does give guidance for this particular type of circumstance, which helps define who is a person subject to the UCMJ. A number of decisions have upheld the validity of trials by court-martial of civilians performing services for the armed forces in the field during time of war. For an excellent discussion of these cases, see Reid v. Covert, 354 U.S. 1 (1957); United States v. Robertson, 5 C.M.A. 806, 19 C.M.R. 102 (1955). Certain of these decisions have construed the words "in the field" to embrace all military operations with a view towards action taken, indirectly or directly, against an enemy. For example, domestic staging operations and merchant shipping to a battle zone have been discussed in the case of Hines v. Mikell, 259 F. 28 (4th Cir. 1919). See also In re Berue, 54 F. Supp. 252 (S.D. Ohio, 1944). The Supreme Court strongly suggests, however, that the permissible limits of military jurisdiction over civilians "in the field" extends no further than the actual area of battle "in the face of the enemy." Reid v. Covert, supra, at 33. For further discussion of this issue, see the Procedure Study Guide.

3. A prisoner in the custody of the armed forces, serving a sentence after the execution of his punitive discharge, may violate article 134. For example: The accused was convicted of an assault on a person in the execution of MP duties in violation of article 134. He had already been given a DD and was confined in the Army's Disciplinary Barracks serving out his sentence. Held: Affirmed. "[S]ome conduct to the prejudice of good order and discipline does not depend upon the existence of a military relationship between the actor and the armed services. What is important is the effect of the act upon the service. If the accused's conduct has a direct and palpable prejudicial impact upon good order and discipline, it constitutes a violation of Article 134." United States v. Ragan, 14 C.M.A. 119, 122, 33 C.M.R. 331, 334 (1963). NOTE: A prisoner serving a sentence imposed by a court-martial who is in the custody of the armed forces is still subject to the UCMJ. Also note that Ragan was prosecuted under article 134 for an assault. In this regard, see the Ragan opinion at page 335 (C.M.R.). See also Peebles v. Froehlke, 22 C.M.A. 266, 46 C.M.R. 266 (1973).

E. Challenges to the article's specificity

In the important case of Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547 (1974), the Supreme Court ruled that articles 133 and 134 were not unconstitutionally vague or imprecise. The court ruled the same way in another case decided the same term: Secretary of the Navy v. Avrech, 418 U.S. 677 (1974). In both of these cases, the court held that the articles were not violative of the due process clause of the fifth amendment and were capable of withstanding such assaults because of the narrowing interpretations placed upon the scope of the articles by military legal authorities and traditions.

0502 DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE (CLAUSE 1) (Key Numbers 759-764)

A. General discussion

1. The "disorders and neglects" punishable under clause (1) of article 134 include those acts or omissions to the prejudice of good order and discipline not specifically mentioned in other articles of the UCMJ.

> "To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, the article does not contemplate these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.

Part IV, para. 60c(2)(a), MCM, 1984. It is this type of "narrowing" that the Supreme Court alluded to in the Parker v. Levy, supra, decision, which caused it to uphold article 134 despite attacks against its purported overbreadth and imprecision.

2. Military case law is to the same effect. "Suffice it to say that the article contemplates only the punis ent of that type of misconduct which is directly and palpably, as distinguished from indirectly and remotely, prejudicial to good order and discipline." United States v. Holiday, 4 C.M.A. 454, 456, 16 C.M.R. 28, 30 (1954); see also United States v. Snyder, 1 C.M.A. 423, 4 C.M.R. 15 (1951); United States v. Frantz, 2 C.M.A. 161, 7 C.M.R. 37 (1952); United States v. Kick, 7 M.J. 82 (C.M.A. 1979); United States v. Davis, 4 M.J. 752 (A.F.C.M.R. 1978); United States v. Seeger, 2 M.J. 249 (A.F.C.M.R. 1976); United States v. Cuevas-Ovalle, 6 M.J. 909 (A.C.M.R. 1979); United States v. King, 4 M.J. 785 (N.C.M.R. 1977); United States v. Sadinsky, 14 C.M.A. 563, 34 C.M.R. 343 (1964).

3. Prosecutions under this clause require the terminal element of "prejudice of good order and discipline" to be proved beyond a reasonable doubt. This element is an essential one and must be instructed upon as such. Failure to do so constitutes error. United States v. Gittens, 8 C.M.A. 673, 25 C.M.R. 177 (1958); United States v. Lawrence, 8 C.M.A. 732, 25 C.M.R. 236 (1958); and United States v. Carter, 28 C.M.R. 631 (N.B.R. 1957). See United States v. Long, 20 M.J. 657 (N.M.C.M.R. 1985), where failure to advise accused of terminal element was error, but not reversible, as judge is presumed to know the terminal element. Facts stated by accused determine prejudice to good order and not just parroting words by the accused. See also United States v. Finn, 20 M.J. 696 (N.M.C.M.R. 1985), failure to advise of terminal element in drug distribution case not fatal as "C to P" inherent in basic elements of drug offense. In United States v. Harper, 22 M.J. 157 (C.M.A. 1986), the court held it was permissible to infer the prejudice to good order and discipline if the wrongfulness of the conduct was proven beyond a reasonable doubt.

4. While the terminal element must be proved by the prosecution, it need not be pleaded. In the case of United States v. Marker, 1 C.M.A. 393, 400, 3 C.M.R. 127, 134 (1952), the Court of Military Appeals said, "... we find no reason for the inclusion in the specifications of the words 'conduct of a nature to bring discredit upon the military service'. In truth we believe the suggested language to be nothing more than traditionally permissible surplusage in specifications...." The one exception to this rule is in drunk and disorderly offenses. To get the benefit of the aggravated punishment, "C to P" or "SD" must be expressly pled. Part IV, para. 73c(3), MCM, 1984.

5. The following are examples of offenses which have been held to involve conduct to the prejudice of good order and discipline:

a. Appearing in improper uniform [United States v. Jackson, 16 C.M.A. 509, 37 C.M.R. 129 (1967)];

b. careless discharge of firearms [United States v. Hand, 46 C.M.R. 440 (A.C.M.R. 1972); United States v. Potter, 15 C.M.A. 271, 35 C.M.R. 243 (1965)];

c. impersonating an officer (see further discussion below) [United States v. Lane, 28 C.M.R. 749 (A.F.B.R. 1959)];

d. impersonating a noncommissioned officer [United States v. Wesley, 12 M.J. 664 (A.C.M.R. 1981); United States v. Pasha, 24 M.J. 87 (C.M.A. 1987)];

e. impersonating an OSI agent [United States v. Cagle, 12 M.J. 736 (A.F.C.M.R. 1981)];

f. jumping into the sea from a vessel [United States v. Sadinsky, 14 C.M.A. 563, 34 C.M.R. 343 (1964)];

g. a breach of a custom of the service, such as fraternizing with enlisted personnel by an officer [United States v. Free, 14 C.M.R. 466 (N.B.R. 1953); United States v. Jefferson, 14 M.J. 806 (A.C.M.R. 1982) (see Section 0505 of this chapter for further discussion of fraternization)];

h. receiving, buying, or concealing stolen property [United States v. Gluch, 30 C.M.R. 534 (A.B.R. 1960)];

i. negligent homicide [United States v. Kick, 7 M.J. 82 (C.M.A. 1979); United States v. Reitz, 12 M.J. 784 (A.C.M.R. 1982); United States v. Perez, 15 M.J. 585 (A.C.M.R. 1983)];

j. falsely making an identification card [United States v. Davis, 4 M.J. 752 (A.F.C.M.R. 1978)];

k. making an obscene phone call [United States v. Respess, 7 M.J. 566 (A.F.C.M.R. 1979)];

l. voyeurism [United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978)];

m. obstruction of justice [United States v. Caudill, 10 M.J. 787 (A.F.C.M.R. 1981); United States v. Jones, 20 M.J. 38 (C.M.A. 1985); United States v. Kellough, 19 M.J. 871 (A.F.C.M.R. 1985)];

n. indecent assault [United States v. Parini, 12 M.J. 679 (A.C.M.R. 1981); United States v. Wilson, 14 M.J. 680 (A.F.C.M.R. 1982)]; and

o. cross-dressing [United States v. Karen Davis (previously known as Charles W. Marks), 26 M.J. 445 (C.M.A. 1988)].

p. Also see other chapters of this Study Guide for discussion of the following "C to P" offenses:

(1) Breaking restriction (Ch. VII);

(2) incapacitation for duty as the result of prior indulgence in intoxicating liquor (Ch. VII);

(3) drunk on station (Ch. VII);

(4) communication of a threat (Ch. VIII); and

(5) false swearing (Ch. VII).

6. In the case of United States v. Woods, 28 M.J. 318 (C.M.A. 1989), the Court of Military Appeals decided that a specification alleging conduct prejudicial to good order and discipline stated an offense, under a reckless endangerment theory, for engaging in unprotected sexual intercourse after having been diagnosed as having the AIDS virus.

The court found that the specification was not fatally defective though there was no allegation of lack of consent by the accused's sex partner and despite an absence of traditional words of criminality (such as "wrongfully"), though the court expressed a preference for such words in a "novel" specification.

B. Discussion of some specific offenses under clause 1, article 134

1. Impersonating an officer

a. Elements. Part IV, para. 86b, MCM, 1984.

(1) That the accused wrongfully, willfully, and unlawfully impersonated a commissioned officer, WO, NCO, PO, an agent of a superior authority, or an official of a government in the manner alleged.

(2) "C to P." (The standard instruction to the court on all of these offenses is generally stated in the alternative: "C to P" or service discrediting.")

(3) An aggravated form of this offense may be alleged by including the element of "with intent to defraud", in which case it must also be instructed upon. If a more serious offense (i.e., impersonation with

the intent to defraud) is charged, but simple impersonation is proved, the accused may be found guilty of the latter. United States v. Gillispie, 9 C.M.R. 299 (A.B.R. 1953).

(4) If the nonaggravated form of impersonation (no intent to defraud) is alleged, the final element is that the accused committed one or more acts which exercised or asserted the authority of the office the accused claimed to have.

b. Discussion

(1) In United States v. Messenger, 2 C.M.A. 21, 24 6 C.M.R. 21, 24 (1952), the Court of Military Appeals said the following about this particular offense:

> [W]e here hold that the offense charged [impersonating an officer] falls under disorders to the prejudice of good order and discipline of the armed forces. ..... The gravamen of the military offense of impersonation does not depend upon the accused deriving a benefit from the deception or upon some third party being misled, but rather upon whether the acts and conduct would influence adversely the good order and discipline of the armed forces. It requires little imagination to conclude that a spirit of confusion and disorder and lack of discipline in the military would result if enlisted personnel were permitted to assume the roles of officers and masquerade as persons of high rank.

The case of United States v. Kupchik, 6 M.J. 766 (A.C.M.R. 1978) is to the same effect.

(2) Prior law assumed that the military offense of impersonation was different than its civilian counterpart, impersonating an officer of the United States (18 U.S.C. § 912): "... it can be seen that in the military, the offense can be committed by falsely assuming the role or pretending to be a commissioned officer, whereas in order to violate the federal statute prohibiting impersonation of an officer of the United States, one must not only falsely assume the role or pretend to be an officer but one must also act in the pretended capacity." United States v. Lane, 28 C.M.R. 749, 751 (A.B.R. 1959). This assumption, however, was not quite correct. There is a dispute on the subject among the Federal courts which have interpreted the Federal statute. Some have held that an intent to defraud must be alleged and proved in order to make out the offense [see United States v. Randolph, 460 F.2d 367 (5th Cir. 1972)], while others have held that an intent to defraud is unnecessary. See, e.g., United States v. Rose, 500 F.2d 12 (2d Cir. 1974). The Court of Military Appeals adopted a middle ground in the case of United States v. Yum, 10 M.J. 1 (C.M.A. 1980), and followed the District of Columbia circuit's lead in doing so. The D.C. Circuit said in the case of United States v. Rosser, 528 F.2d 652, 656 (D.C. Cir. 1976):

> The crime ... has two elements: falsely pretending to be an officer or employee of the United States, and

> acting "as such." If acting "as such" is understood to mean performing an overt act that asserts, implicitly or explicitly, authority that the impersonator claims to have by virtue of the office he pretends to hold, the concerns of both the Fifth and Fourth Circuits can be accommodated. Attempting to exercise pretended authority is far more offense (sic) to the interests of the United States than "mere bravado." Moreover, it seems reasonable for Congress to have concluded that virtually everyone who pretends to be an officer or employee of the United States and in some manner asserts authority by acting as such seeks to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct.

The Court of Military Appeals adopted this language as its own and held that "both law and logic compel not only an allegation and a showing of the pretense of authority but also the allegation and showing of an act which must be something more than merely an act in keeping with the falsely assumed character. United States v. Yum, supra, at 4. The court held that a bare allegation of false representation was deficient and failed to state an offense. In United States v. Cagle, 12 M.J. 736 (A.F.C.M.R. 1981), a specification alleging impersonation of an OSI agent was deemed to be sufficient. In that particular specification, there was an allegation of more than a "bare false representation, indeed there was an assertion that the accused used an OSI business card to further his false impersonation and questioned a named individual in his assumed capacity as an OSI agent." Id at 739. Consequently, care must be taken when drafting a specification alleging impersonation without the intent to defraud, for the Yum case holds that some act beyond mere false impersonation is required if an offense is to be stated. This requirement has been adopted in Part IV, para. 86b, MCM, 1984.

c. Pleading. A sample specification is found in Part IV, para. 86f, MCM, 1984.

d. Instructions. A sample instruction regarding this offense is found at paragraph 3-155 of the Military Judges' Benchbook, DA Pam 27-9 (1982), which conforms with the requirements of the Yum decision, and Part IV, para. 86b, MCM, 1984, as noted above.

2. False or unauthorized passes, permits, discharge certificates, and military identification cards. See generally Part IV, para. 77, MCM, 1984.

a. False pass, permit, discharge, and I.D. card offenses are among the more commonly committed crimes in the military. Passes and I.D. cards are altered, forged, or wrongfully used in order to achieve a variety of illegal objectives.

b. Part IV, para. 77, MCM, 1984 lists four categories of pass, permit, etc. offenses:

(1) Wrongful making, altering, counterfeiting, or tampering;

(2) wrongful sale, gift, loan, or disposition;

(3) wrongful use or possession; and

(4) wrongful use or possession with intent to defraud or deceive.

c. Wrongful use or possession (with intent to deceive or defraud)

(1) Elements

(a) That the accused wrongfully used or possessed a certain military or official pass, (etc.);

(b) that the pass (etc.) was false or unauthorized;

(c) that the accused knew the pass (etc.) was false or unauthorized;

(d) that under the circumstances the conduct was "C to P" or of a nature to bring discredit upon the armed forces; and (if alleged)

(e) that the use or possession was with the intent to deceive or defraud.

(2) Discussion

(a) The element of intent to deceive or defraud, when alleged, constitutes an aggravated circumstance and authorizes a more severe punishment. Part IV, para. 77f, MCM, 1984 provides for the following maximum punishments:

-1- Possessing or using with intent to deceive or defraud ... DD and three years CONF; and

-2- "other cases" (i.e., possessing or using without intent to deceive or defraud) ... BCD and six months CONF.

(b) Not all "passes" or "identification" cards are within the ambit of article 134. For example, possession of another's college I.D. card or an expired draft card, with intent to deceive, states no offense. United States v. Gilbert, N.M.C.M. 68-3536 (18 September 1968).

(c) In United States v. Fortenberry, 14 M.J. 505 (A.F.C.M.R. 1982), jurisdiction was found concerning a specification of wrongful possession of an identification card where the accused found a wallet containing the card in an apartment complex parking lot close to the base and where the accused knew the owner to be a member of the same organization. The accused also attempted to use the card to negotiate a money order found in the wallet. Jurisdiction was predicated on the military's interest in the control and use of service identification cards.

(d) An element of the offense of wrongful possession or use is that the accused knew the pass, etc., was false. United States v. Blue, 3 C.M.A. 550, 13 C.M.R. 106 (1953). It has been held to be error if the members are instructed instead that the accused must have known that the possession was unauthorized. United States v. Espinoza, 31 C.M.R. 705 (A.B.R. 1961).

(e) What if the accused has a genuine card which belongs to another in his possession? That situation arose in the case of United States v. Chism, 31 C.M.R. 421, 425 (N.B.R. 1961) and the court said that "a true means of identification in the possession of one to whom it is properly issued becomes a false means of identification when wrongfully used by another."

d. Wrongful sale, gift, loan, or disposition

(1) Elements

(a) Wrongfully sold, gave, loaned, or disposed of a certain military or official pass (etc.);

(b) that the pass (etc.) was false or unauthorized;

(c) that the accused knew that the pass (etc.) was false or unauthorized; and

(d) that under the circumstances the conduct was "C to P" or of a nature to bring discredit upon the armed services.

(2) Discussion

-- The term "dispose," as used in this offense, includes all forms of disposition other than "sale." Part IV, para. 77e, MCM, 1984, provides the following punishment limitations:

-1- "Selling" -- DD and three years confinement; and

-2- "other cases" (disposition other than sale) -- BCD and six months confinement.

(3) It is interesting to note that the MCM prescribes a maximum punishment of a DD and three years confinement for the sale of a false or unauthorized pass or identification card under Article 134, UCMJ, but also promulgates a maximum punishment of only a BCD and one year confinement for sale of military property worth less than $100.00 under article 108. Part IV, para. 32e, MCM, 1984. Since most military identification cards are worth considerably less than $100.00, the ability of the government to subject the accused to a greater punishment by merely charging the offense under article 134 is suspect. See United States v. Courtney, 1 M.J. 438 (C.M.A. 1976). For a case in which the sale of identification cards was prosecuted under article 108, see United States v. Burgin, 30 C.M.R. 525 (A.B.R. 1961).

e. Falsely making, altering, counterfeiting, or tampering

(1) Elements

(a) Wrongfully and falsely making, altering, counterfeiting, or tampering with a certain military or official pass (etc.); and

(b) that under the circumstances the conduct was "C to P" or "SD."

(2) Discussion

(a) Unlike the "use," "possession," "sale," or "disposition" offense, knowledge is not an element in the "making" or "altering" offenses. It would seem, however, that lack of knowledge of its falsity or of its being unauthorized would be at least an affirmative defense, if raised by the evidence, and would necessitate sua sponte instructions to the court. See language in United States v. Karl, 3 C.M.A. 427, 12 C.M.R. 183 (1953) and United States v. Warthen, 11 C.M.A. 93, 28 C.M.R. 317 (1959); see also Military Judges' Benchbook, DA Pam 27-9 (1982) 3-147a; United States v. Mabes, 47 C.M.R. 28 (N.C.M.R. 1973).

(b) Part IV, para. 77e(1), MCM, 1984, sets the punishment limitation for the "making" or "altering" offenses at DD and three years confinement.

(c) The maker need not be skilled at his art in order to be found guilty. In the case of United States v. Davis, 31 C.M.R. 469 (C.G.B.R. 1961), the court held that although the making and possession of a false identification card that bore little resemblance to a genuine one could not be punished under a Federal statute, which required the false document to be a "colorable imitation" of a genuine article, it could be tried under article 134 as conduct prejudicial to good order and discipline.

(d) Forged armed forces identification cards are not writings which would on their faces, if genuine, apparently operate to the legal prejudice of another; thus, an allegation that they would do so in a forgery specification is defective in the absence of an allegation of extrinsic facts to show how the cards could be or were used to affect the legal rights of others. United States v. Davis, 4 M.J. 752 (A.F.C.M.R. 1978). The same case held that a falsely made identification card was properly chargeable under article 134.

f. Pass offenses under 18 U.S.C. § 499

(1) In United States v. Warthen, 11 C.M.A. 93, 28 C.M.R. 317 (1959), the court pointed out that pass offenses in the military spring from a Federal statute (18 U.S.C. § 499). All three judges considered that statute for the purpose of determining the nature of the offenses now provided for in Part IV, para. 77, MCM, 1984.

(2) Although nearly all pass offenses contained in 18 U.S.C. § 499 are incorporated in the MCM, there are several that are not included. These omitted offenses could also be charged under article 134, clause 3, and, hence, would not require the terminal element (i.e., "C to P" or "SD"). Charging under clause 3 of article 134 is discussed in section 0506, infra.

-- Apparently omitted offenses contained in 18 U.S.C. § 499 are:

-1- Impersonating or falsely representing to be or not to be the person to whom such a pass has been issued. There would seem to be little need to charge this in such a case, however, since "wrongful possession with intent to deceive" would almost invariably be chargeable.

-2- Willfully allowing any other person to have or use any such pass or permit issued for his use alone. This one is also partly, at least, included in the MCM [see paragraph (d)-1-, above, concerning the sale or disposition of a pass (etc.)]. See Military Judges' Benchbook, DA Pam 27-9 (1982), inst. 3-147b.

g. Pleading pass offenses

(1) Examine the facts closely and utilize precisely the language for the selected offense as found in the sample specifications in Part IV, para. 77f, MCM, 1984.

(2) Utilize a variation of the pass offenses under 18 U.S.C. § 499 only when necessary.

(3) The sample specifications indicate that the pass should be set forth verbatim within the specification. This may be accomplished by placing a copy of the document on the charge sheet at the appropriate place.

(a) In United States v. Dupass, 11 C.M.R. 750 (A.F.B.R. 1953), the specification alleged that the accused did wrongfully possess at a certain time and place "a certain written instrument purporting to be an official Armed Forces Liberty Pass ... knowing the same to be unauthorized."

-1- The board held that the failure to set forth the pass verbatim or to describe it further rendered it fatally defective because it did not inform the accused of the particular pass offense.

-2- In view of the many C.M.A. cases upholding the validity of analogous specifications which were similarly defective (i.e., as to particularity of the offense alleged), the opinion in United States v. Dupass, supra is probably unsound. See United States v. Karl, 3 C.M.A. 427, 12 C.M.R. 183 (1953); United States v. Williams, 12 C.M.A. 683, 31 C.M.R. 269 (1962); United States v. Autrey, 12 C.M.A. 252, 30 C.M.R. 252 (1961); and United States v. Bunch, 3 C.M.A. 186, 11 C.M.R. 186 (1953).

(b) Conclusion: Adhere to the best practice in drafting such specifications (i.e., set out the pass verbatim in the specification).

(4) For a sample of a tailored pass specification, see United States v. Karl, supra.

(a) Be sure to follow the sample specification carefully. Also make sure that applicable knowledge requirements are pleaded.

(b) Insert a photographic copy of the pass or permit within the specification.

h. Instructions

(1) In a wrongful use, possession, sale, or disposition of a pass (etc.) case, knowledge of the unauthorized or false character of the item is an element which must be instructed upon as well as pleaded and proved. See United States v. McIntosh, 12 C.M.A. 474, 31 C.M.R. 60 (1961), United States v. Blue, 3 C.M.A. 550, 13 C.M.R. 106 (1953), and Military Judges' Benchbook, DA Pam. 27-9 (1982), inst. 3-147 (a-d). An instruction that the card possessed or used by the accused was unauthorized, rather than false, may not be defective. See United States v. Peoples, 43 C.M.R. 656 (A.C.M.R. 1971).

(2) As noted earlier, it has been held to be error for the members to be instructed that the accused must have known that the possession was unauthorized instead of being told that the accused must have known that the card, etc., was false. United States v. Espinoza, 31 C.M.R. 705 (A.B.R. 1961). On the other hand, it is probably sufficient if the members determine that the accused intended to use the false card in the future. United States v. Forster, 13 C.M.A. 162, 32 C.M.R. 162 (1962).

(3) See the following cases with regard to the sufficiency of evidence and the instructions required in "intent to deceive cases": United States v. Tamas, 6 C.M.A. 502, 20 C.M.R. 218 (1955); United States v. Alberico, 7 C.M.A. 757, 23 C.M.R. 221 (1957); United States v. Burton, 13 C.M.A. 645, 33 C.M.R. 177 (1963); United States v. Espinoza, supra; United States v. Nugent, 33 C.M.R. 664 (C.G.B.R. 1963); and United States v. Rolands, 39 C.M.R. 571 (A.B.R. 1968).

(4) On a charge of wrongful possession with intent to deceive, mere wrongful possession (without that intent) is a lesser included offense. See discussion above and Part IV, para. 77d, MCM, 1984. If there is some evidence in the record which reasonably places this LIO in issue, it must be instructed upon. See United States v. Burton, 13 C.M.A. 645, 33 C.M.R. 177 (1963), where the accused requested liberty which was denied. He went UA and, while UA, was asked by SP to produce his liberty card and ID card. Accused only gave ID card and was taken in custody to SP Headquarters. Later a forged liberty pass bearing accused's name and service number was found in the patrol vehicle's rear seat on which accused had ridden. Accused later confessed that he had a forged liberty pass on his

person when apprehended and knew it was forged. Held: This evidence raised issue of LIO. The accused only admitted wrongful possession and, when faced with an obvious opportunity to use the card in order to deceive the shore patrol, he did not produce it. Failure to instruct on LIO was prejudicial.

(5) On a charge of wrongful sale of a pass, a wrongful disposition other than by sale might be a lesser included offense. However, the argument that such is not the case may be just as strong. Applying traditional property concepts, it appears evident that one could act as a seller without having possession of the card or pass. There appear to be no cases either accepting or rejecting this approach insofar as pass and ID card offenses are concerned. However, note the case of United States v. Burgin, 30 C.M.R. 525 (A.B.R. 1961), which dealt with a "sale of" identification cards charged under Article 108 of the UCMJ. There the accused had delivered some cards to a third party with instructions that the cards were to be sold in the future and any cards not thus sold were to be returned to the accused. The court held that this was a transfer and not a sale and dismissed the charge, without discussing whether the transfer was a lesser included offense. (Article 108 also makes wrongful disposition of military property illegal.)

0503 SERVICE DISCREDITING CONDUCT -- CLAUSE 2 (Key Numbers 753-758)

A. Clause 2 of article 134, proscribes "all conduct of a nature to bring discredit upon the armed forces."

1. Part IV, para. 60c(3), MCM, 1984, defines "discredit" to mean "to injure the reputation of" and states that, "this clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem."

2. To be punishable under this clause, the discrediting potential must be direct and substantial. United States v. Holt, 7 C.M.A. 617, 23 C.M.R. 81 (1957). But, it is not necessary that actual discredit result from the accused's actions in order to constitute this offense. It is sufficient if under the circumstances, the conduct was of a nature to bring direct and substantial discredit. United States v. Berry & Mitchell, 6 C.M.A. 609, 20 C.M.R. 325 (1956). For example: Accused was charged with publicly associating with persons known to be sexual deviates, to the disgrace of the armed forces. The defense contended that, since the association was solely in the presence of sexual deviates, the element of disgrace to the service is necessarily lacking. Held: The defense argument meritless, and the evidence sufficient. United States v. Hooper, 9 C.M.A. 637, 26 C.M.R. 417 (1958).

3. Clauses 1 and 2 frequently overlap; that is, acts which have a direct and palpable tendency to prejudice good order and discipline often are also committed under circumstances which have a direct and substantial tendency to injure the reputation of the armed forces.

a. In actual practice, most cases are tried and reviewed under this dual approach.

(1) Part IV, para. 60c(6)(a), MCM, 1984, specifically provides "The same conduct may constitute a disorder or neglect to the prejudice of good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces."

-- In United States v. Holt, 7 C.M.A. 617, 622, 23 C.M.R. 81, 86 (1957), C.M.A. held that conducting a rigged bingo game in an Airmen's Open Mess was an offense under article 134, and stated: "We find in this case that the accused's behavior was not only prejudicial to good order and discipline, but it further reflected discredit on the armed forces. Open messes of officers and enlisted personnel are semi-public and perform valuable functions for the service. The bingo games and entertainment have a direct impact upon the morale of our forces overseas. We cannot but conclude, therefore, that patent dishonesty by an employee in one of these organizations constituted improper acts and conduct which directly and substantially affected adversely the good order and discipline in the armed forces of the United States and did directly and substantially bring discredit upon the armed forces."

(2) The dual approach may not be discussed in every case.

-- In United States v. Snyder, 1 C.M.A. 423, 4 C.M.R. 15 (1952), C.M.A. considered the particular misconduct involved to come under clause 1 because it had occurred in the semi-privacy of a military reservation, and concluded that enticing another to have intercourse with a female constituted a disorder prejudicial to good order and discipline. However, even in this case, where the court concentrated on a single vice dual approach, it did not go so far as to specifically hold that the conduct was not service discrediting. Rather, it simply analyzed the offense under clause 1 and stated that clause 2 "need not detain us" because the misconduct occurred on the military reservation.

b. Standard instruction on final element. The standard instruction on the final element of every offense tried under clauses 1 and 2 of article 134 is stated in the alternative. Military Judges' Benchbook, DA Pam 27-9 (1982), inst. 3-126, et. seq. See also, Part IV, para. 60b(2), MCM, 1984: "That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." C.M.A. has never questioned the propriety of this alternative form of instruction on the final element of clauses 1 and 2, article 134 offenses. Nevertheless, it is important to recognize that these two concepts -- "C to P" and "SD" -- are distinct even though one act may constitute a violation of both.

B. Analysis of some offenses under article 134, clause (2)

1. Dishonorable failure to pay just debts. Part IV, para. 71, MCM, 1984.

a. Elements:

(1) That the accused was indebted to a certain person or entity in a certain sum;

(2) that the debt became due and payable on or about a certain date;

(3) that, while the debt was still due and payable, the accused dishonorably failed to pay the debt; and

(4) that under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. (Or "C to P.")

b. The debt must be a sum certain which is due and payable.

(1) If there is a genuine dispute as to whether the debt is due and payable, the dispute will constitute a defense to the charge. In the case of United States v. Webb, 10 C.M.A 422, 27 C.M.R. 496 (1959), the accused was a manager of a club which showed a shortage in funds as a result of an audit. The accused signed an acknowledgment of indebtedness to make up the shortage from his own funds and attempted to make a monthly allotment to pay it off. However, his attempt was unsuccessful and he did not make further efforts to make good on the note. At his later trial he claimed that the shortage was not a "just" debt and that he had signed the acknowledgment because he was upset, although he admitted that he was not forced to sign it. The court held that his argument was without merit and that there was no genuine dispute as to the legality or the amount of the obligation; consequently, the accused had no defense.

(2) The courts have held that gambling losses are not "debts." Even a deliberate refusal to pay a gambling debt is not an offense under article 134, because the courts consider the enforcement of such obligations to be in conflict with "the welfare and morals of society." United States v. Lenton, 8 C.M.A. 690, 25 C.M.R. 194 (1958). In appropriate circumstances, however, the fact that the accused has incurred gambling debts may bear upon the question of whether the accused's failure to pay his other obligations was dishonorable. See United States v. Swanson, 9 C.M.A. 711, 26 C.M.R. 491 (1958).

(3) In most instances, there must be a demand for payment by the creditor before the debt can be considered to have matured. See United States v. Rusterholz, 39 C.M.R. 903 (A.B.R 1968). Because the law "does not require the doing of a useless act," however, no such demand is required if the accused has made clear his intent to defraud the creditor. United States v. Delancey, 34 C.M.R. 845, 848 (A.B.R. 1963).

c. Wrongful and dishonorable failure to pay the debt is required.

(1) "Wrongful" means without justification or excuse.

(a) A discharge in bankruptcy may constitute a defense to this charge because a subsequent refusal to pay would not then be wrongful. "... a discharge in bankruptcy, before a dishonorable failure to pay has occurred can do away with the basis for a later charge of a violation of the Uniform Code." United States v. Swanson, 9 C.M.A. 711, 715, 26 C.M.R. 491, 495 (1958).

(b) Part IV, para. 71c, MCM, 1984, provides that, "for a debt to form the basis for this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to the accused's belief, at the time alleged." (Emphasis added). Thus, if the accused honestly believed that he was not under any legal and moral duty to pay the debt, his failure to do so should not be characterized as "dishonorable."

(2) "Dishonorable" means that the failure to pay the debt was characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations. Part IV, para. 71e, MCM, 1984; United States v. Bonar, 40 C.M.R. 482 (A.B.R. 1968).

-- A mere negligent failure to pay a just debt is not an offense under the UCMJ. United States v. Kirksey, 6 C.M.A. 556, 20 C.M.R. 272 (1955); United States v. Stevenson, 30 C.M.R. 769 (A.B.R. 1960); United States v. Bethea, 3 M.J. 526 (A.F.C.M.R. 1977).

(3) Mere inability to pay or the failure to pay over a long period of time, without more, has been held insufficient to support a charge of dishonorable failure to pay a just debt. United States v. Cummins, 9 C.M.A. 669, 26 C.M.R. 449 (1958). On the other hand, failure to pay over a lengthy period of time coupled with false denials of the existence of the debt is sufficient to support a conviction. United States v. Atkinson, 10 C.M.A. 60, 27 C.M.R. 134 (1958); United States v. Smith, 1 M.J. 703 (A.F.C.M.R. 1975).

-- Along this same line of reasoning, the mere failure to keep a promise to pay a debt is not itself dishonorable unless the promise was made with a fraudulent or deceitful purpose in order to evade responsibility for payment. United States v. Gibson, 1 M.J. 714 (A.F.C.M.R. 1975). There must be some proof of a fraudulent or deceitful purpose in order to support a conviction. United States v. Rusterholz, 39 C.M.R. 903 (A.B.R. 1967).

d. Terminal element. Since this offense is charged under article 134, the "terminal element" of conduct to the prejudice of good order and discipline or service discrediting conduct is required. If the dishonorable failure to pay a just debt occurs in the civilian community, it is more appropriately described as conduct that is service discrediting; however, the question of service-connection and jurisdiction over the offense is also present in such circumstances.

e. Case illustrations

(1) The accused was requested a number of times over a period of several months to pay each of his debts; the evidence indicated that he was able to pay, but he evaded payment. Held: Evidence sufficient for conviction. United States v. Swanson, 9 C.M.A. 711, 26 C.M.R. 491 (1958).

(2) Accused made a number of late payments on a loan; some were by checks which were returned for insufficient funds, but he finally made all payments good, and the manager of the finance company testified that the accused's account was "satisfactory." Held: Evidence not sufficient. "The public nature of the offense has its source in a private relationship. If the private relationship is entirely satisfactory to the parties, there is no ill effect upon the civilian or military community. In other words, if the creditor is satisfied with the conduct of the debtor, there is no basis for concluding that the conduct of the debtor discredits the military service." United States v. Cummins, 9 C.M.A. 669, 673-674, 26 C.M.R. 449, 453-454, (1958); see also United States v. Schneiderman, 12 C.M.A. 494, 31 C.M.R. 80 (1961). This view is now reflected in Part IV, para. 71c, MCM, 1984, which provides that: "This offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment."

f. Pleading. Utilize sample specification at Part IV, para. 71f, MCM, 1984.

2. Carrying a concealed weapon. Part IV, para. 112, MCM, 1984.

a. Elements:

(1) That the accused carried a certain weapon concealed on or about the accused's person;

(2) that the carrying was unlawful;

(3) that the weapon was a dangerous weapon; and

(4) "C to P" or "SD."

b. "A weapon is concealed when it is carried by a person and intentionally covered or kept out of sight." Military Judges' Benchbook, DA Pam. 27-9 (1982), inst. 3-186. This instruction has been approved in the case of United States v. Tobin, 17 C.M.A. 625, 38 C.M.R. 423 (1968). The weapon does not have to be concealed on the accused's person, concealment in an automobile at "a place where it is readily available to him" is sufficient to support a conviction. United States v. Detuccio, 29 C.M.R. 879 (A.B.R. 1960).

c. The particular thing allegedly concealed may be found to be dangerous if it was designed for the purpose of doing grievous bodily harm or was used or intended to be used by the accused to do grievous bodily harm. Military Judges' Benchbook, DA Pam. 27-9 (1982), inst. 3-186. See also United States v. Bussard, 31 C.M.R. 448 (N.B.R. 1961).

-- Some examples of items held to be dangerous weapons for this purpose include:

(a) Straight razors. Accused was charged with unlawfully carrying a "concealed weapon, to wit: a straight razor" at the USO building. C.M.A. held: "Carrying a concealed weapon under circumstances to the discredit of the armed services is a violation of Article 134, ... A straight razor is, of course, not designed for use as a weapon. However, it is 'naturally considered a dangerous instrument.' And it is readily capable of use as a weapon. Its character as a dangerous but innocent instrument, or as a weapon, depends upon the surrounding circumstances. In other words, whether a particular object is a weapon is often a question of fact. ... The specification ... alleges that the razor was carried 'unlawfully' as a 'concealed weapon.'" The specification states an offense. United States v. Bluel, 10 C.M.A. 67, 68, 27 C.M.R. 141, 142 (1958).

(b) Carbine bayonet with a seven-inch blade. United States v. Bryant, 17 C.M.R. 896 (1954), petition denied, 18 C.M.R. 333 (1955).

(c) Unloaded pistol. United States v. Ramsey, 18 C.M.R. 588 (A.B.R. 1954). See United States v. Brungs, 14 C.M.R. 851 (A.B.R. 1954), which is in accord with Ramsey and indicates that an unloaded pistol is dangerous when it can be readily transformed into an effective lethal weapon.

d. Pleading. See Part IV, para. 112f, MCM, 1984. Both the Army Military Judges' Benchbook, DA Pam. 27-9 (1982) and the sample specification in the MCM indicate that "unlawfully" is an element of the offense. Several cases have held that failure to allege that the carrying of the concealed weapon was "unlawful" results in a failure of the specification to state an offense, since there may be occasion when it is authorized or otherwise proper to carry a concealed weapon. United States v. McCoy, 37 C.M.R. 579 (A.B.R. 1966), petition denied, 37 C.M.R. 471 (C.M.A. 1967); United States v. Detuccio, 29 C.M.R. 879 (A.B.R. 1960). The McCoy case also held that the failure to object did not waive the error.

3. Violations of local law (domestic or foreign)

a. General. In discussing what constitutes "conduct of a nature to bring discredit upon the armed forces," Part IV, para. 60c(3), MCM, 1984, states: "Acts in violation of local civil law may be punished if they are of a nature to bring discredit upon the armed forces."

(1) This includes the local law of foreign countries as well as the local law of the states.

(2) However, "A violation of a state statute does not by itself constitute a violation of article 134. The violation must, in fact, and in law, amount to conduct to the discredit of the Armed Forces. Not every violation of a state statute is discrediting conduct." United States v. Grosso, 7 C.M.A 566, 23 C.M.R. 30 (1957).

(3) The holding in Grosso, which required an instruction on the terminal element in every case tried under clause 1 or clause 2, has been consistently reaffirmed by C.M.A. See United States v. Williams, 8 C.M.A. 325, 24 C.M.R. 135 (1957); United States v. Gittens, 8 C.M.A. 673, 25 C.M.R. 177 (1958); and United States v. Leach, 7 C.M.A. 388, 22 C.M.R. 178 (1956). See also United States v. Parrish, 20 M.J. 665 (N.M.C.M.R. 1985); United States v. Long, 20 M.J. 657 (N.M.C.M.R. 1985).

b. Case example. In the case of United States v. Grose, 26 C.M.R. 740 (N.B.R. 1958), the accused, a minor, was charged with possessing and drinking alcoholic beverages in a public place in violation of a state law which prohibited such conduct by minors unless accompanied by an adult. The specification merely alleged that the accused had been in possession and consumed alcoholic beverages as a minor in a public place. The court held that (1) the state statute did not prohibit a minor's drinking or possessing alcoholic beverages per se but prohibited such conduct unless accompanied by a parent, adult spouse, or guardian; and (2) since the "misconduct charged . . . has not been specifically denounced as a crime or offense by Congress, the third class of offenses [clause 3] mentioned in article 134 is of no concern . . . ." Id. at 742. It went on to note that even if the conduct had amounted to a violation of state law, it still must be "C to P" or "SD" in order to be prosecuted under clause (1) or clause (2) of article 134. The court held that there "was an absence of facts alleged" which would meet this last requirement and held that the specification failed to state an offense.

c. Though it is rare that an act, illegal under state law, is prosecuted under clause 2 of article 134, that was what occurred in United States v. Sadler, 29 M.J. 370 (C.M.A. 1990). In Sadler, the accused was charged with contributing to the delinquency of a minor and sexual exploitation of a minor in violation of New Mexico law. As this conduct occurred off base, the Federal Assimilative Crimes Act was inapplicable. The government's theory was that the conduct was service-discrediting. In reversing the conviction as to these specifications, the court held that the military judge should have instructed the members that they could not convict the accused solely because he had violated New Mexico law, though they could consider the violation to determine whether the accused's conduct was service-discrediting. Further, the judge should have instructed the members on the elements of the crimes prohibited by New Mexico law.

4. Negligent homicide. Part IV, para. 85, MCM, 1984.

a. Elements:

(1) That a certain person is dead;

(2) that this death resulted from the act or failure to act of the accused;

(3) that the killing by the accused was unlawful;

(4) that the act or failure to act of the accused which caused the death amounted to simple negligence; and

(5) "C to P" or "SD."

b. "In light of past court-martial practices" with respect to the prosecution of negligent homicide and the "special need in the military" to make the killing of another as a result of simple negligence a criminal act, homicide by simple negligence is an offense under the UCMJ, and its prosecution under the UCMJ is not rendered unlawful by civilian case law which requires a higher degree of negligence in order to punish a civilian for the same offense in civil courts. United States v. Kick, 7 M.J. 82 (C.M.A. 1979). In the Kick case, supra, the court also rejected a claim that the offense of negligent homicide had been preempted in the military since Congress had specially created the offense of manslaughter and murder in other articles of the UCMJ. See United States v. King, 4 M.J. 785 (N.C.M.R. 1977), where the Navy court held that negligent homicide occurred when an automobile driven by the accused, who was intoxicated at the time, weaved across the center line of a highway and struck another vehicle, killing the driver. The court found that such conduct was "C to P" under the circumstances. It could also be construed as service discrediting. In United States v. Reitz, 12 M.J. 784 (A.C.M.R. 1982), the Army Court of Military Review approved a negligent homicide conviction. The accused was driving his vehicle at a high rate of speed while intoxicated. He lost control of the vehicle; it rolled over; and his military passenger was killed. The court determined that operating a vehicle through a civilian community in such a manner, as to result in the death of a fellow soldier, demonstrated sufficient prejudice to good order and discipline as to sustain a conviction under article 134. In United States v. Perez, 15 M.J. 585 (A.C.M.R.1983), a conviction for negligent homicide was affirmed when a woman left her baby in the care of her brutal boyfriend (who subsequently killed the baby) after being warned that her boyfriend had previously abused the child. By leaving the baby with her boyfriend, in spite of the warnings, her action played a material role in the baby's death and was a proximate cause of the child's death. Finally, in United States v. Zukrigl, 15 M.J. 798 (A.C.M.R. 1983), the accused was in charge of a water crossing exercise and failed to ensure that appropriate safety measures were in effect. Such a failure was the proximate cause of the death of an Army private, thereby supporting a conviction for negligent homicide.

c. In the recent case of United States v. Billig, 26 M.J. 744 (N.M.C.M.R. 1988), the Navy-Marine Corps Court of Military Review extensively used their factfinding power to overturn the accused's conviction for, inter alia, negligent homicide based on alleged medical malpractice in the performance of heart bypass surgery. Although the court decided this case on its facts, it indicated, in dicta, an unwillingness to find a physician criminally liable for simple negligence.

0504 NOVEL SPECIFICATIONS UNDER CLAUSES 1 AND 2 OF ARTICLE 134 (Key Numbers 550-552, 756, 762, 953)

A. As a general rule, the creation of "unestablished offenses" under the first and second clauses of article 134 should be avoided whenever possible. They are generally frowned upon by the courts, although it is difficult to predict what action they will take when confronted by any given specification, since the cases on point deal with allegations tailored to specific types of misconduct. Nonetheless, a review of some of these cases is helpful in gaining some insight into the problem.

B. The courts have refused to uphold convictions for "new" article 134 offenses in the following cases.

1. A charge of wrongfully and unlawfully opening a package addressed to another before the package was received by the addressee was held not to state an offense in the case of United States v. Lorenzen, 6 C.M.A. 512, 20 C.M.R. 228 (1955). The following points from the opinion are noteworthy:

a. The specification did not fairly imply that the package was "mail matter," hence it did not state the offense "of interference with the mail," which is a "recognized" article 134 offense.

b. To the extent that such an act amounted to wrongful appropriation or larceny, article 134 has been preempted (see below for a discussion of the doctrine of preemption) by article 121. The specification, however, failed to state an offense under article 121 because it did not allege an intent to deprive, either permanently or temporarily ("steal" or "wrongfully appropriate").

c. The alleged act did not have the required impact on good order and discipline nor was it service discrediting.

2. Willful indecent exposure is an offense under article 134, but negligent indecent exposure is not. In United States v. Manos, 8 C.M.A. 734, 25 C.M.R. 238 (1958), the Court of Military Appeals mentioned the following factors in reaching that conclusion:

a. An act that results from simple negligence does not give rise to criminal liability in the absence of an express statute or "ancient usage" to the contrary.

b. Negligent exposure is not mentioned as an LIO in the MCM.

c. The services may not eliminate vital elements of recognized offenses and then punish "the remainder" as a violation of article 134.

3. In United States v. Jackson, 16 C.M.A. 509, 37 C.M.R. 129 (1967), the specification alleged that the accused wrongfully appeared on board his ship wearing white socks. C.M.A. held that the specification failed to allege the offense of wearing an improper uniform under article 134.

4. In United States v. Day, 11 C.M.A. 549, 29 C.M.R. 365 (1960), the accused was convicted of lending money at a usurious and unconscionable rate of interest, to wit: $30 to be repaid at the end of one month with $30 interest. C.M.A. held that this did not state an offense even though it ostensibly had been recognized as an offense in military law for 150 years, was listed in TMP, and there was a sample specification for it in Appendix 6c, MCM, 1951. C.M.A. stated: " ... [W]hether a particular rate of interest is usurious depends upon a statute. ... Without some definite provision limiting the rate which the lender may receive, the rate charged cannot be called usurious. ... [S]ince military law in general and Army regulations in particular

provide no legal rate of interest, the exaction of any given rate cannot be described as illegal and, therefore, usurious. The interest alleged in the specification here may indeed be unconscionable but it is not unlawful." The 1969 MCM deleted all reference to usury from the TMP and from the Appendix 6c sample specifications. Id. at 550, 29 C.M.R. at 366. Cf. United States v. Smith, 23 C.M.A. 542, 50 C.M.R. 713 (1975); see also United States v. Brown, 7 M.J. 586 (N.C.M.R. 1979). (NOTE: Lending money at a rate in excess of eighteen percent per year simple interest is now prohibited by Article 1132, U.S. Navy Regulations dated 26 February 1973, violation of which can be prosecuted under Article 92, UCMJ.)

5. Air Force officer engaging in mutual, voluntary, private, nondeviate sexual intercourse with enlisted member is not "C to P" or "SD", as it was not a violation of any Air Force policy or against Air Force customs. United States v. Johanns, 20 M.J. 155 (C.M.A. 1985). See also United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984).

6. United States v. Seda, N.M.C.M. 84-4114 (3 May 1985), wrongfully concealing a prophylactic filled with urine with the intent to deceive is not an offense under article 134. An Air Force captain (O-3) catheterizing herself and communicating to enlisted person how to conceal use of marijuana by catheterization constituted two violations of article 133 for conduct unbecoming an officer. United States v. Norvell, 26 M.J. 477 (C.M.A. 1988).

7. Act of sexual intercourse consummated on public beach after midnight where it was unlikely to be discovered did not constitute indecent acts by fornicating in public, an act proscribed by article 134. United States v. Carr, 28 M.J. 661 (N.M.C.M.R. 1989).

C. In certain instances, the validity of prosecutions for particular violations of article 134 have been recognized by the courts but expansion of these offenses to cover novel fact situations has been resisted. That is, while a particular offense may be considered an "established" offense, its limitations are considered to be defined by the nature of its traditional application. For example:

1. Unlawful entry into property without intent to commit an offense therein is an offense under article 134. However, there is no offense of unlawful entry into property other than a building, structure, real property, or such form of personal property as is usually used for storage or habitation.

-- This is based upon a most peculiar limitation. Article 130, Housebreaking, defines the places which may be the subject of unlawful entry with intent to commit a crime therein as a "building or structure." The types of property subject to article 134 unlawful entry are deemed to be extended from the article 130 limitations and do not extend so far as to include an automobile. United States v. Gillin, 8 C.M.A. 669, 25 C.M.R. 173 (1958); (but see United States v. Wright, 5 M.J. 106 (C.M.A. 1978), which held that the government could assimilate a state law which prohibited unlawful entry into an automobile by utilizing the Federal Assimilated Crimes Control Act) or a locker, United States v. Breen, 15 C.M.A. 658, 36 C.M.R. 156 (1966). See also United States v. Wickersham, 14 M.J. 404 (C.M.A. 1983) (a fenced-in storage area of the Air Force may be the subject of an unlawful entry); United States v. Love, 4 C.M.A. 260, 15 C.M.R. 260 (1954) (a tent may be the subject of unlawful entry).

2. Glue sniffing "with intent to become intoxicated" has been held to be an article 134 offense if the intent is so alleged. United States v. Limardo, 39 C.M.R. 866 (N.B.R. 1969). In Limardo, supra, the specific substance inhaled was not alleged and the court strongly suggested that it should have been. Other cases have struck down seemingly similar specifications. An allegation that the accused did wrongfully sniff glue, such conduct being to the prejudice of good order and discipline in the Armed Forces" was held insufficient in United States v. Menta, 39 C.M.R. 956 (A.F.B.R. 1968). In United States v. Mielke, No. 69-3552 (N.C.M.R. 1970), a specification which alleged that the accused did "wrongfully use an intoxicating chemical, to wit: Toluene," was held to be insufficient.

D. Occasionally, the courts will uphold the creation of a "new" offense under article 134. In each of the following cases, the offense prosecuted had not been "established" previously but was considered to be viable by the reviewing court.

1. Wrongfully, unlawfully, and through design jumping from a ship into the sea. United States v. Sadinsky, 14 C.M.A. 563, 34 C.M.R. 343 (1964). This offense is now "established" in Part IV, para. 91, MCM, 1984.

2. Submission of a forged (false and unauthorized) loan recommendation to a credit union, with intent to deceive. United States v. Winton, 15 C.M.A. 222, 35 C.M.R. 194 (1965). See also United States v. Wilson, 13 C.M.A. 670, 33 C.M.R. 202 (1963) and United States v. Rusterholz, 39 C.M.R. 903 (A.F.B.R. 1968), in which the inducement of a private concern to extend credit through a false and wrongful statement made with the intent to deceive was found to be "service discrediting" and an offense under article 134.

3. Keeping a disorderly house (house of prostitution) in government quarters. United States v. Mardis, 6 C.M.A. 624, 20 C.M.R. 340 (1956). (NOTE: C.M.A. herein considered District of Columbia law to establish the elements of the offense in a "C to P" case.) See also United States v. Butler, 11 C.M.R. 445 (A.B.R. 1953).

4. Disrespect to a superior airman (not an NCO) who was then in the execution of his office. United States v. Spigner, 16 C.M.R. 604 (A.F.B.R. 1954). But see United States v. Lumbus and Sutton, 23 C.M.A. 231, 49 C.M.R. 248 (1974), which held that assault upon an acting NCO was not an offense under article 134.

5. Wrongfully, unlawfully, and knowingly affiliating with a group which advocates the overthrow of the U.S. Government. United States v. Blevens, 5 C.M.A. 480, 18 C.M.R. 104 (1955).

6. Willfully, wrongfully, and intentionally placing foreign objects into intake ducts of jet engines with knowledge of the destructive effects of foreign object injection, thereby endangering the engines and aircraft. United States v. Martinson, 21 C.M.A. 109, 44 C.M.R. 163 (1971). The court found this to be an LIO of a charge under article 80, attempting to damage military property. The language of C.M.A. is instructive here: "In general we discourage the use of specifically formulated specifications under Article 134 as lesser included offenses of ones charged under specific punitive articles. But

we are satisfied that the existing language of Article 134 supports the validation of the offense found in this instance. Since the acts of the appellant constituted a military offense and since they were directly and palpably prejudicial to good order and discipline, we affirm. ..." Id. at 112, 44 C.M.R. at 166.

7. Communicating indecent, insulting, and obscene language (obscene telephone calls) was held to be more than simple disorderly conduct and hence properly chargeable as a more serious offense under article 134. United States v. Respess, 7 M.J. 566 (A.C.M.R. 1979). See also United States v. Linyear, 3 M.J. 1027 (N.C.M.R. 1977).

8. Obtaining services by false pretenses by using another's phone to make long-distance calls is an offense under article 134. United States v. Flowerday, 28 M.J. 705 (A.F.C.M.R. 1989).

9. Voyeurism may be charged under article 134 and is similar to a simple disorder. United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978).

10. Indecent acts with a dead body has been held to be an offense under article 134. United States v. Mabie, 24 M.J. 711 (A.C.M.R. 1987).

E. Conclusion. It is difficult to ascertain which article 134 offenses the appellate courts will reject, although on balance it would appear they have upheld more "novel" article 134 offenses than they have disallowed. It is clear that using the MCM model specifications is the safe and prudent course and that the creation of "new, novel" specifications is risky. Likewise, the use of a case-established offense without carefully noting its discussion of the specification's contents and the elements of the offense is pure folly.

0505 FRATERNIZATION - CLAUSE 1 OR 2
(Key Numbers 533, 754, 759, 760, 763, 778)

A. General. Fraternization is very much a viable offense under the UCMJ. There is an increasing number of fraternization cases being published by the courts of review and the Court of Military Appeals. Though each service appears to be handling the offense slightly differently, cases have been successfully prosecuted under articles 92 (when there is a lawful order in effect which precludes the conduct), 133, and 134. United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985) (*Army regulation precludes student-instructor fraternization*); United States v. Moultak, 21 M.J. 822 (N.M.C.M.R. 1985), aff'd, 24 M.J. 316 (C.M.A. 1987) (officer-enlisted sexual relations and financial dealings are conduct unbecoming an officer under article 133); United States v. Mayfield, 21 M.J. 418 (C.M.A. 1986) (asking enlisted woman on a date and fondling an enlisted woman is fraternization). Cases prosecuted as violations of article 134 may have as their essence conduct which is prejudicial to good order and discipline or which is service discrediting. United States v. Pitasi, 44 C.M.R. 31 (C.M.A. 1971); United States v. Livingston, 8 C.M.R. 206 (A.B.R. 1952); United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981); United States v. Smith, 18 M.J. 786 (N.M.C.M.R. 1984); United States v. Baker, N.M.C.M. 84-4043 (30 August 1985); United States v. Smith, 18 M.J. 786 (N.M.C.M.R. 1984); United States v. Tedder, 24 M.J. 176 (C.M.A. 1987).

1. Historically, the prohibition against fraternization applied only to relations between officers and enlisted and was based on social distinctions. United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984). Presently it is the negative effect wrongful fraternization has on discipline and morale that has allowed the proscription to withstand all manner of legal attacks. Stanton v. Froehlke, 390 F. Supp. 503 (D.D.C. 1975); United States v. Adams, supra; United States v. Free, 14 C.M.R. 466 (N.B.R. 1953); United States v. Tedder, supra; United States v. Van Steenwyk, 21 M.J. 795 (N.M.C.M.R. 1985). The courts have held that wrongful fraternization compromises the chain of command, undermines a leader's integrity and, at the very least, creates the appearance of partiality and favoritism. United States v. Moultak, supra; and United States v. Adames, 21 M.J. 465 (C.M.A. 1986).

2. In the past, fraternization was pled either under article 133 or as an unlisted offense under article 134. The maximum punishment was determined by the underlying offense. United States v. Lovejoy, 42 C.M.R. 210 (C.M.A. 1970); United States v. Stocken, 17 M.J. 826 (A.C.M.R. 1984). Fraternization is now a listed offense at paragraph 83 in the MCM, 1984. The maximum punishment is two years' confinement and a dismissal.

B. Definition. Because fraternization has traditionally been a breach of custom, it is more describable than definable. Frequently it is not the acts alone which are wrongful per se, but rather the circumstances under which they are performed. In United States v. Free, 14 C.M.R. 466, 470 (N.B.R. 1953), the Navy Board first enunciated the difficulty in defining fraternization:

> Because of the many situations which might arise, it would be a practical impossibility to lay down a measuring rod of particularities to determine in advance what acts are prejudicial to good order and discipline and what are not. As we have said, the surrounding circumstances have more to do with making the act prejudicial than the act itself in many cases. Suffice it to say, then, that each case must be determined on its own merits. Where it is shown that the acts and circumstances are such as to lead a reasonably prudent person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by the compromising of an enlisted person's respect for the integrity and gentlemanly obligations of an officer, there has been an offense under Article 134.

Therefore, it is not every interaction between officers and enlisted that is wrongful. United States v. Tedder, supra (officer having a drink with enlisted woman not fraternization); United States v. Johanns, 20 M.J. 155 (C.M.A. 1985) (private, nondeviate, voluntary sexual relations between male Air Force officer and enlisted female not fraternization where there is no command or supervisory relationship and no discernible custom against fraternization). United States v. Mayfield, 21 M.J. 418 (C.M.A. 1986) (young enlisted personnel are at the mercy of officers who supervise them so that the potential for the disruption of good order and discipline is tremendous if superiors take advantage of the opportunities to victimize subordinates).

1. Part IV, para. 83c, MCM, 1984, makes no specific attempt to define fraternization. It expressly adopts the "acts and circumstances" language of United States v. Free, supra and describes the offensive acts as those which are in "violation of the custom of the armed forces against fraternization."

2. United States v Baker, N.M.C.M. 84-4043 (30 August 1985) describes fraternization as: "...untoward association that demeans the officer, detracts from the respect and regard for authority in the military relationship between officers and enlisted and seriously compromises the officer's standing as such." Baker cites with approval United States v. Tedder, supra and the Marine Corps Manual. para. 1100.4 explanations of fraternization.

3. United States v. Van Steenwyk, supra, contains an excellent historical analysis of the concept of fraternization. In discussing whether an officer's sharing of marijuana with enlisted personnel and having sexual relations with female members of his staff constituted wrongful fraternization, the Navy court says in footnote 12: "Fraternization...in civilian usage means associating in a brotherly manner; being on friendly terms. The military usage of the term is very similar...fraternization refers to a military superior-subordinate relationship in which mutual respect of grade is ignored."

4. The Court of Military Appeals in United States v. Mayfield, supra, says "fraternization is any, nonprofessional, social relationship of a personal nature between two or more persons." Included in this definition are relationships between permanent personnel and trainees, NCO's (E-5 and above) and junior enlisted personnel, or officer and enlisted personnel of all grades. Suggestive (but not exhaustive) of the types of conduct addressed by the term fraternization are: drinking alcoholic beverages together, playing cards or gambling together, going to private homes or clubs together, and dating or engaging in sexual activities.

C. Elements. Part IV, para. 83b, MCM, 1984, lists five elements under fraternization. Though this listed offense is quite new, the paragraph appears to be largely a codification of existing case law.

1. The accused was a commissioned or warrant officer.

-- There are no enlisted accused's under this paragraph, though there are other theories for prosecuting the enlisted personnel involved (see paragraph 0506.E of this section). According to the analysis to paragraph 83, this article 134 offense does not preempt the creation of a novel 134 specification or an article 92 orders violation to punish the enlisted participant. See United States v. Carter, 23 M.J. 683 (N.M.C.M.R. 1986). Warrant officers (WO-1) are included as accused despite the fact that elsewhere in the UCMJ they are treated as enlisted. Part IV, para. 15a, MCM, 1984. A midshipman would have to be charged under article 133, since this first element would seem to exclude them. Part IV, para. 59c(1), MCM, 1984.

2. The accused fraternized on terms of military equality with one or more enlisted members in a certain manner.

a. This element suggests that not every meeting between officers and enlisted is wrongful. United States v. DeStefano, 5 M.J. 824

(A.C.M.R. 1978); United States v. Tedder, supra; United States v. Smith, 18 M.J. 786 (N.M.C.M.R. 1984); United States v. Johanns, 20 M.J. 155 (C.M.A. 1985). However, this article does not require that a command or supervisory relationship exist between the officer and enlisted person. The Army and Air Force have interpreted this more strictly. AR 600-20, para. 5-7f (15 January 1979) as modified by HQDA ltr 600-84-2 dated 23 November 1984 (where the senior member is not in a direct or supervisory position with regard to the lower ranking member, such relationships are not improper); United States v. Johanns, supra (absent a command or supervisory relationship, consensual nondeviate sexual activity between officers and enlisted in the Air Force does not constitute fraternization). But see United States v. Serino, 24 M.J. 848 (A.F.C.M.R. 1987) (there is a custom against fraternization when such conduct occurs within the chain of command). The Navy court, in United States v. Van Steenwyk, supra, said that the damage done by fraternization does not depend on the chain of command. "...today's lovers of different commands are tomorrow's senior and subordinate." Recently, it appears the Army court may have revised its position on the necessity for an existing senior - subordinate relationship. In United States v. Lowery, 21 M.J. 998 (A.C.M.R. 1986), the court held that, where the accused had been the victim's supervisor at a different duty station, the relationship was still wrongful.

b. The conduct prohibited need not be sexual in nature, although it often is. United States v. Livingston, 8 C.M.R. 206 (A.B.R. 1952) (drinking liquor with enlisted men and sodomy); United States v. Lovejoy, 42 C.M.R. 210 (C.M.A. 1970) (sodomy); United States v. Nelson, 22 M.J. 550 (A.C.M.R. 1986) (soliciting a male soldier to arrange social engagements with enlisted women); United States v. Adames, 21 M.J. 465 (C.M.A. 1986) (attending private enlisted party); United States v. Mayfield, supra (asking enlisted woman for dates); United States v. Van Steenwyk, supra (using marijuana with enlisted personnel). United States v. Serino, supra (using drugs with enlisted personnel).

3. The accused then knew the person(s) to be (an) enlisted member(s).

-- It would appear to be a general defense that the accused honestly did not know the person's enlisted status. The government must show actual knowledge beyond a reasonable doubt.

4. Such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality.

a. The existence of a custom proscribing the alleged conduct also provides the notice of criminal sanction required by due process. United States v. Johanns, supra. United States v. Moultak, 21 M.J. 822 (N.M.C.M.R. 1985), aff'd, 24 M.J. 316 (C.M.A. 1987); United States v. Van Steenwyk, supra. Recent N.M.C.M.R. cases have uniformly held that any reasonable officer of even minimal intelligence is deemed to be on notice that officers cannot associate with enlisted personnel on terms of military equality in the naval service. In Van Steenwyk, the court described a "judicially recognizable custom" against sexual relations with enlisted personnel.

b. However, the prosecution must prove the existence of a service custom which makes the alleged conduct wrongful. "Custom" is defined at Part IV, para. 60c(2)(b), MCM, 1984. It is the existence of a custom that makes conduct such as fornication between officers and enlisted wrongful. Absent the existence of the service-wide custom, it is not unlawful. United States v. Wilson, 32 C.M.R. 517 (C.M.A. 1962); United States v. Means, 10 M.J. 162 (C.M.A. 1981); United States v. Johanns, supra. The government may rely on written documents such as OPNAVINST 5370.2 (Feb 89) (fraternization); the Marine Corps Manual, para. 1100.4; or NAVMC 2767 of 12 March 1984 "User's Guide to Marine Corps Leadership Training" to prove a custom.

c. The existence of a punitive order or regulation would eliminate the need to prove custom was violated and allow the offense to be charged under article 92. United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981); United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985). Such codifications of custom in the form of regulations is also encouraged by the MCM. Part IV, para. 83c(2), MCM, 1984 specifically suggests that officer-enlisted relations may be governed by orders. The analysis at Appendix 21, para. 83, states that there would be no preemption issue raised with a fraternization prosecution under article 92. Multiplicity would still have to be considered. United States v. Cantu, 22 M.J. 819 (N.M.C.M.R. 1986).

d. In United States v. Lowery, 21 M.J. 998 (A.C.M.R. 1986), the Army court opined that the question as to whether there is custom against fraternization was answered for all of the services on 1 August 1984. The court said that the President created such a custom when he signed the executive order that effectuated the Manual for Courts-Martial. In fact, because of the creation of paragraph 83, said the Lowery court, the Johanns, supra case is no longer viable even in the Air Force. If this dicta is correct, the prosecution would still have to prove beyond a reasonable doubt that the alleged misconduct violated the custom. See United States v. Serino, supra.

5. Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

-- The harm must be direct and palpable. United States v. Tedder, 24 M.J. 176 (C.M.A. 1987). There is no conduct known as "simple fraternization," which does not prejudice good order and discipline. United States v. Adames, 21 M.J. 465 (A.C.M.R. 1986).

D. Constitutionality. All manner of constitutional challenges have been leveled against the concept of fraternization. Since the United States Supreme Court decided Parker v. Levy in 1974, all such attacks have largely failed. 417 U.S. 733. In Parker, the high court recognized the military's special need for discipline, against which certain personal liberties may pale.

1. Freedom of association. This right is accorded less weight because of the negative impact on discipline that fraternization has. The prohibition is "valid and necessary." Stanton v. Froehlke, 390 F. Supp. 503 (D.D.C. 1975).

2. Vagueness. The existence of a long acknowledged custom and the circumstances surrounding the misconduct make the prohibition against fraternization specific. United States v. Pitasi, supra; United States v. Van Steenwyk, supra; United States v. Moultak, supra; Parker v. Levy, supra.

3. Equal protection. Officers have always been held to a higher standard of conduct, so it is reasonable to single them out. United States v. Means, 10 M.J. 162 (C.M.A. 1981); United States v. Moultak, supra. Some regulations governing fraternization apply to instructor-student relationships, even when the instructors are also enlisted. Singling out this group of enlisted personnel has also been held to be reasonable because of their temporary special status as teachers. United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981).

4. Privacy. There is no right to privacy when it compromises discipline. United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985). The need for discipline has been called a compelling state interest when weighed against an individual servicemember's need for sexual privacy. United States v. McFarlin, 19 M.J. 790 (A.C.M.R. 1985).

E. Alternative theories of prosecution. For cases of overfamiliarity between ranks which do not fit the elements described in Part IV, para. 83, MCM, 1984, there may be other means of prosecution.

1. The conduct may violate a lawful order or regulation and be punishable under Article 92, UCMJ. Notice that officer-officer and enlisted-enlisted overfamiliarity may have the same detrimental effect on morale and discipline in the appropriate circumstances as officer-enlisted fraternization. As such, the participants may be subject to a lawful written or verbal order to cease and desist. United States v. Carter, 23 M.J. 683 (N.M.C.M.R. 1986) (enlisted-enlisted fraternization in the chain of command violated the ship's order); United States v. Calloway, 21 M.J. 770 (A.C.M.R. 1986) (officer-officer fraternization in the chain of command is an offense). Failure to terminate the relationship may constitute willful disobedience under Articles 90 or 91, UCMJ. Additionally, drafting a novel 134 fraternization specification for officer-officer or enlisted-enlisted fraternization would be appropriate.

2. The underlying conduct might itself constitute a separate crime such as adultery, sodomy, drug abuse or even dereliction. United States v. Conn, 6 M.J. 351 (C.M.A. 1979); United States v. Johanns, 17 M.J. 862 (A.F.C.M.R. 1983), aff'd, 20 M.J. 155 (C.M.A. 1985); United States v. Lovejoy, supra.

3. The conduct may be such that it would constitute conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ. See Part IV, para. 59, MCM, 1984, section 0508 infra. United States v. Graham, 9 M.J. 556 (N.C.M.R. 1980); United States v. Parini, 12 M.J. 679 (A.C.M.R. 1981). Cf. United States v. Baker, N.M.C.M. 84-4043 (30 August 1985) (partying with enlisted and passing out in bed next to an enlisted man does not reach that level of dishonor to be considered "conduct unbecoming.") United States v. Johanns, supra, at 162, 163.

F. Pleading. The sample specification for the listed fraternization offense appears at Part IV, para. 83f, MCM, 1984.

1. Where fraternization is alleged under Article 134, UCMJ, and the same conduct is alleged under article 133, the offenses will merge for findings with the conduct unbecoming. United States v. Rodriguez, 18 M.J. 363 (C.M.A. 1984); United States v. Jefferson, 21 M.J. 203 (C.M.A. 1986). Where fraternization and the underlying misconduct such as adultery or sodomy are both alleged, the offenses may merge for punishment purposes. United States v. Lovejoy, 42 C.M.R. 210 (C.M.A. 1970). Where there is conduct amounting to fraternization which is different from the underlying offense which is also alleged, the offenses may be separate for sentencing also. United States v. Smith, 18 M.J. 786 (N.M.C.M.R. 1984).

2. Pleading the same conduct as fraternization and violation of a local order or regulation is multiplicious charging. United States v. Cantu, supra.

0506 CRIMES AND OFFENSES NOT CAPITAL (CONC)--CLAUSE 3
(Key Numbers 771-776)

A. Text of article (clause 3). "Though not specifically mentioned in this chapter ... crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial...."

B. MCM interpretation of clauses. Part IV, para. 60c(1), MCM, 1984, states: "Clause 3 offenses involve noncapital crimes or offenses which violate Federal law .... If any conduct of this nature is specifically made punishable by another article of the code, it must be charged as a violation of that article." Part IV, para. 60c(4) further explains: "State and foreign laws are not included within the crimes and offenses not capital referred to in this clause of Article 134 ... except when State law becomes Federal law of local application under section 13 of title 18 of the United States Code (Federal Assimilative Crimes Act)."

C. There are two groups of Federal "crimes and offenses not capital":

1. Crimes and offenses of unlimited application (i.e., crimes which are punishable regardless of where they may be committed). For example: counterfeiting and murder.

2. Crimes and offenses of local application (i.e., crimes which are punishable only if they are committed in areas of federal jurisdiction). This group consists of two types of Congressional enactments

a. Specific Federal statutes defining particular crimes. Example: 18 U.S.C. § 2198: seducing a female passenger on board an American vessel by a master, officer, or seaman. United States v. Williams, 17 M.J. 207 (C.M.A. 1984). 18 U.S.C. § 1201: Kidnapping. United States v. Santisteven, 22 M.J. 538 (N.M.C.M.R. 1986).

b. A Federal statute, 18 U.S.C. § 13, which simply "adopts" certain state criminal laws. This is commonly known as the Federal Assimilative Crimes Act (hereinafter FACA).

D. Federal Assimilative Crimes Act (FACA)

1. Text of the act: "Laws of states adopted for areas within Federal jurisdiction." "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title [special maritime and territorial jurisdiction of the United States defined], is guilty of any act or omission which, although not made punishable by any enactment of Congress, should be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. § 13 (1982).

2. FACA constitutes a limited adoption by Congress of state criminal laws in areas of Federal jurisdiction located in the state concerned. It also adopts the criminal law of territories, possessions, and districts. It does not adopt the law of local authority, such as counties, cities, etc. State law is not adopted if other Federal law has defined an applicable offense for the misconduct involved. "This provision of the Code is a valid exercise of congressional authority and constitutes an adoption by Congress for Federal enclaves, of state criminal laws in those areas where Federal criminal law has not defined a certain offense or provided for its punishment." United States v. Rowe, 13 C.M.A. 302, 309, 32 C.M.R. 302, 309 (1962).

a. For example, if A were to commit a certain act aboard the Naval Education and Training Center, Newport, Rhode Island, which did not constitute an offense specifically defined by Federal law, A could nonetheless be tried for committing that act by a court-martial if that act constituted a noncapital offense under Rhode Island law. This is so because FACA, under these circumstances, adopts the criminal law of the state where the Federal enclave is located and applies it just as though it were Federal law. United States v. Craig, 19 M.J. 166 (C.M.A. 1985).

b. FACA applies to valid state laws that were in existence at the time of the alleged offense, without regard to whether they were enacted before or after the passage of FACA or the acquisition of the Federal enclave in question. The law also incorporates into Federal law all additions, repeals, modifications and amendments of the pertinent state law. United States v. Rowe, supra.

3. The doctrine of preemption and FACA

a. Only those offenses which have not already been defined by Federal law are assimilated by FACA. For example, in United States v. Williams, 327 U.S. 711 (1946) (which dealt with the predecessor of the current FACA statute), the accused had consensual sexual intercourse with an Indian maid, who was over 16 but under 18 years of age, within the Colorado Indian Reservation, a Federal enclave in Arizona. Federal law set the statutory rape

age at 16, but Arizona law set it at 18. The Court held that Congress intended to assimilate crimes, not acts, and since at the time there were Federal statutes that covered statutory rape, the doctrine of preemption precluded resort to the state law.

-- Of similar import is the case of United States v. Jones, 5 M.J. 579 (A.C.M.R. 1978), which held that since prosecution of the accused under a specific article of the UCMJ was possible on charges of making false reports of armed robberies, the accused could not be tried under an assimilated Texas statute. See United States v. Irwin, 21 M.J. 184 (C.M.A. 1986) (the accused cannot be convicted under the Assimilated Crimes Act where child abuse consisted only of assaults on a child which are recognized under article 128).

b. On the other hand, if an actual void in Federal law exists, FACA fills the gap with state law. United States v. Williams, supra; United States v. Rowe, supra. Thus, the Court of Military Appeals held in the case of United States v. Wright, 5 M.J. 106 (C.M.A. 1978), that such a void existed in military law with respect to unauthorized entry into an automobile and that state law on the subject could be assimilated and prosecuted under FACA. Furthermore, in United States v. Kline, 15 M.J. 805 (A.C.M.R. 1983), aff'd, 21 M.J. 366 (C.M.A. 1986), it was determined that the offense of resisting apprehension, pursuant to Article 95, UCMJ, did not preempt charging the accused with eluding the police under the Maryland Code. Congress did not intend to limit the prosecution of resisting authority offenses to article 95, nor was the offense of eluding a Maryland police officer a residuum of elements of Article 95, UCMJ.

4. Basis for FACA prosecutions. A trial based upon FACA is not for the enforcement of the underlying state statute, but of the Federal law. United States v. Williams, supra; United States v. Rowe, supra; United States v. Picotte, 12 C.M.A. 196, 30 C.M.R. 196 (1961); United States v. Harkcom, 12 C.M.A. 257, 30 C.M.R. 257 (1961). Example. Accused was driving a car at 30 MPH on MCAS, Cherry Point, North Carolina, when his wife jumped out. He put her back in the car, nose bleeding and unconscious, and took her home and put her to bed. The next morning she was dead. He was charged under article 134 with violation of Section 20 - 166 of General Statutes of North Carolina, in that while a driver of a vehicle involved in an accident resulting in injuries to Mrs. Rowe (wife), he wrongfully and unlawfully failed to render reasonable assistance to her, etc., and that such conduct was of a nature to bring discredit upon the armed forces. TC, from the start and throughout the trial, asserted that he was proceeding under FACA. The court was instructed strictly on this theory (i.e., clause 3, article 134, based on FACA). The accused was convicted. Held: The evidence established an offense under the alleged North Carolina statute, which was assimilated. Affirmed. United States v Rowe, supra. [Note the manner in which C.M.A. indicated that the state statute should be construed as an independent federal determination.] But see United States v. Seeger, 2 M.J. 249 (A.F.C.M.R. 1976), which was not considering a FACA issue but rather a prosecution under clauses 1 and 2 of article 134 for the same basic offense (failure to report an accident). The court there held that the offense of leaving the scene of an accident without making one's identity known was not intended to extend to a situation in which the only property damaged was the driver's vehicle and the only personal injury was to a passenger in the driver's vehicle.

5. Constitutionality

a. The constitutionality of FACA (or its predecessors) was considered by the Supreme Court in United States v. Sharpnack, 355 U.S. 286 (1958). The Court held that the statute was not an unconstitutional delegation to the states of Congress' legislative authority but was rather a "continuing adoption by Congress for federal enclaves of such unpreempted offenses and punishments as shall have already been put into effect by the respective States. ..." Id. at 294, 78 S.Ct. at 296. The claim of unconstitutional delegation of congressional authority was rejected even earlier in the case of Franklin v. United States, 216 U.S. 559 (1910), in which the Court said that such a claim was "clearly unfounded." See United States v. Heard, 220 F.Supp. 198 (D.C.Mo. 1967); Hemans v. United States, 163 F.2d. 228 (6th Cir. 1947), cert. denied, 332 U.S. 801 (1947).

b. On the other hand, if the specification with which the accused is charged is ambiguous as to exactly what misconduct is proscribed under which state law, it may fail to pass constitutional muster in other respects. For example, in the case of United States v. Robinson, 495 F.2d 30 (1974), the accused was charged with "disorderly conduct-abusive language" under Virginia law, while he was in Washington National Airport, a federal enclave. His conduct could have been proscribed under any of three different Virginia statutes, yet the charge against him failed to cite specifically which statute he had allegedly violated. This caused the court to conclude that the charge was so vague and ambiguous that it violated due process and, consequently, it overturned the accused's conviction.

E. General considerations regarding the use of clause 3

1. Drafting clause 3 specifications can be quite complex. It would seem that the better practice is to set out all of the essential elements and also specify the name and number of the statute which defines the offense. However, failure to add the latter is not always defective. For example, in United States v. Hogsett, 8 C.M.A. 681, 686, 25 C.M.R. 185, 190 (1958), the court, citing United States v. Doyle, 3 C.M.A. 585, 14 C.M.R. 3 (1953) and United States v. Long, 2 C.M.A. 60, 6 C.M.R. 60 (1952), said: "It is well settled that if a specification sets out the essential elements of an offense it need not also specify the name or the number of the statute defining the offense, unless the designation is necessary to a proper understanding of the charge." The Hogsett case also shows that precision drafting is required when writing a specification under this clause of article 134. The court dismissed the specification then under review because it failed specifically to define the criminal conduct prohibited by the underlying statute.

2. Even though the specification may be correctly drawn, it may still be of no use to the prosecution because the underlying statute may not be effective in the area at which the court-martial is located. Many "non-capital" Federal statutes are effective only within the limits of the United States. Ordinarily this is not a problem but, since a great number of courts-martial are convened overseas, this limitation may preclude use of the statute. See, e.g., United States v. Cuevas-Ovalle, 6 M.J. 909 (A.C.M.R. 1979). On the other hand, United States v. Wilmot, 11 C.M.A. 698, 29 C.M.R. 514 (1960), reveals that the courts will sometimes "stretch" the literal language of the statute in order to uphold a prosecution. In that case, the statute (Narcotic

Drugs Import and Export Act, 21 U.S.C. §§ 171-185) applied to any territory "under the control" of the United States. The court looked to provisions of the applicable Status of Forces Agreement to conclude that the statute had effect over conduct that occurred at Yokota Air Base, Japan, since it was "under the control" of the United States.

3. Another area that causes some difficulty is the determination of the maximum punishment. R.C.M. 1003(c)(1)(B)(ii), MCM, 1984, indicates that the maximum punishment in such cases should be determined by reference to the United States Code: "When the United States Code provides for confinement for a specified period or not more than a specified period, the maximum punishment by court-martial shall include confinement for that period. If the period is one year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if six months or more, a bad-conduct discharge and forfeiture of all pay and allowances." If state law is assimilated under the provisions of FACA, the state prescribed maximum punishment is also assimilated. United States v. Picotte, 12 C.M.A. 196, 30 C.M.R. 196 (1961). See also United States v. Irvin, 13 M.J. 749 (A.F.C.M.R. 1982), rev'd on other grounds, 21 M.J. 184 (C.M.A. 1986), which determined that a sentence of sixteen years confinement for child abuse was unlawful, since the maximum penalty for child abuse under applicable Colorado state law was limited to eight years.

F. More on pleading

1. Part IV, para. 60, MCM, 1984, does not contain any sample specifications specifically designed for pleading clause 3 offenses under article 134.

2. The only guidance, therefore, comes from the case law. As noted above, while it is not absolutely necessary to plead the particular Federal or state statute concerned when alleging a CONC, it is advisable to do so. Part IV, para. 60c(6)(b), MCM, 1984. United States v. Hogsett, supra, and United States v. Harbaugh, 28 C.M.R. 711 (C.G.B.R. 1959). An example of this procedure is found in United States v. Rowe, 13 C.M.A. 302, 32 C.M.R. 302 (1962). Note, however, that the Rowe specification was a combination of clause 3 and clause 2; that is, it mentioned the state statute and also alleged "service discrediting conduct." C.M.A. focused on the former. The same combination pleading was used in United States v. Bartole, 21 M.J. 234 (C.M.A. 1986) (the court affirmed the conviction on a clause 1 or 2 theory despite the fact that the MJ failed to instruct properly on the clause 3 theory under which the specification was pled). The case of United States v. Green, N.M.C.M. 79-0464 (12 February 1973), provides a good example of the care that is required in this area. Green was charged with violating Section 11555 of the California Health and Safety Code, as a violation of article 134. This statute provides: "It is unlawful to possess ... any device, contrivance, instrument, or paraphernalia used for unlawfully injecting or smoking a narcotic." The court held the specification to be fatally defective because it failed to allege that the hypodermic needle and syringe involved were used for the unlawful purposes specified by the statute, thus omitting an element of the offense. See also United States v. Perry, 12 M.J. 112 (A.F.C.M.R. 1981), which noted that, when FACA is relied on, it is generally "helpful" to allege the basis of jurisdiction in the specification. In Perry, a specification alleging a

wrongful supplying of intoxicating liquor to persons under 21 years of age in violation of "section 311.310 of the Vernon's Annotated Missouri Statutes" was set aside since, during the trial, the applicability of FACA was neither established through judicial notice nor stipulation, but only through a providency inquiry. The A.F.C.M.R. did not utilize judicial notice at its level because the accused's guilt as to this specification did not play "an appreciable role in the adjudication of the accused's punishment.

3. It is necessary to set forth all of the essential elements of the underlying Federal law when drafting a specification involving a "crime and offense not capital." United States v. Johnson, 48 C.M.R. 282 (A.C.M.R. 1974). With respect to such elements as knowledge, intent, or willfulness, the general rule is that if these elements are expressed in the statute, they should be specifically alleged in the "indictment or the charge" either expressly or by implication. Where knowledge is only implied in the statute, it need not be alleged. United States v. Johnson, supra.

4. Under FACA, the misconduct must occur in a place over which the Federal government exercises exclusive or current jurisdiction. See 18 U.S.C. § 13. This geographic requirement becomes an element of the offense which must be pled and proved beyond a reasonable doubt; usually by judicial notice. United States v. Bartole, supra; United States v. Irvin, 21 M.J. 184 (C.M.A. 1986) (applicability of the FACA cannot be established without evidence at trial or by judicial notice, and this oversight cannot be rectified by a DuBay hearing). It is error for the military judge to fail to instruct on the jurisdictional element. United States v. Bartole, supra. In uncontested cases, however, a guilty plea admits the requisite element of jurisdiction over the situs of the crime. United States v. Kline, 21 M.J. 366 (C.M.A. 1986).

5. As a practical matter, seldom does a situation arise that necessitates recourse to clause 3 of article 134. Invariably the pleader is able to proceed using an allegation specifically described by the UCMJ and the MCM. However, it is preferable to avoid the creation of "new" clause 1 (C to P) or clause 2 (SD) offenses if a viable CONC approach is available. If clause 3 is used, and if there is any doubt as to the law or the facts, it would be well to consider the advisability of pleading two similar specifications to provide for the contingencies of proof:

a. One specification should clearly express the offense under a clause 3, article 134, premise (i.e., fully identify the Federal statute (or the assimilated state statute) within the specification, but do not allege that it was "C to P" or "SD").

b. The second specification should clearly express the offense under a clause 1 or 2 premise (i.e., do not mention the Federal or state statute within the specification and, at the conclusion of the specification, allege expressly that it was "C to P" or "SD," or both in the alternative, whichever is more appropriate).

c. The court should be instructed that these two specifications have been provided to allow for the contingencies of proof. United States v. Strand, 6 C.M.A. 297, 20 C.M.R. 13 (1955); United States v. Littlepage, 10 C.M.A. 245, 27 C.M.R. 319 (1959); and United States v. Middleton, 12 C.M.A. 54, 30 C.M.R. 54 (1960).

0507 ARTICLE 134'S LIMITATIONS (Key Numbers 753, 754, 755)

A. The doctrine of preemption. Although described as the "general article," article 134 (and its officer counterpart, article 133) are limited in scope and effect. It was this restricted nature of the article that the Supreme Court focused upon in declaring it constitutional in the case of Parker v. Levy, 417 U.S. 733, 754 (1974): "The effect of these constructions ... has been twofold. It has narrowed the very broad reach of the literal language of the articles and at the same time has supplied considerable specificity by way of examples of the conduct which they cover." One of the "constructions" alluded to is the "doctrine of preemption." This concept was explained in United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979): "Simply stated, preemption is the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the Code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element." United States v. Irvin, supra.

1. This doctrine was first applied by C.M.A. in United States v. Norris, 2 C.M.A. 236, 8 C.M.R. 36 (1953). The accused therein was charged with larceny, was convicted of wrongful appropriation, and the Board of Review affirmed an offense of "wrongful taking" (without any intent) under article 134. Held: *"Wrongful taking" is not an offense under the code.*

> ... Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive Articles.... [T]here is scarcely an irregular or improper act conceivable which may not be regarded as in some indirect or remote sense prejudicing military discipline under Article 134 .... We cannot grant to the services unlimited authority to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134.... We are persuaded, as apparently the drafters of the Manual were, that Congress has, in Article 121, covered the entire field of criminal conversion for military law. We are not disposed to add a third conversion offense to those specifically defined.

Id. at 239, 8 C.M.R. at 39. In United States v. McCormick, 12 C.M.A. 26, 30 C.M.R. 26 (1960), the court equally disparaged the addition of an element to create an article 134 offense. See also United States v. Geppert, 7 C.M.A. 741, 23 C.M.R. 205 (1957), in which "wrongful withholding," without intent, was held not to be an offense.

a. The Court of Military Appeals has held, however, that the doctrine of preemption does not preclude prosecution for the crime of burglary of an automobile. United States v. Wright, 5 M.J. 106 (C.M.A. 1978). The court noted that automobiles were not among the "protected" structures into which unlawful entry was proscribed by other articles of the UCMJ and concluded that the government was free to assimilate a state law which prohibited unlawful entry into an automobile. A "void" in military criminal law existed according to the court and the prosecution was at liberty to fill it with state law under FACA.

b. In United States v. Canatelli, 5 M.J. 838 (A.C.M.R. 1978), the Army Court of Military Review held that articles 108, 121, and 134 (1) and (2) did not preempt a prosecution under article 134 (3) for the unlawful storage and disposal of explosive material in violation of a Federal statute.

c. The offense of eluding police, under the Maryland Code, is not preempted by the offense of resisting apprehension pursuant to Article 95, UCMJ. See United States v. Kline, 15 M.J. 805 (A.C.M.R. 1983), aff'd, 21 M.J. 366 (C.M.A. 1986). Likewise, the offense of flight from detention by post exchange detective to avoid apprehension by MP's is not preempted by article 95. United States v. Williams, 26 M.J. 606 (A.C.M.R. 1988).

2. "Absence" offenses constitute the next area in which the doctrine was applied. An accused was charged under article 134, "without proper authority and with wrongful intent of permanently preventing completion of his basic training and useful service as a soldier" by absenting himself for a specified period. Held: No such offense under article 134 because offenses sounding in UA may be reached only under articles 85, 86 and 87 (but the factual allegation stated desertion with intent to shirk important service under article 85). United States v. Deller, 3 C.M.A. 409, 12 C.M.R. 165 (1953).

3. Another area in which the doctrine of preemption has been applied is that of "misbehavior before the enemy," all forms of which must be charged under article 99. Example: The accused was charged with misbehaving before the enemy under article 99. The trial court excepted the words, "cowardly conduct," and found him guilty under article 134. Held: It was not an offense under article 134, because it was preempted by article 99. However, the specification did allege the offense of "UA" under article 86, and C.M.A. so affirmed. United States v. Hallett, 4 C.M.A. 378, 15 C.M.R. 378 (1954).

4. C.M.A. has held that offenses sounding in graft, bribery, cheating, and fraudulent misrepresentation may be prosecuted under article 134. They are not preempted by article 121 nor by any other specific article of the UCMJ. United States v. Holt, 7 C.M.A. 617, 23 C.M.R. 81 (1957); United States v. Leach, 7 C.M.A. 388, 22 C.M.R. 178 (1956); United States v. Marker, 1 C.M.A. 393, 3 C.M.R. 127 (1952); United States v. Alexander, 3 C.M.A. 346, 12 C.M.R. 102 (1953); and United States v. Bey, 4 C.M.A. 665, 16 C.M.R. 239 (1954).

5. A prosecution for unlawfully altering a public record is cognizable under article 123, forgery. United States v. Maze, 21 C.M.A. 260, 45 C.M.R. 34 (1972).

6. Fraudulent burning of a building under article 134 has been held to be an offense and not preempted by article 126, arson. These two distinct offenses have a different purpose. Arson is to protect the security of the habitation or other property whereas the purpose of fraudulent burning is to protect against fraud. United States v. Fuller, 9 C.M.A. 143, 25 C.M.R. 405 (1958); United States v. Freeman, 15 C.M.R. 639 (A.F.B.R. 1954).

7. Stealing from the mail has been held to be an offense under article 134 and is not preempted by article 121. Distinct purposes are involved. Article 121 is designed to protect possession of personal property; whereas the mail theft offense is designed to protect the sanctity of the mail (i.e., to protect our mail system). "Value" is an element in the former but not the latter. See United States v. Gaudet, 11 C.M.A. 672, 29 C.M.R. 488 (1960); United States v. Thurman, 10 C.M.A. 377, 27 C.M.R. 451 (1959); United States v. Manausa, 12 C.M.A. 37, 30 C.M.R. 37 (1960).

8. An injury self-inflicted without the intent to avoid service was held not to be preempted by article 115 (malingering). United States v. Taylor, 17 C.M.A. 595, 38 C.M.R. 393 (1968).

9. It has been held that the existence of articles 83 (fraudulent enlistment) and 107 (false official statement) do not preempt prosecution of an individual servicemember for the offense of "fraudulent extension of an enlistment by means of a false official statement." United States v. Wiegand, 23 M.J. 644 (A.C.M.R. 1986).

10. The offense of negligent homicide may be prosecuted under article 134 and has not been preempted by the articles dealing with murder or manslaughter. United States v. Kick, 7 M.J. 82 (C.M.A. 1979). There the court said that "special reasons" existed for "not mentioning or treating negligent homicide in conjunction with murder or manslaughter...." Among the reasons cited were that, under prior military law, negligent homicide had been considered a lesser included offense of murder and manslaughter and was prosecuted as a "general neglect or disorder."

B. A capital offense may not be tried under article 134

-- In United States v. French, 10 C.M.A. 171, 27 C.M.R. 245 (1959), C.M.A. was confronted with a specification under article 134 alleging that the accused, "having reason to believe it would be used to the advantage of a foreign nation, to wit: ... [Russia] did, in ... [Washington, D.C.] and ... [New York City] during and about the period 5 April 1957 to 6 April 1957, wrongfully and unlawfully attempt to communicate information relating to national defense of the United States contained in six ... [described] documents, to a foreign nation, to wit: ... [Russia]."

a. This specification in fact alleged an offense made capital by Congress by the 1954 Espionage Act. It followed the wording of the Espionage Act and alleged every element of that offense. However, the government, on appeal, took the position that the specification could be supported under clause 2 (service discrediting) and there is an indication in the C.M.A. opinion that the case was tried under that approach.

b. C.M.A. found that the specification "[s]tates an offense which is rooted in criminal misconduct of a nature to bring discredit upon the Air Force ...", but held that a court-martial had no jurisdiction over the offense. The historical background of article 134 compels "a holding that Congress intended not to permit the prosecution of any capital offense in a military court under any guise except when specifically authorized by statutory enactments...." Id. at 176, 27 C.M.R. at 250. Therefore, no capital offense

can be tried under any part of article 134. It is suggested that, for these same reasons, no capital offense can be tried under article 133 (conduct unbecoming an officer and a gentleman).

0508 ARTICLE 133's LIMITATIONS (Key Numbers 777-782)

A. Serious dereliction. A prosecution under article 133, conduct unbecoming an officer and a gentleman, should be reserved for those offenses seriously compromising an individual's character as a gentleman and standing as an officer. United States v. Sheehan, 15 M.J. 724 (A.C.M.R. 1983). In Sheehan, supra, the accused's failure to meet a suspense date in performing a required duty, as well as a three-day period of unauthorized absence, were minor offenses not coming under the ambit of conduct unbecoming an officer/gentleman and should not have been separately charged pursuant to Article 133, UCMJ. His intentional deception of his superior, however, could legitimately be so charged. In United States v. Clark, 15 M.J. 594 (A.C.M.R. 1983), the court held that two minor derelictions of failure to go and failure to repair should not have been separately charged under article 133, since this article is reserved for more serious violations. See United States v. Johanns, 20 M.J. 155 (C.M.A. 1985) (Cox, J., concurring) (fraternization between officers and enlisted which also constitutes adultery may be charged under article 133). But see United States v. Baker, N.M.C.M. 84-4043 (30 August 1985) (female officer in a drunken sleep next to an enlisted man not disgraceful enough for article 133, but sufficiently prejudicial for article 134 fraternization).

The conduct complained of should expose the offender to "public opprobrium." United States v. Shober, 26 M.J. 501 (A.F.C.M.R. 1986). In Shober, the court found that an unmarried Lieutenant Colonel's sexual exploitation of an unmarried civilian waitress, who was supervised by the accused, was conduct unbecoming, particularly because the affair was well known. However, the accused's actions in taking nude photographs of the waitress were not conduct unbecoming since the photo session was consensual.

A charge under article 133 for charging a fellow officer $2,000.00 for tutoring in leadership skills was held not to be constitutionally vague in the case of United States v. Lewis, 28 M.J. 179 (C.M.A. 1989).

B. Preemption. Article 133 offenses are not preempted by the existence of a specific article prohibiting the misconduct of the officer, cadet, or midshipman. Accordingly, an officer who forges travel vouchers may be prosecuted under article 133 for conduct unbecoming an officer, even though the conduct would be a violation of article 123. United States v. Timberlake, 18 M.J. 371 (C.M.A. 1984). Similarly, an officer guilty of drug offenses punishable under article 134 may be prosecuted instead under article 133. United States v. Rodriguez, 18 M.J. 363 (C.M.A. 1984). These results are consistent with the language of Part IV, para. 59c(2), which states: "This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and gentleman." United States v. Jefferson, 21 M.J. 203 (C.M.A. 1986).

C. Multiplicity. Although prosecution under article 133 is not pre-empted by the existence of a specific article prohibiting the officer's conduct, the rules of multiplicity prohibit charging both articles as separate offenses. In United States v. Timberlake, supra, the accused was charged with forgery in violation of article 123 and with a violation of article 133. C.M.A. held that, under the rationale of United States v. Baker, 14 M.J. 361 (C.M.A. 1983), the forgery charge was a lesser included offense of the conduct unbecoming an officer charge and dismissed the forgery as multiplicious for findings. In United States v. Rodriguez, supra, the same result was reached concerning the article 134 allegations of drug abuse and the article 133 allegations concerning the same misconduct and, in United States v. Abendschein, 19 M.J. 619 (A.C.M.R. 1984), the court held that an article 134 offense of lewd and lascivious acts on a female under the age of 16 was multiplicious for findings with the article 133 offense. In United States v. Scott, 21 M.J. 345 (C.M.A. 1986), the court took a distinctly different tack. First Lieutenant Scott was charged with taking improper liberties under article 134 and article 133 for the same conduct. The court held the offenses to be multiplicious for findings but dismissed the 133 specification. The court reasoned that the article 134 specification was more descriptive of the misconduct.

D. Punishment. The maximum punishment for an offense under article 133 not listed in the Table of Maximum Punishments is the punishment for the most closely related offense in the Table. See Part IV, para. 59e, MCM, 1984. In United States v. Ramirez, 21 M.J. 353 (C.M.A. 1986), the court found that the charged offense of masturbating in the presence of two children under article 133 was more similar to indecent liberties than indecent exposure. This raised the maximum permissible punishment from six-months and a BCD to seven years' confinement and a DD.

CHAPTER VI

DRUG OFFENSES

0600 HISTORICAL OVERVIEW (Key Numbers 783, 788)

A. Prior theories of drug prosecution. On 1 August 1984, Article 112a, UCMJ, became effective as the statutory basis for the prosecution of military drug offenses. Prior to the adoption of article 112a, military practitioners used different theories of prosecution. In the Navy, most drug offenses had been prosecuted under Article 92, UCMJ, as a violation of Article 1151, U.S. Navy Regulations (1973). The Army had prosecuted most drug cases under article 134 as conduct prejudicial to good order and discipline or service discrediting conduct. All of the services would occasionally be forced to resort to clause 3 of article 134 and charge certain offenses not covered by service regulations or listed under article 134 as crimes and offenses not capital. In these instances, violations would be charged under Federal civilian statutes or under state statutes assimilated through the Federal Assimilative Crimes Act, 18 U.S.C. § 13 (1982). These divergent theories of prosecution were deemed to be less than satisfactory and, on 23 September 1982, the President, by Executive Order 12383, amended paragraph 127c, Manual for Courts-Martial, 1969 (Rev.) to provide standardized prosecution punishments for drug offenses under article 134. The purpose of this change was to ensure uniformity among the services in the basis and punishment for all drug prosecutions. Accordingly, article 134 was the primary source for military drug prosecution from 23 September 1982 until 1 August 1984, the effective date of article 112a. Article 112a will be utilized for all enumerated drug offenses occurring on or after 1 August 1984. Offenses occurring prior to 1 August 1984 must be prosecuted under the law in effect at the time of the offense.

B. The adoption of article 112a has created a uniform statutory basis of prosecution for most military drug offenses. Since there are drug offenses which are not provided for in article 112a, however, there will be occasions when it will be necessary to resort to alternative theories of prosecution, such as 134. This chapter will discuss individually the theories of prosecution.

0601 THEORIES OF PROSECUTION (Key Numbers 787, 784)

A. Article 112a, UCMJ

1. The statute. Article 112a, UCMJ, states:

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

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

(1) opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana, and any compound or derivative of any such substance.

(2) Any substance not specified in clause (1) that is listed on a schedule of controlled substances prescribed by the President for the purposes of this article.

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

2. Elements of the offenses. Part IV, para. 37b, MCM, 1984, is the MCM provision which implements article 112a and which provides a list of the elements of each of the seven offenses prohibited by the statute. In addition to the listed elements, the Court of Military Appeals has stated that two types of knowledge are necessary to establish the offenses of use and possession; first, knowledge of the presence of the substance and, second, knowledge of its contraband nature. See United States v. Mance, 26 M.J. 244 (C.M.A. 1988) and United States v. Brown, 26 M.J. 266 (C.M.A. 1988).

3. Wrongfulness. A common element to all article 112a offenses is that the accused's acts must be wrongful as defined in Part IV, para. 37c(5), MCM, 1984:

To be punishable under Article 112a, possession, use, distribution, introduction, or manufacture of a controlled substance must be wrongful. Possession, use, distribution, introduction, or manufacture of a controlled substance is wrongful if it is without legal justification or authorization. Possession, use, distribution, introduction, or manufacture of a controlled substance is not wrongful if such act or acts are: (A) done pursuant to legitimate law enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession); (B) done by authorized personnel in the performance of medical duties; or (C) without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence

> with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

See United States v. West, 15 C.M.A. 3, 34 C.M.R. 449 (1964) (accused, a pharmacist who, with approval of his supervisors, kept a supply of narcotics arising from overages to make up for possible shortages, testified that he took the narcotics from his pharmacy only to safeguard them when he was unable to open the safe where the extra narcotics were usually kept). This inference does not operate to deprive an accused of the defense of lack of knowledge of the physical presence of the drugs. United States v. Greenwood, 6 C.M.A. 209, 19 C.M.R. 335 (1955) (girlfriend of the accused testified that she laced accused's beer with drugs after a quarrel). See also United States v. Grier, 6 C.M.A. 218, 19 C.M.R. 344 (1955) (accused entitled to an instruction on ignorance of fact of heroin use when he testified he had not used heroin, and the only way it could have entered his body was through penicillin injections he had been receiving for venereal disease); United States v. Rowe, 11 M.J. 11 (C.M.A. 1981) (military judge committed prejudicial error in failing to give instruction on "innocent" possession despite evidence that the accused therein possessed "planted" drugs with intention to rid himself of them by returning them to their "suspected owners"). United States v. Ludlum, 20 M.J. 954 (A.F.C.M.R. 1985) (court not convinced beyond reasonable doubt that accused knowingly possessed drug when facts established accused loaned jacket to roommate, and jacket is found in trunk of his car with residue in pocket).

The permissible inference of wrongfulness in a urinalysis case is raised after the prosecution proves use of a contraband drug. United States v. Harper, 22 M.J. 157 (C.M.A. 1986). See also United States v. Douglas, 22 M.J. 891 (A.C.M.R. 1986) and discussion supra, at 5(b). The inference may be drawn even if the accused testifies that he or she has no knowledge of why their urine sample tested positive. Whether or not to draw the permissive inference of wrongfulness is for the trier-of-fact to decide, based upon the available evidence. United States v. Ford, 23 M.J. 331 (C.M.A. 1987).

4. Prohibited substances

a. Marijuana. Marijuana is one of several substances specifically prohibited by article 112a. Marijuana is defined at 21 U.S.C. § 802(15) as "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin . . . ." Although it might be argued that there are more than one species of marijuana (e.g., Cannabis indica Lam.), and that not all marijuana is therefore prohibited, this "species argument" has been almost universally rejected. See United States v. Dinapoli, 519 F.2d 104 (6th Cir. 1975) (no valid defense, even though statute refers solely to Cannabis sativa L. and evidence showed presence of three species); United States v. Gavic, 520 F.2d 1346 (8th Cir. 1975); United States v. Walton, 514 F.2d 201 (D.C. Cir. 1975). Although the Court of Military Appeals has never squarely ruled on the

issue, in United States v. Lee, 1 M.J. 15 (C.M.A. 1975) (Held: No fatal variance where specification alleged possession of marijuana in hashish form, but evidence showed possession of growing marijuana plants), Judge Cook clearly indicated in the opinion of the court that C.M.A. would reject the "species argument." The Air Force Court of Military Review has specifically rejected this defense. United States v. Carrier, 50 C.M.R. 135 (A.F.C.M.R. 1975) (statutory definition of marijuana sufficient to cover all species).

b. Other specific statutory prohibitions. Article 112a also specifically prohibits opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and any compound or derivative of such substances. This allows these named substances to be pled without mention of the Federal Schedule upon which each is listed.

c. Substances incorporated by reference. Article 112a also prohibits any substance that is included in Schedules I through V established by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended. 21 U.S.C. § 812 establishes five schedules of controlled substances, designated I, II, III, IV, and V. Under the Comprehensive Drug Abuse Prevention and Control Act, the significance of these five schedules is that the act provides different regulations and penalties based upon the schedule in which a certain substance is listed. The most dangerous, and most strictly regulated, drugs are in Schedule I; the least dangerous in Schedule V. In addition to the schedules included in the text of the act, the Attorney General may delete or add substances, or may transfer a substance from one schedule to another. 21 U.S.C. § 811. The updated schedules are published in the Federal Register and in the Code of Federal Regulations at 21 C.F.R. § 1308 et seq. Particular care should be exercised when using materials outside the actual schedules. In United States v. Waggoner, 22 M.J. 692 (A.F.C.M.R. 1986), the court held it was not error to admit extracts of Drug Enforcement Administration pamphlets to assist the court in identifying substances; the court noted that such materials must be carefully edited to eliminate prejudicial materials. The characteristics of substances in each schedule are briefly summarized as follows:

(1) Schedule I: 21 U.S.C. § 812(b)(1)

(a) Characteristics:

-1- High potential for abuse;

-2- no currently accepted medical use in the United States; and

-3- unsafe even under medical supervision.

(b) Examples: Heroin, LSD, marijuana. (Note: Classification of marijuana as a Schedule I substance is currently being challenged on the grounds that marijuana can be used effectively to treat glaucoma, and is used with cancer patients. Reclassification of marijuana as a Schedule II substance may occur in the future.)

(2) Schedule II: 21 U.S.C. § 812(b)(2)

(a) Characteristics:

-1- High potential for abuse;

-2- currently accepted medical use in the United States; and

-3- potential for severe psychological or physical dependence.

(b) Examples: Opium, cocaine, methadone.

(3) Schedule III: 21 U.S.C. § 812(b)(3)

(a) Characteristics:

-1- Less abuse potential than that of drugs in Schedules I and II;

-2- currently accepted medical use in the United States; and

-3- potential for high degree of psychological dependence, or for low to moderate degree of physical dependence.

(b) Examples: Nalorphine, secobarbital, barbiturates.

(4) Schedule IV: 21 U.S.C. § 812(b)(4)

(a) Characteristics:

-1- Less abuse potential than that of drugs in Schedules I, II, and III;

-2- currently accepted medical use in the United States; and

-3- less potential for limited physical or psychological dependence than that of Schedule III drugs.

(b) Examples: Phenobarbital, meprobamate, chloral hydrate.

(5) Schedule V: 21 U.S.C. § 812(b)(5)

(a) Characteristics:

-1- Less abuse potential than that of drugs in Schedules I, II, III, and IV;

-2- currently accepted medical use in the United States; and

-3- less potential for limited physical or psychological dependence than that of Schedule IV drugs.

(b) Examples: Compounds containing small quantities of narcotics, such as codeine, combined with non-narcotic ingredients.

d. Additional substances prohibited by the President. Article 112a clause 2 contemplates that the President may publish a list of controlled substances specifically for the purpose of article 112a. The President has not utilized this power, but obviously may do so in the future in the form of an executive order.

e. Designer drugs. Designer drugs such as "Ecstacy" and "China White" are synthetic substitutes for existing drugs. The concept has been called "diabolically simple":

> [T]he underground chemist makes a simple molecular alteration to an existing drug. The original is a controlled substance, but because illegal drugs are defined and classified in the United States by their precise molecular structure, the new chemical cousin, or analog...is, in effect, as legal as powdered milk.

United States v. Tyhurst, 28 M.J. 671, 673 (A.F.C.M.R. 1989) (quoting Burden & Burden, Student Lawyer, May 1986, p. 42). As soon as one version is discovered and added to the controlled substances list, the chemist goes back to the lab, makes a few changes, and stays one step ahead of the law.

To combat this problem, Congress passed the Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. § 813 which prohibits all permutations of existing illegal drugs, whether known or unknown. Tyhurst, 28 M.J. at 673. In Tyhurst, however, U.S.C. § 813 fails to establish a violation for purposes of prosecution under article 112a. "We refuse to read article 112a as some type of military law PACMAN, designed to absorb every new drug law passed or ban every new drug mischief." Id. at 675. The court, however, went on to allow for the possibility of prosecuting these cases under article 134 as a crime and offense not capital.

In United States v. Loftin, 28 M.J. 677 (A.F.C.M.R. 1989), the court suggested an approach practitioners take when faced with offenses involving designer drugs. First, check if the substance appears on Schedules I through V. If so, charge it under 112a. If the substance is not listed in any of the five schedules, charge it under Article 134, clause 3. See also United States v. Reichenbach, 29 M.J. 128 (C.M.A. 1989).

5. Prohibited acts

a. Possession

(1) Definition. Part IV, para. 37c(2), MCM, 1984, provides:

> "Possess" means to exercise control of something. Possession may be direct physical custody like holding an item in one's hand, or it may be constructive, as in the case of a person who hides an item in a locker or car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible, however, for more than one person to possess an item simultaneously, as when several people share control of an item. An accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused's control. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence.

Thus, two or more persons may have "exclusive" possession where one holds the property for another. See United States v. Aloyian, 16 C.M.A. 333, 36 C.M.R. 489 (1966) (Held: Sufficient evidence to find possession of marijuana stored in accused's roommate's locker where evidence showed accused had access to the locker and the container in which the marijuana was found was like one accused had earlier possessed); United States v. Courts, 4 M.J. 518 (C.G.C.M.R. 1977) (Held: One who assists others in weighing and packaging drug has possession of drug). Cf. United States v. McMurry, 6 M.J. 348 (C.M.A. 1979) (Held: Accused's possession of heroin not shown by evidence that he initially knew of heroin's location, and that later, without knowledge of heroin's location, accused indicated his willingness to help his roommate sell it and feigned a transfer of some of it); United States v. Burns, 4 M.J. 572 (A.C.M.R. 1977) (Held: No possession where a third party held the marijuana at accused's request while accused was deciding whether or not to accept it in payment for a car he sold). See also United States v. Wilson, 7 M.J. 290 (C.M.A. 1979) (where a person is in nonexclusive possession of premises, it cannot be inferred that he knows of presence of drugs or had control of them unless there are other incriminating statements or circumstances; however, presence, proximity, or association may establish a prima facie case of drug possession when colored by evidence linking accused to an ongoing criminal operation of which that possession is a part); United States v. Keithan, 1 M.J. 1056 (N.C.M.R. 1976) (Held: Evidence that accused was driving an automobile and knew that one of the passengers was in possession of marijuana was insufficient to sustain accused's conviction for possession).

It is completely unnecessary for an accused to have actual possession of a drug to be found in wrongful possession of it. Wilson, supra. The theory of constructive possession is not based on ownership or actual physical control of the contraband. Instead, the government must show that the accused was

knowingly in a position or had the right to exercise dominion and control over an item either directly or through others. United States v. Traveler, 20 M.J. 35 (C.M.A. 1985) (items found in plain view in accused's house along with other drug-related items over which the accused acknowledged control. United States v. Cozine, 21 M.J. 581 (A.C.M.R. 1985) (after having to delete key statement from confessional stipulation, court still affirms conviction based on evidence showing hashish was found in envelope addressed to appellant contained in his night stand). But see United States v. Richardson, summary disposition, 21 M.J. 313 (C.M.A. 1985) (court dismissed a specification of possession that was based only on evidence that the appellant shared a hotel room where the odor of marijuana was detected and several "roaches" and some marijuana were found).

(2) Lack of knowledge

(a) Context. Lack of knowledge can become an issue in all types of drug offenses, although it most frequently is raised in possession cases. The accused's lack of knowledge may arise in one of three contexts:

-1- The accused doesn't know that possession of the substance is unlawful. This is simply ignorance of law. This is not a defense.

-2- The accused doesn't know that he or she possesses the substance. This is a defense.

-3- The accused is aware that he or she possesses the substance, but is unaware of its composition. This is also a defense.

(b) Raising the issue. Prior to 1988, it had been held that, when an issue is raised by evidence that the accused's possession was without the accused's knowledge of the presence or nature of the substance, the prosecution must prove knowing, conscious possession beyond reasonable doubt. When the issue is not raised, knowledge is not an affirmative element of proof that must be established by the prosecution in order to make a prima facie case. See, e.g., United States v. Alvarez, 10 C.M.A. 24, 27 C.M.R. 98 (1958) (knowledge may be inferred from the fact of possession). United States v. Ashworth, 47 C.M.R. 702 (A.F.C.M.R. 1973).

(c) In two cases decided in 1988 [United States v. Mance, 26 M.J. 244 (C.M.A. 1988) and United States v. Brown, 26 M.J. 266 (C.M.A. 1988)], the Court of Military Appeals determined that two types of knowledge were necessary to establish the offenses of use and possession; first, knowledge of the presence of the substance and, second, knowledge of its contraband nature.

(d) Inference of knowing use or possession. In United States v. Mance and United States v. Brown, supra, C.M.A. indicated that knowledge was an element of the offenses of use and possession. Presumably, however, in absence of evidence to the contrary, knowledge like wrongfulness may be inferred.

(e) Proving knowledge. The accused's knowledge is usually proven, despite his or her assertions of ignorance, by circumstantial evidence. See, e.g., United States v. Griggs, 13 C.M.A. 57, 32 C.M.R. 57 (1962) (Held: Evidence, although of dubious weight, that accused frequented a bar that had a reputation as a place where marijuana was offered for sale was admissible to show accused's knowledge); United States v. Alvarez, 10 C.M.A. 24, 27 C.M.R. 98 (1958) (Held: Admission of pretrial statement by accused that he had possessed and smoked marijuana for a period of time ending several months prior to the charged offense strengthened inference raised by exclusive possession); United States v. Young, 5 M.J. 797 (N.C.M.R. 1978) (Held: After accused had stipulated that drugs and marijuana were found in his jacket, but had testified that he didn't know that marijuana was in his pocket, it was not prejudicial error for trial counsel to ask why he had water pipe and cigarette papers in his locker). United States v. Gardner, 29 M.J. 673 (A.F.C.M.R. 1989) (Held: Minuteness of quantity of cocaine found in accused's car relevant as to whether accused knew the cocaine was there). Note that, while the accused's own assertions about the composition of the substance may be sufficient to establish knowledge, such assertions, standing alone, may be insufficient proof of the actual nature of the substance. United States v. Jenkins, 5 M.J. 905 (A.C.M.R. 1978) (where a faulty chain of custody prohibited use of laboratory test results to establish that the substance was marijuana, an uncorroborated assertion by the accused that he was selling marijuana was insufficient to prove that the substance he possessed was in fact marijuana). But see United States v. Weinstein, 19 C.M.A. 29, 41 C.M.R. 29 (1969); United States v. Guzman, 3 M.J. 1062 (A.F.C.M.R. 1977); United States v. Coen, 46 C.M.R. 1201 (N.C.M.R. 1972); United States v. Day, 20 M.J. 213 (C.M.A. 1985) (accused's own remark that he had heroin and referred to hashish as "dope" sufficient to show knowledge and sustain conviction).

(f) Instructions. Both Mance and Brown, supra, mandate that the jury be specifically instructed with regard to the "two types of knowledge" (e.g., presence and nature) which are "required to establish criminal liability." 26 M.J. at 254 and 267.

(g) Resolution of the issue. Lack of knowledge of either the presence of the drug or of the composition of the substance gives rise to a failure of proof on an essential element of the offense. Such a lack of knowledge need only be honest (i.e., not feigned) for purposes of evading criminal liability. It need not be honest and reasonable. To require that such a lack of knowledge also be reasonable would permit conviction based on negligence rather than knowledge. United States v. Lampkins, 4 C.M.A. 31, 15 C.M.R. 31 (1954) (instruction that the defense of ignorance of fact of possession must be honest and reasonable was incorrect and required reversal); United States v. Hansen, 6 C.M.A. 582, 20 C.M.R. 298 (1955).

(3) Mere suspicion that a controlled substance may be present is insufficient to prove knowledge of the presence of a drug by an accused. United States v. Whitehead, 48 C.M.R. 344 (N.C.M.R. 1973) (Accused suspected the locker to which he had been given the key contained drugs, but he had no direct knowledge. Held: Not possession); United States v. Heicksen, 40 C.M.R. 475 (A.B.R. 1969) (SJA incorrectly advised convening authority he could uphold a possession conviction on the basis of constructive knowledge of the presence of marijuana). Cf. United States v. Valle-Valdez, 554 F.2d 911

(9th Cir. 1977) (actual knowledge not necessary if defendant was aware of high probability of a crucial fact, coupled with a deliberate avoidance of that probability in an effort to remain ignorant). United States v. Newman, 14 M.J. 475 (C.M.A. 1983) (under some circumstances, "deliberate ignorance" of a fact can create the same criminal liability as actual knowledge thereof). The distinction between the cases presents a conceptual problem that will arise with any offense that can be proven by circumstantial evidence where actual knowledge is required. While "should have known" will not be sufficient in those cases, proof of knowledge by circumstantial evidence is nothing more than piecing together enough "should have known" factors until knowledge in fact, beyond a reasonable doubt, is found. The decision of exactly where "should have known" ends and "knew" begins cannot be defined with precision in the abstract, but will turn on the facts presented in each case.

(4) As with ignorance of a controlled substance's presence, when the accused honestly does not know of the substance's composition, such ignorance or mistake of fact is a defense. United States v. Greenwood, supra; United States v. Ashworth, 47 C.M.R. 702 (A.F.C.M.R. 1973) (insufficient evidence to establish knowledge where government could only show accused acted nervous when questioned about a box of "better brownies" he received through the mails). Knowledge of the name of a substance will not necessarily defeat this defense. To be guilty, the accused must know the illicit or "narcotic quality" of the substance. United States v. Crawford, 6 C.M.A. 517, 20 C.M.R. 233 (1955) (accused claimed he was unaware that the medicine paregoric given him by a friend contained morphine). There is an intricate relationship between the issue of knowledge and the inference of wrongfulness relating to a defense of lack of mens rea. The inference of wrongfulness which flows from possession of a controlled substance does not operate to deprive the accused of the defense of lack of knowledge. United States v. Greenwood, supra; see also United States v. Grier, 6 C.M.A. 218, 19 C.M.R. 344 (1955) (accused's testimony that he did not know how morphine entered his body raised an issue of ignorance of fact and required instruction). However, once the issue of lack of knowledge is raised, especially when raised by the accused's testimony, the court may properly decide to disregard the accused's explanation and find knowledge based on all the circumstances, including the accused's physical possession. United States v. Branch, 41 C.M.R. 545 (A.B.R. 1969) (although the mere tendering of an explanation concerning possession raises an issue as to its wrongful possession, the determination of whether the inference of wrongful possession that arises from accused's possession is successfully rebutted is a question strictly for the court's determination).

(5) Lack of mens rea. Prohibited drug acts include possession, use, manufacture, distribution, introduction, and possession, manufacture and introduction with intent to distribute controlled substances. Therefore, wrongfulness, while it must be plead, is not an essential element which the prosecution must establish in order to make a prima facie case. A lack of wrongful intent, or mens rea, however, may be an affirmative defense. This defense most commonly arises in possession cases. Once lack of mens rea is raised, the prosecution must prove beyond a reasonable doubt that the accused's acts were wrongful. Examples of the defense of lack of mens rea fall into two categories: innocent possession and other.

(a) Innocent possession. When an individual possesses a controlled substance with the intent of turning that substance over to the authorities, or with the intent of destroying the substance, that individual may have the affirmative defense of innocent possession. These cases result from an involuntary possession followed by an apprehension prior to turning over or destroying the controlled substance. The government must establish beyond a reasonable doubt that the accused's possession was wrongful. This is achieved by showing that the accused's intent was other than to turn over or destroy the substance. The length of time between initial possession and discovery is circumstantial evidence of intent; longer elapsed periods are more indicative of an intent to do something other than turn over or destroy the controlled substance. An intent to return the substance to its "true owner" is not innocent possession. The key to an innocent possession defense is an intent to take action that removes the controlled substance from the "drug market."

-1- Accused found controlled substance in his apartment following a party. Knowing the substance to be controlled, the accused put it in his pocket with the intent to return it to its "owner." The accused was found in possession of the controlled substance 90 minutes later. In United States v. Kunkle, 23 M.J. 213 (C.M.A. 1987), the court held these facts did not raise an innocent possession issue during the providency inquiry because of the lapse of time and intent to reintroduce the substance into the drug market. This case overrules United States v. Thompson, 21 C.M.A. 526, 45 C.M.R. 300 (1972).

-2- Accused's assertion that someone else had stored drugs in his diving gear, and that he was unaware of their location until the day before they were discovered in a search, did not raise the defense of "innocent possession" where he made no attempt to turn the drugs in to authorities or to dispose of the drugs. United States v. Neely, 15 M.J. 505 (A.F.C.M.R. 1982). NOTE: This decision is particularly well-reasoned and follows the recent Federal law in the area.

(b) Other. Lack of mens rea cases, other than innocent possession cases, involve voluntary possession of a controlled substance. This possession is for a lawful purpose.

-1- Enlisted pharmacy specialist, pursuant to his understanding of local practice, maintained an overstock of narcotics in order to supply sudden pharmacy needs or fill an inventory shortfall. Note that "local practice" was contrary to published regulations. United States v. West, 15 C.M.A. 3, 34 C.M.R. 449 (1964). The court held it was error to fail to instruct the members on innocent possession. The conviction for possession was overturned.

-2- Accused acted on his commander's suggestion and bought drugs in order to further a drug investigation. United States v. Russell, 2 M.J. 433 (A.C.M.R. 1975). The military judge failed to inquire or resolve the possibility of lawful possession and the accused's plea was held improvident. See United States v. Chambers, 24 M.J. 586 (N.M.C.M.R. 1987)

(accused testified the cocaine distribution to an NIS source resulted from the source's request that the accused assist him in an undercover drug operation; citing Federal case law, the court held the issue is mistake of law vice fact but adopts a hybrid mistake of fact defense requiring an "objectively reasonable" standard).

b. Use. Neither the U.S. Code nor the case law defines "use." In the context of drug offenses, "use" means the voluntary introduction of the drug into the body for the purpose of obtaining the substance's chemical or pharmacological effects. "Use," therefore, would include ingestion, injection, and inhalation.

(1) With the advent of the Department of Defense's drug testing program, questions concerning what evidence was necessary to prove use have been raised in court. In United States v. Cordero, 21 M.J. 714 (A.F.C.M.R. 1985), the court held that evidence of THC metabolite in urine does prove wrongful use of marijuana. Presumably, this is also sufficient to prove two types of knowledge required by Mance and Brown, supra.

(2) The Court of Military Appeals reviewed the standard of proof in Harper, infra. Hearing extensive medical and scientific testimony on the laboratory and the urinalysis test, the court made several rulings. First, the court found that the combined laboratory results, along with the expert testimony, was enough to find that the appellant used marijuana beyond a reasonable doubt. The court next stated that a permissive inference of wrongfulness could be drawn, based on the finding of marijuana use. The court noted that there was expert testimony that the chemical compound THC does not naturally occur in the body. The court specifically declined to rule whether a simple laboratory report, without expert explanation, would be sufficient proof beyond a reasonable doubt. This case raises the question of what would happen if an expert witness was not available. Would a medical doctor alone suffice? Could reference be made to learned articles or treatises, such as the one cited in Harper? Certainly, the Harper approach of test results, coupled with in-court testimony, has judicial approval; but the unavailability of a laboratory officer should not stop prosecution. In the 27 October 1986 Viewpoint, Appellate Government opined that an expert could assist in proving (a) that the metabolite is not naturally produced by the body, (b) that the reported level indicates a knowing ingestion, and (c) that unknowing inhalation or ingestion is not reasonable. The best method is actual expert or stipulated testimony. However, other methods to show THC does not occur naturally in the body could include (a) learned treatises, utilizing Mil.R.Evid. 803 (18), (b) asking the court to take judicial notice under Mil.R.Evid. 201, and (c) using other competent evidence or exhibits. When using learned treatises, prosecutors need a witness to testify about the contents and reliability of the studies and to respond to possible defense theories. This witness need not be the laboratory director, but should be someone whose background allows him or her to understand the material.

(3) In United States v. VanHorn, 26 M.J. 434 (C.M.A. 1988), the Court of Military Appeals held that it was reversible error to deny accused's request for employment of an expert witness who would have testified that the government had not followed proper testing procedures in analysing accused's urine specimen for cocaine metabolites that formed basis of charge of wrongful use of cocaine.

(4) Knowledge. Lack of knowledge can be an issue in wrongful use cases as well as wrongful possession cases; this is particularly true in cases supported by urinalysis evidence. Here, the accused claims not to have known the controlled substance was present, or did know the substance was present but did not know what it was. The knowledge issue is handled the same as in possession cases. See section 0601A.5a(2), supra; United States v. Domingue, 24 M.J. 766 (A.F.C.M.R. 1987) (guilty plea to cocaine use improvident where Care inquiry indicated accused did not know the marijuana used was laced with cocaine).

c. Distribution. Distribution is a new term with respect to drug offenses and is designed to replace the separate concepts of transfer and sale, which were often difficult to distinguish. Part IV, para. 37c(3), MCM, 1984, defines distribution as:

> "Distribute" means to deliver to the possession of another. "Deliver" means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship.

(1) Distribution, therefore, encompasses both transfer and sale. Transfer was not previously defined by the Comprehensive Drug Abuse Prevention and Control Act; sale, however, was defined as the transfer of ownership for consideration. Actual possession need not be transferred, nor must the accused have possession of the substance in order to sell it. Military Judges' Benchbook, DA Pam 27-9 (1982), inst. 3-145. Additionally, the Court of Military Appeals recently stated that the term "distribution" includes the transfer of drugs between conspirators as part of the conspiracy to distribute the same drugs. Therefore, it is possible to distribute to someone who already constructively possesses the same drugs. United States v. Tuero, 26 M.J. 106 (C.M.A. 1988). It is not necessary that the person to whom the accused distributed drugs know that he or she has received the contraband. United States v. Sorrell, 20 M.J. 684 (A.C.M.R. 1985). By adopting this new term, it is intended that the agency defense which created some problems in differentiating transfer from sale be eliminated.

(2) Agency defense. (This particular defense is no longer relevant in view of the use of the general term "distribution." The following discussion is provided, however, as background information as to the concepts to be focused upon should, in an unusual case prosecuted other than under article 112a, it become necessary to utilize an agency defense.) United States v. Power, 20 M.J. 275 (C.M.A. 1985). One who acted merely as a procuring agent for another was not guilty of sale of drugs to that person. Such an accused could, however, be convicted of transfer and possession. The agency defense required that the accused act merely as a conduit or middleman, and in no other capacity. United States v. Suter, 21 C.M.A. 510, 45 C.M.R. 284 (1972); United States v. Young, 2 M.J. 472 (A.C.M.R. 1975); United States v. Martinez, 3 M.J. 600 (N.C.M.R. 1977); United States v. Whitehead, 48 C.M.R. 344 (N.C.M.R. 1973) (the agency defense is not available to one who acts as a participant in the sale by aiding and abetting the seller). When was one a seller and not an agent? In United States v. Holladay, 47 C.M.R. 22 (1973), the Navy Court of Military Review identified eight distinct facts that must be considered in determining whether the accused seller was merely an agent. N.C.M.R. did not state how many of the eight factors were necessary to constitute an adequate agency defense nor the relative importance of each.

In United States v. Suter, supra, not all eight factors were present. It would appear, however, that the single most important fact was whether the accused made a profit or was merely a conduit between the purchaser and the ultimate supplier of the drugs. United States v. Curtis, 1 M.J. 861 (A.F.C.M.R. 1976) (profit factor, though admittedly probative on issue of agency, was not alone decisive in determining whether accused acted solely as a procuring agent); United States v. Elwood, NCM 80-3100 (N.C.M.R. 1981) (unpublished) (The "linchpin question" to the defense of agency in a drug transaction is whether the accused profited in some way from the transaction; if he did, then the defense is not available). The lack of profit did not necessarily mean that an agency defense would succeed. United States v. Fortney, 12 M.J. 987 (A.F.C.M.R. 1982) (while failure to make a profit may reflect on one's business acumen, a valid sale may occur in absence of profit or even at a loss). See also United States v. Hunter, 21 M.J. 240 (C.M.A. 1986) (evidence of uncharged misconduct relating to prior drug sales admissible to rebut defense of agency).

(3) Entrapment (Key Number 847, 848). The affirmative defense of entrapment is also discussed in Chapter X of this study guide. When the unlawful inducement by a government agent causes an accused (who had no unlawful predisposition) to distribute drugs, entrapment will be a defense. There must be government overreaching amounting almost to coercion.

(a) Examples:

-1- United States v. Walker, 47 C.M.R. 797 (N.C.M.R. 1973). Government agents had no reasonable suspicion that the accused was selling LSD or was about to do so. Nonetheless, they approached the accused on five occasions in one month to urge him to sell drugs to them. The accused finally relented, due to one agent's claim that he "was in a bad way" and "needed" the LSD. Held: Entrapment.

-2- United States v. Skrzek, 47 C.M.R. 314 (A.C.M.R. 1973). Government agent feigned withdrawal symptoms in order to induce the accused to sell him heroin on several occasions. A.C.M.R. held that not only was there unlawful inducement at the first sale, but that the influence of the initial unlawful inducement would be presumed to continue into subsequent sales, absent prosecution proof beyond reasonable doubt to the contrary.

(b) Accused's predisposition. Entrapment will not apply where the accused had a predisposition or intent to commit the crime. Both prior and subsequent acts of misconduct are admissible to show such a predisposition. Mil.R.Evid. 404b. United States v. Henry, 23 C.M.A. 70, 48 C.M.R. 541 (1974) (no error in permitting cross-exam of accused on an uncharged sale of drugs occurring five days after the charged sale). See also United States v. Bailey, 21 M.J. 244 (C.M.A. 1986). The government is entitled to great latitude in showing predisposition but the military judge must use sound discretion in admitting evidence of uncharged misconduct. It must be probative, and its probative value must outweigh the risk of undue prejudice. Possession or use of a controlled substance does not establish predisposition to distribute. United States v. Dayton, 29 M.J. 6 (C.M.A. 1989). The court should not admit evidence on why the police suspect the accused [held error in

United States v. Eason, 21 M.J. 79 (C.M.A. 1985)]. The military judge should instruct on the limited purpose of such evidence. (Mil.R.Evid. 105 requires the military judge, upon request, to restrict to its proper scope evidence admitted for a limited purpose and to instruct the members accordingly.) United States v. Grunden, 2 M.J. 116 (C.M.A. 1977). Finally, the misconduct must be reasonably contemporaneous with the charged offense. See United States v. Rodriguez, 474 F.2d 587 (5th Cir. 1973) (introduction of evidence of a drug transfer 20 days after the charged possession with intent to distribute not abuse of discretion by the judge in light of entrapment defense). See Sorrells v. United States, 287 U.S. 435 (1932) and United States v. Meyers, 21 M.J. 1007 (A.C.M.R. 1986) for general discussions of the entrapment defense. An excellent discussion of the law of entrapment as applied to military practice is found in United States v. VanZandt, 14 M.J. 332 (C.M.A. 1982). The Benchbook instruction on entrapment at DA Pam 27-9 para 5-6 is helpful in understanding the defense.

(c) When the military judge is alerted to the possibility that an entrapment defense might be available, he is required to discover from the accused his attitude concerning the defense. United States v. DeJong, 13 M.J. 721 (N.M.C.M.R. 1982) (Held: No defense available in this case where accused entered into transaction to satisfy his own profit motive).

(d) Defense counsel must scrutinize all alleged offenses for the possibility of entrapment. (The fact that second sale of drugs occurred almost a month after the first did not preclude invocation of the entrapment defense. The defense applies not only to the original crime induced by the government agent, but also to subsequent acts which are part of a course of conduct which was a product of the inducement.) This is the concept of "continuing entrapment." United States v. Bailey, 21 M.J. 244 (C.M.A. 1986).

(4) Good military character. The defense of good military character is also discussed in Chapter X of this study guide. It is now clear that good military character is admissible in all drug cases. United States v. Weeks, 20 M.J. 22 (C.M.A. 1985); United States v. Vandelinder, 20 M.J. 41 (C.M.A. 1985). The test to determine prejudice when the military judge fails to admit or instruct on character evidence is the strength of the government's case as opposed to the quality, strength, and relevance of the defense's evidence. What standard of harm the court will use (harmless beyond reasonable doubt or a lesser one) has not been announced. So far, courts have resolved the issue based on the overwhelming strength of the government's case. United States v. Weeks, 21 M.J. 1025 (N.M.C.M.R. 1986). Defense counsel should be alert to the government's ability to present acts of bad character to rebut the defense. See United States v. Walton, summary disposition, 21 M.J. 148 (C.M.A. 1986) (evidence of on-going drug enterprise properly admitted to rebut testimony on good military character).

d. Intent to distribute. Part IV, para. 37c(6), MCM, 1984, provides clarification with respect to intent to distribute as follows:

> Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to

> support an inference of intent to distribute are: possession of a quantity of substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the substance may tend to negate an inference of intent to distribute.

e. Manufacture. Part IV, para. 37c(4), MCM, 1984, proscribes the manufacture of a controlled substance. This is a new offense, and manufacture is defined as follows:

> "Manufacture" means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of such substance or labeling or relabeling of its container. The term "production", as used above, includes the planting, cultivating, growing, or harvesting of a drug or other substance.

f. Introduction. Introduction is the act of bringing a controlled substance aboard a military installation, vessel, or aircraft. This definition also includes "causing" the drug to be introduced. See United States v. Banks, 20 M.J. 166 (C.M.A. 1985) (accused could not find supplier on base and took clients off-base, where he located another supplier; transaction and exchange completed off-base does not absolve accused of criminal liability for immediately subsequent introduction). See also United States v. Barber, 23 M.J. 761 (N.M.C.M.R. 1986) (evidence of attempted introduction with intent to distribute insufficient as a matter of law).

6. Sentencing. Part IV, para. 37e, MCM, 1984, now provides for standardized punishments under article 112a. Such punishments are increased when an offense proscribed is committed while the accused is on duty as a sentinel or lookout; on board a vessel or aircraft used by or under control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; in a hostile fire pay zone; or in time of war. The standardized punishments under article 112a are as follows:

> a. Drugs, wrongful use, possession, manufacture, or introduction of amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana (except possession of less than 30 grams or use of marijuana), methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II and III controlled substances. Maximum punishment: Dishonorable discharge, forfeiture of all pay and allowances, and confinement not to exceed 5 years.

b. Drugs, wrongful possession of less than 30 grams or use of marijuana, and wrongful use, possession, manufacture, or introduction of phenobarbital, and Schedule IV and V controlled substances. Maximum punishment: Dishonorable discharge, forfeiture of all pay and allowances, and confinement not to exceed 2 years.

c. Drugs, wrongful distribution of, or, with intent to distribute, wrongful possession, manufacture, or introduction of amphetamine, cocaine, heroin, lysergic acid diethylamide, marijuana, methamphetamine, opium, phencyclidine, secobarbital, and Schedule I, II and III controlled substances. Maximum punishment: Dishonorable discharge, forfeiture of all pay and allowances, and confinement not to exceed 15 years.

d. Drugs, wrongful distribution of, or, with intent to distribute, wrongful possession, manufacture, or introduction of phenobarbital and Schedule IV and V controlled substances. Maximum punishment: Dishonorable discharge, forfeiture of all pay and allowances, and confinement not to exceed 10 years.

e. When any offense described in article 112a is committed while the accused is: On duty as a sentinel or lookout; on board a vessel or aircraft used by or under the control of the armed forces; in or at a missile launch facility used by or under the control of the armed forces; in a hostile fire pay zone; or in time of war, the maximum period of confinement and forfeiture of pay and allowances authorized for such offense shall be increased by 5 years.

7. Pleading

a. General considerations. When possession of marijuana is alleged, the amount possessed must be included in the specification if it is thirty grams or more. By pleading and proving possession of thirty or more grams of marijuana, the government will be able to increase the maximum confinement from two to five years. Except in "use" specifications, it is always good form to allege the approximate amounts of drugs. Metric amounts are preferable because most laboratory reports indicate weight in grams. With the exception of marijuana possession, the quantity of drugs will not affect the maximum authorized punishment. The amount can, however, be an important consideration in determining an appropriate sentence. Accordingly, Part IV, para. 37c(7), MCM, 1984, provides the following guidance:

> When a specific amount of a controlled substance is believed to have been possessed, distributed, introduced, or manufactured by an accused, the specific amount should ordinarily be alleged in the specification. It is not necessary to allege a specific amount, however, and a specification is sufficient if it alleges that an accused

possessed, distributed, introduced, or manufactured some traces of, or an unknown quantity of a controlled substance.

If the offense involves distribution, the specification should identify the other persons involved. In cases involving more than one distribution, this will make it easier for all parties to the trial to relate a witness' testimony to a particular specification. The sample specifications require that all drug abuse specifications be alleged as "wrongful." Failure to allege "wrongful" had been held a fatal defect in United States v. Lesch, N.M.C.M. 85-3830 (17 Dec 85); yet some cases can be salvaged. In United States v. Richardson, N.M.C.M. 85-3022 (23 Jan 86), the word wrongful was stated in the charge but not the actual specification. The court elected to read the charge and specification together and upheld the specification. Though it is not required that drugs named in 112a, clause 1, be named as listed on a schedule, it is advisable for ease in referencing the maximum sentencing provisions.

b. Sample pleadings. See Part IV, para. 37f, MCM, 1984.

B. Article 134, UCMJ. Although the great majority of military drug offenses will be prosecuted under article 112a, prosecutors must be alert to the fact that there may be rare instances in which they will be required to resort to clause 3 of article 134.

1. Example. The accused is apprehended after selling what he purports to be cocaine to an undercover agent. The substance sold is chemically analyzed and turns out to be ephedrine. The distribution takes place on a Federal reservation in the state of Washington. The drug ephedrine is not listed in article 112a, nor is it included in the schedules of the Drug Abuse Prevention and Control Act of 1970. Ephedrine is, however, a prohibited substance under the laws of the state of Washington.

2. United States v. Reyes-Ruiz, 16 M.J. 784 (A.C.M.R. 1983) was a case in which the facts were identical to the ephedrine example. The astute prosecutor charged the offense of delivery of ephedrine as a crime and offense not capital under clause 3 of article 134. Here, it was necessary to use the Federal Assimilative Crimes Act, 18 U.S.C. § 13, to properly charge the misconduct of the accused. (The defense argument that existing Federal law preempted the use of FACA was rejected by the Army Court of Military Review.) This may be useful in the prosecution of the new "designer" drugs.

3. Alternative charging for contingencies of proof under both article 80 (attempted distribution of cocaine) and under article 121 (larceny by trick of the purchase price) would also have been possible and indeed necessary if the distribution had taken place off-base (outside the reach of 18 U.S.C. § 13).

C. Prosecution of possession of drug paraphernalia under Article 92, UCMJ. Possession of drug paraphernalia is not prohibited by article 112a, nor may it be charged under either clause 1 or 2 of article 134. United States v. Caballero, 23 C.M.A. 304, 49 C.M.R. 594 (1975). Article 1151, U.S. Navy Regulations (1973), does not prohibit possession of paraphernalia. Therefore, until recently, such possession had to be prosecuted either under Article 92,

UCMJ, as a violation of a locally promulgated lawful order regulating paraphernalia, or under clause 3 of Article 134, UCMJ, as a violation of a state paraphernalia statute adopted through the Federal Assimilative Crimes Act, 18 U.S.C. § 13. See, e.g., United States v. Tee, 20 C.M.A. 406, 43 C.M.R. 246 (1971) (local order prohibited possession of syringes); United States v. Sweney, 48 C.M.R. 476 (A.C.M.R. 1974) (local order prohibited possession of bottle caps used to administer heroin); United States v. Dykes, 6 M.J. 744 (N.C.M.R. 1978) (discusses lawfulness of orders prohibiting possession of paraphernalia).

Now, however, a naval service-wide paraphernalia regulation was promulgated in SECNAVINST 5300.28A, dated 17 January 1984, which provides:

> Except for authorized medicinal purposes, the use for the purpose of injecting, ingesting, inhaling, or otherwise introducing into the human body marijuana, narcotic substances, or other controlled substances, or the possession with the intent to so use, or the sale or other transfer with the intent that it be so used, of drug abuse paraphernalia by persons in the naval service is prohibited.

Enclosure (1) to the instruction defines drug abuse paraphernalia in greater detail, and notes that it is the intent of the persons in possession of the paraphernalia which separates innocent possession from a criminal offense. For example, under the instruction, cigarette papers may be safely possessed if the intent of the possession is to roll tobacco cigarettes, but their possession constitutes an offense if they are to be used to roll marijuana cigarettes. The enclosure lists "evidentiary factors" to consider in making a determination as to intent. Such factors include statements by the person in possession or anyone in control concerning use; instructions provided with the object concerning its use; and descriptive materials with the object explaining its use.

The model for the paraphernalia sections of SECNAVINST 5300.28A was the "Model Drug Paraphernalia Act," promulgated by the Drug Enforcement Administration, which has also served as the model for many state paraphernalia statutes. The language of the Model Act, "used, intended for use, or designed for use," which appears in SECNAVINST 5300.28A, has come under attack in a number of cases challenging state statutes, which also adopt the language, as being unconstitutional on vagueness grounds. To date, courts have split on the question. See, e.g., Mid-Atlantic Accessories Trade Association v. Maryland, 500 F. Supp. 834 (D.C. Md. 1980) (Constitutional); Record Revolution No. 6 Inc. v. City of Parma, 638 F.2d 916 (6th Cir. 1980) (Unconstitutional); Franza v. Carey, 518 F. Supp. 324 (D.C. N.Y. 1981) (Unconstitutional). No military cases have as yet addressed the issue, but it is anticipated that the constitutionality of SECNAVINST 5300.28A will be attacked. For an example of the line of logic that might be followed to uphold the instruction, see United States v. Hoard, 12 M.J. 563 (A.C.M.R. 1981) (Army regulation which prohibits persons assigned full time to training center from engaging in unofficial personal association with persons passing through reception station, does not violate first amendment on overbreadth grounds since regulation proscribes conduct, not mere expression, and any impact on freedom of speech is purely incidental).

The Supreme Court gave a boost to the prospects for SECNAVINST 5300.28A withstanding an attack on constitutional grounds when it decided, on 3 March 1982, the case of Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, petition for rehearing denied, 456 U.S. 950 (1982). The court upheld, on an 8-to-0 vote, a local ordinance requiring a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." The court stated that the language "designed ... for use" was not unconstitutionally vague on its face. While the ordinance in this case was not based on the DEA model, the language is similar, and the outcome augers well for SECNAVINST 5300.28A.

0602 RELATIONSHIP AMONG DRUG OFFENSES

A. Lesser included offenses and offenses which are multiplicious for findings. Under previous law, transfer was not a lesser included offense of sale. Possession was not a lesser included offense of sale. United States v. Maginley, 13 C.M.A. 445, 32 C.M.R. 445 (1963). Therefore, it was common practice to allow for all possible contingencies of proof by pleading separate specifications of sale, transfer, and possession for each sale of a controlled substance. United States v. Couisnard, 47 C.M.R. 765 (A.F.C.M.R. 1973) (dismissal of the multiplicious specifications not required where they were separately charged for contingencies of proof and treated as multiplicious for sentencing purposes).

These cases are of little, if any, utility today because article 112a merges the prior offenses of sale and transfer into a single offense of distribution, and because of the fact that C.M.A. has recently adopted the more expansive "fairly embraced" test for multiplicity. See the discussion of multiplicity in section 0206 of this text. Utilizing these new developments in the law, we now know:

1. Possession of a drug and possession of the same drug with intent to distribute are multiplicious for findings. United States v. Forance, 12 M.J. 312 (C.M.A. 1981). Accordingly, if possession with intent to distribute is charged, it is improper to charge the fairly embraced LIO of simple possession of the same substance.

2. Possession and use of the same substance are multiplicious for findings. United States v. Bullington, 18 M.J. 164 (C.M.A. 1984). But see United States v. Nixon, 29 M.J. 505 (A.C.M.R. 1989) (possession is not included within use where accused retains possession of a substantial remnant); United States v. Johnson, 26 M.J. 415 (C.M.A. 1988).

3. Possession and distribution of the same drug are multiplicious for findings. United States v. Zubko, 18 M.J. 378 (C.M.A. 1984). Utilizing the "fairly embraced" logic of Zubko, id., it is virtually impossible to imagine a situation in which an accused could distribute a drug without also possessing the drug with intent to distribute it. Accordingly, the holdings of Zubko and Forance, both supra, would lead to the conclusion that a charge of distribution would carry with it the LIO's of possession with intent to distribute and simple possession.

4. Possession and introduction of the same drug are multiplicious for findings and therefore should not be pleaded in the alternative. United States v. Hendrickson, 16 M.J. 62 (C.M.A. 1983); United States v. Carl, 20 M.J. 216 (C.M.A. 1985) held possession and introduction are multiplicious even when the acts are separated by one day; also United States v. Decker, 19 M.J. 351 (C.M.A. 1985). Possession of drug paraphernalia and possession with intent to distribute are not multiplicious for findings. United States v. Smith, 21 M.J. 642 (A.C.M.R. 1985).

5. Since a person may introduce a drug without intending to distribute it, introduction and possession of the introduced drug with the intent to distribute are not multiplicious for findings. United States v. Zupancic, 18 M.J. 387 (C.M.A. 1984). However, possession with intent to distribute a controlled substance is multiplicious with distribution of the same quantity. United States v. Brown, 19 M.J. 63 (C.M.A. 1984)

6. Factual distinctions may affect the determination of multiplicity. In United States v. Issacs, 19 M.J. 220 (C.M.A. 1985), the court found that the geographic separation between the site of the distribution on base and the remainder of the cache off-base kept the possession and distribution from being multiplicious. In United States v. Snook, 19 M.J. 282 (C.M.A. 1985) and United States v. Cirabisi, 19 M.J. 269 (C.M.A. 1985), both summary dispositions found that distribution and subsequent possession of the leftover quantity were not multiplicious for findings. Attempted distribution of marijuana from one source and subsequent possession of marijuana by the same parties but from a separate source were not multiplicious for findings in United States v. Wells, 20 M.J. 513 (A.F.C.M.R. 1985).

B. Multiplicity for sentencing. The principles of multiplicity for sentencing are discussed in detail in the Procedure Study Guide. There is no single approach to multiplicity problems that is dispositive of every situation; each case must be analyzed in its own factual context. In the drug offense context, multiplicity issues frequently arise and the facts of each case must be closely scrutinized. R.C.M. 1003(c)(1)(C) and discussion at 0206 of this study guide.

1. Sequential acts as a single offense. When the accused's actions constitute a single course of conduct, such conduct will be considered a single offense for sentencing. For example, in United States v. Smith, 1 M.J. 260 (C.M.A. 1976), the accused was apprehended in possession of a drug shortly after he had attempted to sell part of the quantity. C.M.A. held that the separate specification alleging wrongful possession and attempted wrongful sale were multiplicious for sentencing. The accused's course of conduct was so integrated as to merge into a single offense. United States v. Axley, 1 M.J. 265 (C.M.A. 1976) (sale and possession); United States v. Kinion, 5 M.J. 930 (N.C.M.R. 1978) (possession and attempted use of part of the amount possessed). In United States v. Beardsley, 13 M.J. 657 (N.M.C.M.R. 1982), however, introduction of 100 hits aboard U.S. Naval Station, Keflavik, and the subsequent sale of 5-10 hits to another serviceman on the same day were not deemed multiplicious. The court focused on the fact that only a small amount of the originally introduced drugs were sold.

2. Simultaneous possession. Simultaneous possession of different kinds of prohibited substances will be treated as being multiplicious for sentencing purposes, and should normally be charged in a single specification. For purposes of determining whether simultaneous and multiple drug possession offenses may be separately punished, focus should be on the proximity in time of the possession offenses charged; the question of whether the drugs were secreted in the same location or container is not relevant nor is the time and place of acquisition. United States v. Hughes, 1 M.J. 346 (C.M.A. 1976) (amphetamines in a candy jar, hashish in the bedroom, and heroin in a living room cabinet were simultaneously possessed and could not be separately punished); United States v. Griffin, 8 M.J. 66 (C.M.A. 1979). Still apparently unresolved, however, is the issue of whether separate drug distribution to two or more persons at the same time and place are multiplicious. In United States v. Rodriguez, 45 C.M.R. 839 (A.C.M.R. 1972), petition denied, 45 C.M.R. 928 (C.M.A. 1972), the Army Court of Military Review held that separate but simultaneous distributions of heroin to two government informers were not multiplicious; but the court expressed its concern about the potential for abuse in such use of multiple agents and purchases. The court also cautioned military judges to be alert to such potential abuse and to "accordingly treat what might appear to be separate offenses as multiplicious for sentencing purposes where there is no apparent reason for multiple purchases by government agents or informants." Id. at 840 fn. Although C.M.A. denied a petition for review in Rodriguez, and although C.M.A. appears to except "multiple victims" from its rule in Hughes, supra, C.M.A. has not squarely addressed the issues raised by Rodriguez. It may therefore be prudent to treat such simultaneous purchases as multiplicious for sentencing. Note that "separate" drug incidents can be separately charged and punished. See United States v. Nugent, summary disposition, 16 M.J. 419 (C.M.A. 1983) (90 separate specifications each involving separate incidents); United States v. Wells, 20 M.J. 513 (A.F.C.M.R. 1985) (separate charges of attempted distribution with possession of marijuana). Simultaneous possession of a controlled substance and the drug paraphernalia in which the substance is found may also be multiplicious for sentencing. United States v. Derksen, 24 M.J. 818 (A.C.M.R. 1987).

3. Simultaneous distribution conviction of three specifications of distributing cocaine were multiplicious for findings where accused offered cocaine to three soldiers, arranged cocaine on mirror for use by the three, rolled up a dollar bill through which the cocaine was to be snorted -- then offered the mirror, cocaine, and dollar bill to the three in one indivisible transaction. United States v. Johnson, 26 M.J. 686 (A.C.M.R. 1988).

0603 REFERENCE TO OTHER AREAS

Note that, as a practical matter, many of the most common problems that arise with regard to drug offenses do not involve the substantive law. The problem issues include:

-- Establishing a proper chain of custody and identifying the substance in court. See United States v. Day, 20 M.J. 213 (C.M.A. 1985).

-- Proof of drug use using extracted bodily fluids.

-- Failure to report personal use of drugs excused by privilege against self-incrimination. United States v. Heyward, 22 M.J. 35 (C.M.A. 1986) (dereliction of duty charge dismissed).

These problems are the ones that often cause the practicing trial and defense counsel the most difficulty and are the issues raised most frequently on appeal.

These areas are discussed in-depth, as appropriate, in the Naval Justice School Procedure and Evidence Study Guides.

CHAPTER VII

MISCELLANEOUS GROUPS OF OFFENSES

0700 INTRODUCTION: This chapter considers several groups of common, related offenses. Each group is composed of violations of independent articles of the UCMJ and at least one offense under the general article. Some of the offenses are examined in detail, but a major emphasis has been placed upon comparison and analysis of the relationship that the offenses within the groups have to one another. The following groups will be discussed:

A. Resistance, escape, and breach of restraint (Key Numbers 619-630, 754): Resisting apprehension; escape from custody, confinement, and correctional custody; and breaking arrest, restriction, and correctional restraint. These offenses are violations of Article 95 or Article 134, UCMJ.

B. Drunkenness offenses (Key Numbers 754, 783-788): Drunkenness in camp, aboard ship, in public, and incapacitation for duty as a result of prior drinking are violations of article 134; drunk and reckless driving and drunk on duty are violations of articles 111 and 112, respectively.

C. Sentinel, lookout, and watch misbehavior (Key Numbers 687, 753-754, 789): Offenses by sentinels, lookouts, and watchstanders are violations of articles 92, 113, and 134.

D. Falsification (Key Numbers 577-582, 753-754): False official statements are violations of article 107, while false swearing is a violation of article 134.

SECTION A: RESISTANCE, ESCAPE, AND BREACH OF RESTRAINT OFFENSES

0701 INTRODUCTION: This section discusses offenses that involve resistance to the imposition of, the escape from, and the breach of restraint. Such offenses are prosecuted under Articles 95 and 134 of the Uniform Code of Military Justice.

A. Article 95 states: "Any person subject to this chapter who resists apprehension or breaks arrest or who escapes from custody or confinement shall be punished as a court-martial may direct." Thus, it punishes four separate but related offenses:

1. Resisting apprehension;
2. escape from custody;
3. escape from confinement; and
4. breaking arrest.

B. Article 134 is, of course, the general article. It includes within its prohibitions breaches of correctional custody, escape from correctional custody, and the more common offense of breaking restriction. Thus, it punishes three separate but related offenses:

1. Breaking restriction;

2. escape from correctional custody; and

3. breach of restraint during correctional custody.

0702 DEFINITIONS

A. Apprehension. The taking of a person into custody. Article 7a, UCMJ; R.C.M. 302; and Part IV, para. 19c, MCM, 1984. "Apprehensions" in the military are synonymous to "arrests" in the civilian world. An apprehension may take place in a variety of ways, as shown by the following examples:

1. A military policeman approaches Seaman Wiley and says to him, "I'm taking you into custody." Wiley does not resist and complies with the MP's orders. The apprehension is complete even though the word "apprehend" was not used and Wiley was not subjected to physical restraint.

2. A military policeman grabs Seaman Nogood's arm and says, "Come with me you turkey, I'm taking vou in." Seaman Nogood is reluctant, but submits and allows himself to be directed physically by the MP. The apprehension is complete.

3. A military policeman steps in front of Seaman Dasher and announces, "You're under arrest." Seaman Dasher bolts for the door. The apprehension, as we shall see, is not complete. If, however, the MP gives chase and subdues Dasher, it will be complete.

B. Arrest

1. General discussion. In military law, "arrest" is a term of art. There are two types of "arrest." One is nonpunitive in nature and is provided for in Article 9, UCMJ. The other, called "arrest in quarters," is punitive and may be imposed as nonjudicial punishment only upon commissioned and warrant officers by general court-martial authorities, or flag and general officers under the provisions of Article 15, UCMJ.

2. Nonpunitive "arrest": Nonpunitive arrest is the moral restraint of a servicemember that is imposed by an order, but is not punishment for a particular offense. The order directs the individual to remain within the limits of a certain area during the term of the "arrest." Article 9, UCMJ and R.C.M. 304, MCM, 1984. Nonpunitive arrest is similar to pretrial restriction. The major difference between the two types of restraint are:

a. The person ordered into arrest cannot be required to perform his regular military duties, while one who has been restricted may be expected to perform all of his regular military duties. For example, if Seaman

Wiley has been ordered into arrest by his commanding officer, he cannot be required to bear arms, stand watch, etc. On the other hand, a person ordered into arrest may be required to perform routine cleaning and training duties. United States v. Hunt, 3 C.M.R. 573 (A.F.B.R. 1952); R.C.M. 304(a)(3), MCM, 1984.

b. If assigned duties inconsistent with the status of arrest by the authority that imposed it, the arrest status is thereby terminated. United States v. Hunt, supra.

3. "Arrest in quarters." Arrest in quarters is imposed as a nonjudicial punishment upon officers. It is a moral type of restraint which requires the officer upon whom the punishment is imposed to remain within the limits of his quarters. It is seldom imposed, but is authorized by Article 15, UCMJ and Part V, para. 5c(3), MCM, 1984.

C. "Restriction in lieu of arrest." This type of restraint is similar to "arrest," as discussed above. It is authorized by R.C.M. 304(a)(2), MCM, 1984. Unlike "arrest," however, an individual ordered into "restriction in lieu of arrest" may be required to perform his or her full military duties.

D. Confinement. The physical restraint of a person. Article 9(a), UCMJ; R.C.M. 304(a)(4), MCM, 198..

E. Custody. The restraint of free movement imposed by lawful apprehension. Part IV, para. 19c(3)(a), MCM, 1984.

1. The restraint may be corporeal and forcible. Example: handcuffs or an armlock.

2. After submission to apprehension or a forcible taking into custody, the restraint may consist of control exercised over the prisoner by official acts or orders while the ordering authority remains in the prisoner's presence. Example: Rollo peacefully submits to the MP and accompanies him as directed. He's now in the MP's custody. (Caveat: As discussed below, a prisoner is deemed to be in confinement vice custody in some circumstances.)

0703 RESISTING APPREHENSION. Article 95, UCMJ; Part IV, para. 19c(1), MCM, 1984.

A. Essential elements

1. That a certain person attempted to apprehend the accused;

2. that said person was authorized to apprehend the accused; and

3. that the accused actively resisted the apprehension.

B. First element. That a certain person attempted to apprehend the accused.

-- This means that an overt effort with the intent to take the accused into custody was made. Case law indicates that an apprehension may be completed without an "order of apprehension" being expressed. A "totality of circumstances" test is used to decide the question.

a. In United States v. Ramirez, 4 C.M.R. 543 (A.B.R. 1952), MP's told the accused that they wanted to talk to him outside and then hovered over him while he finished a beer. The Board of Review found that he did not have freedom of locomotion at that point in time and that he was therefore in a status of custody (i.e., the apprehension was complete).

b. In a 1972 case, dealing with a search incident to apprehension, C.M.A. used the following language in determining whether an apprehension had taken place:

> Research does not reveal that this Court has ever required that any specific language be used to apprise one of apprehension.... If the totality of facts reasonably indicate that both the accused and those possessing the power to apprehend are aware that the accused's personal liberty has been restrained, even in the absence of verbalization, an apprehension is complete.

United States v. Fleener, 21 C.M.A. 174, 44 C.M.R. 228 (1972).

c. In the more recent case of United States v. Noble, 2 M.J. 672 (A.F.C.M.R. 1976), the Air Force Court of Military Review indicated that, where oral or written orders of apprehension are not given to a person to be apprehended by the person lawfully attempting to apprehend him, the government must establish that the circumstances were such that it would lead a "reasonable man in the same position" to conclude that an attempt was being made to apprehend him. In Noble, supra, the court concluded, not surprisingly, that efforts to restrain and handcuff the accused by several security policemen constituted circumstances sufficient to put the accused on notice that he was being apprehended.

C. Second element: That the person was authorized to apprehend the accused. Article 7, UCMJ; Part IV, para. 19c(1)(b), MCM, 1984.

1. General. The following persons are authorized to apprehend upon reasonable belief that an offense has been committed and that the person apprehended committed it:

a. Officer, warrant officer, PO's, NCO's, and

b. when in the execution of their guard or police duties:

(1) Air police, MP's, SP's, and

(2) personnel designated by proper authority to perform guard or police duties, including duties as criminal investigators. This includes Naval Investigative Service agents under certain circumstances (JAGMAN, § 0147) and other civilian police or investigators designated by proper authority. R.C.M. 302(b), MCM, 1984.

2. Additionally, Article 7(c), UCMJ, authorizes commissioned officers, warrant officers, noncommissioned officers, and petty officers to apprehend anyone subject to the Code who takes part in "quarrels, frays, and disorders."

3. Deserters. R.C.M. 302(b)(3), MCM, 1984.

a. Any civil officer having authority to apprehend under the laws of the United States, or of a state, may apprehend summarily a deserter and deliver him into the custody of the armed forces. Article 8, UCMJ.

b. Other civilians may apprehend deserters only if specifically requested by a military officer. A DD Form 553 (Absentee Wanted by the Armed Forces) is sufficient.

4. Policy regarding apprehending officers and WO's. R.C.M. 302(b)(2) (Discussion) states that NCO's and PO's not performing police duties should apprehend officers and WO's ONLY:

a. Pursuant to specific orders of a commissioned officer;

b. to prevent disgrace to the service; or

c. to prevent escape of one who has committed a serious offense.

5. Resisting apprehension by foreign police officers who are not agents of the United States is not a violation of article 95 because the second element is lacking. United States v. Seymore, 19 M.J. 608 (A.C.M.R. 1984). The offense may be charged under article 134.

6. Illegal apprehension. Suppose the apprehending officer possessed the necessary official status (e.g., was a commissioned officer) but lacked probable cause for his apprehension. May the accused resist such an illegal apprehension? Evidently so, since the Manual says that a person may not be convicted of resisting apprehension if the attempted apprehension is illegal. Part IV, para. 19c(1)(e), MCM, 1984. The analysis to this paragraph suggests strongly that the illegality to which the paragraph refers is the basis for the apprehension (i.e., probable cause). See App. 21, paras. 19b and 19c(1)(e), MCM, 1984. Still, the matter is not free from doubt since, in the leading case in this area, C.M.A. found that probable cause existed, even as it expressly refrained from deciding whether a police officer's determination to apprehend is subject to judicial review. United States v. Nelson, 17 C.M.A. 620, 38 C.M.R. 418 (1968). In any event, the Manual discussion of this point emphasizes that the existence of probable cause is presumed in the absence of evidence to the contrary. Thus, probable cause is not an element of the offense of resisting apprehension. Rather, lack of probable cause to apprehend is an affirmative defense which may be raised by the accused. Part IV, para. 19c(1) and analysis thereto, MCM, 1984.

7. Alternative offenses. It is important to note that the Manual provision clearly suggests that the accused who resists apprehension forcibly can probably be convicted of assault, regardless of whether probable cause to apprehend existed or not. Part IV, para. 19c(1)(e), MCM, 1984. And, indeed, several cases have so held. United States v. Lewis, 7 M.J. 348 (C.M.A. 1979); United States v. Wilson, 7 M.J. 997 (A.C.M.R. 1979). Arguably inconsistent with Lewis and Wilson is the case of United States v. Rozier, 1 M.J. 469 (C.M.A. 1976), in which C.M.A. overturned the accused's conviction for violating Articles 89, 90, and 91, UCMJ, on the ground that the apprehending officers lacked probable cause. But it seems more likely that Rozier can be distinguished from Lewis and Wilson in three respects: (1) Lewis and Wilson both dealt with assault charges, whereas Rozier dealt with charges of disrespect and disobedience; (2) the law enforcement authorities in Lewis and Wilson appear to have acted in a good faith (though mistaken) belief that probable cause existed, whereas the authorities in Rozier seemed not even to care; and (3) the degree of force used by the law enforcement authorities in Rozier was so extreme that C.M.A. declared it was "shocked by the unwarranted physical abuse perpetrated upon the (accused)...." United States v. Rozier, supra, at 471.

D. Third element. That the accused actively resisted in the manner alleged.

-- The resistance must be more than mere words. It must consist of a physical, overt act such as flight from, or assault upon, the apprehending officer. United States v. Noble, 2 M.J. 672 (A.F.C.M.R. 1976); United States v. Chavez, 6 M.J. 615 (A.C.M.R. 1978). However, in United States v. Harris, 29 M.J. 169 (C.M.A. 1989), the court held that the accused could not be convicted of resisting apprehension, even though an MP was in hot pursuit with lights and sirens, where the MP did not testify that he intended to make an apprehension. The court further went on to say that flight from an attempted apprehension does not constitute resisting apprehension.

-- Drafting note: The sample specification for this offense found in Part IV, para. 19f(1), MCM, 1984, does not indicate that the method by which the accused resisted the apprehension should be alleged. Omission of this particular may invite a bill of particulars to be filed by the defense and, at worst, might result in a defective specification. Consequently, it is recommended that the exact method of the resistance be alleged in the specification. For example:

> In that Seaman P. B. Noodlenose, U. S. Navy, USS TinCan, on active duty, did, aboard USS TinCan, then located at Newport, Rhode Island, on or about 18 December 1981, resist being lawfully apprehended by Chief Boatswain's Mate I. Will Nailum, U.S. Navy, by striking him in the face with his fist.

E. A fourth element? Knowledge.

1. The Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-36, lists a fourth element for resisting apprehension: "That the accused had reason to believe that the person attempting to apprehend him was empowered to do so." It indicates further that this element must be instructed upon "if

there is any evidence from which it may justifiably be inferred that the accused may have had no reason to believe that the person attempting to apprehend him was empowered to do so."

2. Part IV, para. 19c(1)(d), MCM, 1984, provides: "It is a defense that the accused held a reasonable belief that the person attempting to apprehend did not have authority to do so." The Manual thus treats lack of knowledge as a mistake of fact defense rather than the presence of such knowledge as an element.

3. The same Manual provision, however, states that "...the accused's belief at the time that no basis exists for the apprehension is not a defense." Part IV, para. 19c(1)(d), MCM, 1984. Thus, the accused who honestly and reasonably believes that the person apprehending him has no probable cause to do so is in much the same position as one who is confronted by an order he believes to be unlawful: he resists the apprehension at his peril. If, at his trial, the court agrees that no probable cause existed, then the accused will be acquitted on the affirmative defense of lack of probable cause. If, however, the court disagrees and finds that probable cause existed, then the accused will be found guilty despite his good faith belief. It should be noted that the Manual rule in this regard is contrary to a dictum in United States v. Nelson, supra.

F. Pleading. Part IV, para. 19f(1), MCM, 1984.

1. Identify the apprehending person by rank, name, and status.

2. Allege the acts which constituted the resistance. See the sample above and don't forget subject matter jurisdiction factors, if appropriate.

G. Lesser included offenses

1. Attempted resistance to apprehension is not an LIO of resistance because the "attempt" would constitute the completed crime.

2. In many cases, there will not be any LIO; however, in those cases in which the resistance also involves an assault upon the apprehending officer, then assault and battery are possible LIO's. Consequently, care must be taken to draft the specification accurately and allege the method by which the resistance was made in order to include as many LIO's as appropriate.

0704 ESCAPE FROM CUSTODY. Article 95, UCMJ; Part IV, para. 19c(3), MCM, 1984.

A. Essential elements

1. That a certain person apprehended the accused;

2. that said person was authorized to apprehend the accused; and

3. that the accused freed himself or herself from custody before being released by proper authority.

B. First element. That a certain person apprehended the accused.

-- Therefore the primary distinction between this offense and the offense of resisting apprehension is whether the apprehension has been completed. Drawing a line of demarcation between the offenses of resisting apprehension and escape from custody can be difficult. The key to doing so is to determine whether the freedom of movement of the person being apprehended has been restrained. Merely informing an individual that he is being apprehended is insufficient. There must be a physical or moral restraint upon his or her freedom of movement imposed by physical means or by submission to the apprehending official. The moral restraint is effective when an apprehending official is capable of imposing physical restraint, should it become necessary. United States v. Mobley, 12 M.J. 1029 (A.C.M.R. 1982). In the case of United States v. Chavez, 6 M.J. 615 (A.C.M.R. 1978), the accused was in an automobile that was ordered stopped by an MP. The accused complied and waited some 20 to 30 minutes before driving away. The court held that the apprehension had been completed and that he could not be convicted of resisting apprehension.

C. Second element. That the person was authorized to apprehend the accused.

1. The authority to apprehend for purposes of this offense is exactly the same as for the offense of resisting apprehension. See the discussion at section 0703.C, supra.

2. The reason for the apprehension is immaterial as long as it is a lawful one. In addition, just as with resisting apprehension, the totality of the circumstances test will be applied to determine whether the accused was aware that he was in a custody situation. United States v. Garcia-Lopez, 16 M.J. 229 (C.M.A. 1983) (where accused was not clearly notified that he was being taken into custody, and the surrounding circumstances did not support the conclusion that he had been apprehended prior to his flight, he could not be found guilty of escape from custody). Mistake concerning the existence of custody is therefore clearly a viable defense.

3. The presence or absence of probable cause to support the legality of the apprehension is as relevant to this offense as it is to the offense of resisting apprehension. Thus, for the reasons set forth in section 0703.C, supra, it would appear that the existence of probable cause to apprehend is not an element of this offense. Rather, the absence of probable cause is an affirmative defense which may be raised by the accused. It is interesting to note that the Manual discussion of this offense does not include the discussion relating to mistake found under the discussion of resisting apprehension at Part IV, para. 19c(1)(d), MCM, 1984. It is at least arguable, therefore, that an honest and reasonable (though mistaken) belief by the accused that the person apprehending him had no probable cause to do so is a viable defense to the charge of escape from custody. But since it is ultimately the intent of Congress which controls, and since both resisting apprehension and escape from custody are proscribed by the same Article of the UCMJ, the better view seems to be that the two offenses should parallel each other. Consequently, it seems likely that the accused who escapes from custody in an honest and reasonable (though mistaken) belief that the apprehending officer has no probable cause to do so should be found guilty if it is determined later that probable cause did in fact exist contrary to his belief.

D. Third element. That the accused freed himself from custody before being released by proper authority.

1. It sometimes is difficult to tell whether the custody status continues when the apprehending officer allows the accused to depart the former's presence in order to complete some item of personal business. The general rule is that the status continues as long as the accused is in the "presence" of the apprehending officer. "Presence" for purposes of this offense includes being within the sight or call of the custodian. United States v. Royal, 2 M.J. 591 (N.C.M.R. 1976). The accused's conviction for escape from custody was upheld because the court found the accused to have been in the custodian's presence when he was given permission to go to the head and the custodian remained outside the door. When control in the presence of the person apprehended ceases, the moral restraint of custody is broken. United States v. Mobley, supra. But see United States v. King, NCM 71-1611 (N.C.M.R. 1971), in which the accused was in the custody of a "chaser" following a conviction at an SPCM. The accused was given permission to enter the squad bay unaccompanied to gather his gear, but he proceeded to catch a taxi outside of the barracks. It was held that the accused was not guilty of an escape from custody since the guard gave the accused permission to depart his presence.

2. If the accused procures his own release from custody through some fraud or deceit on his part, then the fraud or deceit will vitiate his release. In United States v. Felty, 12 M.J. 438 (C.M.A. 1982), the accused obtained his release from custody by a ruse when he told the chaser that a magistrate had ordered his release from confinement when, in actuality, the magistrate had ordered that confinement be continued. The accused pled guilty to escape from custody, although, according to C.M.A., he should have been charged with escape from confinement. While the accused pled guilty to the wrong offense, the court determined that this variance did not materially prejudice the substantial rights of the accused. The court considered the fact that both escape from custody and escape from confinement are proscribed by article 95; that the same maximum punishment is authorized for each offense; that the gravamen of each offense (throwing off lawful physical restraint) is the same; and that the accused believed himself to be guilty of an escape, rendering his plea provident under these circumstances.

E. A fourth element? Knowledge.

-- The Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-38, indicates that there is a fourth element: "That the accused had reason to believe that the person from whose custody the accused allegedly escaped was empowered to hold him in his custody," and indicates that it must be instructed upon "if there is any evidence from which it may justifiably be inferred that the accused may have had no reason to believe that the person from whose custody he allegedly escaped was empowered to hold him in custody." Whether such knowledge is an element, or even lack thereof is a defense, is questionable since there is no mention of knowledge in Part IV, para. 19c(3), MCM, 1984.

F. Pleading. Part IV, para. 19f(3), MCM, 1984.

Sample Specification: In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], escape from the lawful custody of Lieutenant Leonard M. Gable, U.S. Navy, a person authorized to apprehend the accused.

G. Lesser included offenses

1. Attempted escape from custody is chargeable under Article 80, UCMJ, and is a lesser included offense of escape from custody charged under article 95.

2. If the specification alleges that the accused perpetrated an assault or battery in escaping from the custody of his custodian, the assault or battery may be considered a lesser included offense. It may, however be preferable to charge the assault or battery separately.

0705 ESCAPE FROM CONFINEMENT. Article 95, UCMJ; Part IV, para. 19c(4), MCM, 1984.

A. Essential elements

1. That a certain person ordered the accused into confinement;

2. that said person was authorized to order the accused into confinement; and

3. that the accused freed himself/herself from the restraint of confinement before being released from confinement by proper authority.

4. Once again, the Military Judges' Benchbook, DA Pam 27-9, (1982), Inst. 3-38, indicates that a fourth element (i.e., "That the accused knew of his confinement") must be instructed upon "if there is any evidence from which it may justifiably be inferred that the accused may not have known of his confinement" status. Whether knowledge is an element or is an affirmative defense is questionable, since there is no mention of mistake in Part IV, para. 19c(4), MCM, 1984. Since mistake of fact is a generally accepted defense, it is considered that, if raised by the evidence, such a mistake should be instructed on as at least a matter of defense.

B. First element: A certain person ordered the accused into confinement.

1. Confinement is physical restraint depriving the person of freedom.

2. Confinement may be ordered in two situations:

a. As pretrial confinement to assure the presence of the accused for trial or prevent serious misconduct; or

b. as punishment imposed by court-martial or three days' confinement on bread and water imposed at court-martial or at NJP.

C. Second element: Said person was authorized to order the accused into confinement.

1. R.C.M. 304(b) describes who may order pretrial confinement as follows:

a. An officer, warrant officer, or civilian may be confined only by a commanding officer who has authority over the individual.

b. An enlisted person may be confined by:

(1) Any commissioned officer; or

(2) warrant officers, petty officers, or noncommissioned officers if the commanding officer has delegated that authority to them, but only if the person to be confined is attached to that CO's command or temporarily within his/her jurisdiction.

2. Punitive confinement may be imposed by the commanding officer of the accused who may, in the case of confinement awarded by court-martial, delegate confinement authority to the trial counsel. R.C.M. 1101(b)(2), MCM, 1984. Note that only commanding officers of vessels may impose confinement at NJP and this confinement is limited to three days bread and water or diminished rations. Part V, para. 5b(2)(A)(i), MCM, 1984.

D. Third element: The accused freed himself/herself from the restraint of confinement before being released by proper authority. In most cases, this element is simple to understand and to prove; however, as will be seen by the following discussion, there are certain areas of difficulty.

E. Determining an accused's status

1. C.M.A. has held that escape from confinement and escape from custody are entirely different in nature and, if one is pleaded and the other proven, a fatal variance results. United States v. Ellsey, 16 C.M.A. 455, 37 C.M.R. 75 (1966). In Ellsey, supra, the court held that escape from custody, not confinement, was involved where the accused escaped from a guard after he had been properly ordered into confinement but before he had been delivered to the confinement facility. However, as previously noted in United States v. Felty, supra, a guilty plea to escape from custody that was actually escape from confinement was deemed provident since the substantial rights of the accused were not materially affected.

2. Background. One critical factor, then, is to accurately determine the accused's status. The language of C.M.A. in the often-cited Ellsey case, supra, at 458 and 459 (37 C.M.R. at 78 and 79 is helpful). With regard to custody, the court said:

> [W]hile custody may of necessity be maintained by physical restraint, it also suffices to utilize no more than

> moral suasion. Hence, far from being identical to confinement, it is an altogether different condition.... What was intended by custody was the temporary form of restraint imposed on the individual subject to the Code by his lawful apprehension.... It was to continue until "proper authority may be notified" [citing MCM] ... 'Such status [custody] thereafter may be altered by the arrest, confinement, restriction, or the release of the individual."

With regard to confinement the court said:

> [Confinement's] execution before and after trial is subjected to strict control....[After apprehension and custody] "a screening out process will occur here in reference to a more permanent status." "After confinement has been effected in a lawful manner.... such confinement is not a continuation of custody but a new and different form of restraint. Nor does confinement include custody in this sense, because confinement may be imposed in cases where there has been no apprehension and resultant custody." [Citing United States v. West, 1 C.M.R. 770 (A.F.B.R. 1951).]

The court concluded by saying:

> "Poetically speaking, 'Stone walls do not a prison make, nor iron bars a cage'; practically and legally, they do."

As will be seen in the next discussion, "stone walls and iron bars" are also not always necessary for an accused to be in a confinement status.

3. Confinement through physical restraint. A prisoner who has been duly placed in confinement, and who is thereafter removed from the confinement facility while under guard, continues to remain in a status of confinement as long as he is under physical restraint. In this regard, both the guard's duty to use physical restraint and his possession of means to exercise it were considered critical factors.

a. Duty. In United States v. Sines, 34 C.M.R. 716 (N.B.R. 1964), the accused was sent on a work detail outside of the brig. His chaser was not armed and had been instructed not to attempt, physically, to stop an escaping prisoner. The guard's instructions were to shout "Halt," to blow his whistle, and to get help from nonprisoner personnel. The accused took advantage of this policy and escaped. Held: There was no physical restraint and therefore no escape from confinement. See also United States v. Hamilton, 41 C.M.R. 724 (A.C.M.R. 1970) and United States v. Hahn, 42 C.M.R. 623 (A.C.M.R. 1970). Where a guard is instructed to try to "talk" the prisoner out of leaving, but is not to physically restrain him, the prisoner's status is not one of confinement. United States v. Ramsey, 33 C.M.R. 566 (A.C.M.R. 1963) and United States v. Holcomb, 16 C.M.R. 537 (A.F.B.R. 1954).

b. Means. In United States v. Silk, 37 C.M.R. 523 (A.B.R. 1966), one guard was assigned to six men who were working in two different rooms of a mess hall outside of a stockade. The unarmed guard was instructed to use physical force to restrain an escapee but, while he was in one room, the accused left from the other. Held: The issue of restraint is a factual question and, because the guard had to be in two places at one time, the accused was not under confinement due to lack of physical restraint. "In order to create this physical restraint, it is necessary that the guard or person in charge of the prisoner possess some physical means, be it only his person, capable of and available to physically oppose and resist any unauthorized departure by the prisoner...."

c. Temporary impairment

(1) General. In United States v. Dees, NCM 72-0018 (N.C.M.R. 1972), a guard in charge of prisoners on a work detail outside of a brig left his four prisoners temporarily so he could check the time in an adjacent building. He testified that he was gone "no more than three or four minutes at the most." The Navy Court of Military Review held that such action, while not prudent, did not terminate the accused's status of confinement. A similar result was reached in United States v. Anderson, (N.C.M.R. 1972) (unpublished), in which the court upheld a guilty plea to escape from confinement where an accused escaped when allowed to use a head on the first deck while his guard remained on the first deck. See also United States v. Stewart, 17 C.M.R. 805 (A.F.B.R. 1954).

(2) The unopposing or compromising guard: In United States v. Roberts, 43 C.M.R. 998 (A.F.C.M.R. 1971), the accused's conviction of escape from confinement was upheld despite the obviously compromising conduct of his guard. The guard in that case gave a marijuana cigarette to the accused, and both the guard and prisoner-accused were high on the drug when the accused made his exit. The court noted that the guard had the duty and the means to stop the escape (the lack of effectiveness of the guard's restraint was considered immaterial). See also United States v. Haddox, 12 C.M.R. 675 (A.F.B.R. 1953), petition denied, 13 C.M.R. 142 (1953).

(3) In United States v. Westbrooks, 40 C.M.R. 835 (A.B.R. 1969), the accused, who was in lawful confinement, was sent to empty trash about 10 feet outside of the stockade's main gate and he escaped from his guard. The trial court's conviction of escape from custody was reversed due to the court's determination that United States v. Ellsey, supra, required a finding that the accused was in confinement vice custody.

4. Confinement is confinement until released by proper authority. In United States v. Maslanich, 13 M.J. 611 (A.F.C.M.R. 1982), an accused had been placed in pretrial confinement for aggravated assault. While still in a confinement status he was turned over to his first sergeant, who was assigned the duty of escorting the accused to his defense counsel's office. The accused was to confer with his defense counsel concerning an upcoming hearing on his pretrial confinement. While the accused was meeting with his counsel, the first sergeant left for lunch. Subsequently, the accused left his defense

counsel's office, ostensibly to get a drink of water, at which time he proceeded to leave the building and the base. It was held that the accused escaped from confinement when he left the building, in spite of the lack of effectiveness of his restraint. The departure of the first sergeant for lunch could not be construed as setting the accused at liberty. The court of review focused not on the "duty" and "means" test, but rather on the feeling that an accused once placed in confinement remains in that status until released by proper authority. The court pointed to the difficulty in reconciling precedent which followed the "duty" and "means" analysis, and specifically overruled Air Force cases which found no confinement due to a strict application of the "duty" and "means" tests. Id. at 614.

5. Is "duty" and "means" still the test? Despite the attractive logic of United States v. Maslanich, supra, the "duty" and "means" test still seems viable. The conviction in Maslanich could have been upheld using the "duty" and "means" analysis. Maslanich's guard arguably had both the duty and means to prevent the accused's escape; he merely failed to properly execute them. In United States v. Felty, 12 M.J. 438 (C.M.A. 1982), the guard allowed the accused to go free because the accused falsely informed the guard that the magistrate had ordered his release. The Court of Military Appeals cited with approval cases which applied the "duty" and "means" test and found that the guard's negligence did not negate his duty or means to prevent escape.

F. Legality of the confinement. Part IV, para. 19c(4)(e), MCM, 1984, indicates that a person may not be convicted of escape from confinement if the confinement is illegal. It goes on to say that confinement ordered by one authorized to do so is presumed lawful and that legality of confinement is ordinarily a question of law. This provision of the MCM appears to raise more questions than it answers. The following issues are worthy of comment.

1. Question of fact or law. Part IV, para. 19c(4)(e), MCM, 1984, indicates that ordinarily the legality of confinement is a question of law. Accordingly, most issues related to the legality of confinement will be litigated by a motion to dismiss rather than as a defense on the merits. The one issue related to the legality of confinement which can clearly be presented to the factfinder is whether the person ordering the confinement was legally empowered to do so. This is an element of the offense and is therefore clearly a proper matter of defense. United States v. Carson, 15 C.M.A. 407, 35 C.M.R. 379 (1965); United States v. Gray, 6 C.M.A. 615, 20 C.M.R. 331 (1956).

2. Illegal confinement. A most troublesome issue which is left unresolved by Part IV, para. 19c(4)(e), MCM, 1984, is the definition of "illegal" confinement which may not be the basis of a conviction under article 95. We know that confinement imposed by an unauthorized person is illegal and an accused may not be convicted of an escape therefrom. There are other irregularities in the imposition of pretrial confinement which cause the confinement to be "illegal" and which will result in an award of credit on sentence. See NJS Procedure Study Guide, Chapter XII. Interesting issues may develop in a case where the accused escapes from confinement which is "illegal" for one of these reasons. The following are a few possible examples:

a. The accused is placed in pretrial confinement pending charges of murder. On the twentieth day of confinement, he escapes. At his trial for escape from confinement, it is shown that the commanding officer ordering the confinement did so on mere suspicion as opposed to probable cause as required by R.C.M. 305(h)(2)(B), MCM, 1984. Will his motion to dismiss pursuant to Part IV, para. 19c(4)(e), MCM, 1984, be granted? The presumption that the confinement was lawful because it was imposed by someone authorized to do so appears to have been overcome.

b. Assume the same facts as above but, at trial, the government can prove that the mere suspicion can subsequently be shown to be accurate. In other words, when he was confined, it was not on probable cause -- but we now know that the original suspicion was correct. Should this "bootstrap" be allowed to sustain a conviction for escape?

c. Assume that the accused is confined by a proper official based on probable cause, but the review of confinement is not made within seven (7) days as required by R.C.M. 305(i). May the accused lawfully escape from this "illegal" confinement?

G. Pleading. Part IV, para. 19f(4), MCM, 1984.

Sample specification

> In that Seaman Rob The Victim, U.S. Navy, USS Poop-deck, on active duty, having been placed in confinement in the Navy Brig, Naval Education and Training Center, Newport, Rhode Island, by a person authorized to order the accused into confinement, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 25 December 1984, escape from confinement.

0706 BREAKING ARREST. Article 95, UCMJ; Part IV, para. 19, MCM, 1984.

A. Elements

1. That a certain person ordered the accused into arrest;

2. that said person was authorized to order the accused into arrest; and

3. that the accused went beyond the limits of arrest before being released from that arrest by proper authority.

4. The Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-37, indicates that a fourth element exists: "That the accused knew of his arrest and its limits," and states that it must be instructed upon "if there is any evidence from which it may justifiably be inferred that the accused may not have known of his arrest and its limits." (See Section 0703.E, supra, for a discussion of knowledge.)

B. Ordering a person into arrest must be accomplished in accordance with the MCM and any local directives.

1. Procedure. Arrest is imposed by notifying the person to be placed in arrest that he is under arrest and by informing him of the limits of his arrest. Such notification may be oral or written. R.C.M. 304(a)(3), MCM, 1984.

2. Pretrial arrest. When pretrial arrest is imposed, immediate steps shall be taken to inform an accused of the offense suspected and to try him or dismiss the charges against him. Article 10, UCMJ.

3. Arrest or punishment. A flag or general officer exercising general court-martial jurisdiction may impose as nonjudicial punishment upon commissioned or warrant officers only arrest in quarters for not more than 30 consecutive days. Part V, para. 5b(1)(B), MCM, 1984.

C. Pleading. Part IV, para. 19f(2), MCM, 1984.

Sample specification

In that Ensign John B. Smith, U.S. Navy, USS Neversail, on active duty, having been placed in arrest in quarters by a person authorized to order the accused into arrest, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 31 December 1984, break said arrest.

D. LIO's

1. Breaking of restriction under Article 134, UCMJ, is an LIO of breach of arrest if proof shows a status of restriction vice arrest. United States v. Haynes, 15 C.M.A. 122, 35 C.M.R. 94 (1964).

2. Attempt. Article 80, UCMJ.

0707 BREAKING RESTRICTION. Article 134, UCMJ; Part IV, para. 102, MCM, 1984.

A. Breaking restriction is a violation of Article 134, UCMJ. It is a common offense, since various forms of restriction are imposed for a variety of reasons including punishment, administrative requirements, medical needs, etc. (Note that breaking medical quarantine is a separate offense under article 134.)

B. Essential elements

1. That a certain person ordered the accused to be restricted to certain limits;

2. that said person was authorized to order said restriction;

3. that the accused knew of the restriction and the limits thereof;

4. that the accused went beyond the limits of the restriction before being released by proper authority; and

5. that, under the circumstances, the conduct of the accused was "C to P" or "SD."

Notice that the knowledge element is clearly a listed element of the offense. Consequently, it must be proved by the government beyond a reasonable doubt.

C. First element. "Restricted to certain limits." Restriction is the moral restraint of a person imposed by an order directing him to remain within certain specified limits. There are two types:

1. Administrative. This is called restriction in lieu of arrest. It is used pending investigation and disposition of charges, or both, or pending review. R.C.M. 304(a)(2), MCM, 1984.

2. Punitive may be awarded by:

a. NJP, or

b. court-martial sentence.

(1) The sentence should specify limits.

(2) Unlike confinement, however, restriction is not effective until actually ordered executed by the CA after review and action.

D. Second element. "Person authorized to order said restriction." Who may lawfully restrict? This depends upon the type of restriction.

1. Restriction in lieu of arrest

a. Same authority as for "arrest." See R.C.M. 304(b), MCM, 1984.

b. Generally, any commissioned officer can order an enlisted member into restriction; however, enlisted personnel cannot order other enlisted members into restriction unless they have been authorized to do so by the commanding officer. This authority cannot extend to enlisted members not subject to the commanding officer's command. United States v. Smith, 21 C.M.A. 231, 45 C.M.R. 5 (1972) (Held: An enlisted member could not restrict another enlisted member in the absence of the authorization required by the MCM). The Smith court did conclude, however, that the NCO's order to the accused to remain overnight in a specified room was not unlawful as a matter of law, given the presumption that all orders are lawful and the facts that the sergeant who issued the order had a valid reason for doing so and that the accused did not contest the lawfulness of the order at trial. The court's decision was based upon the relative shortness of the order's intended effect (one night) and the immediate need to preserve order within the unit (which the order was intended to enforce). The authority need not be specific.

Hence, the restriction order of a senior noncommissioned officer was upheld where the commanding officer testified that, while he had not specifically authorized the NCO to place personnel in restriction, he had left the NCO in charge and intended to "grant him all authority necessary to act in his behalf." United States v. Collins, 33 C.M.R. 486 (A.B.R. 1962). Query the continued validity of this case in light of Smith, supra, and United States v. Swanson, 38 C.M.R. 803 (A.B.R. 1967). See also United States v. Bigleggins, 12 M.J. 901 (A.C.M.R. 1982), in which the offense of breaking restriction was dismissed where there was no evidence that the command sergeant major who imposed restriction had been delegated such authority by any commander.

2. Punitive restriction

a. Nonjudicial punishment -- Authority to impose punitive restriction as a result of NJP derives from Article 15, UCMJ, and is exercised by the officer who imposes the NJP. See Part V, para. 2, MCM, 1984.

b. Court-martial -- Restriction may be imposed as a court-martial sentence (or part of it) under the authorization found in R.C.M. 1003(b)(6), MCM, 1984. The CA exercises this authority by ordering the sentence executed.

E. Third element. Knowledge. The accused must have actual knowledge of the restriction and of its geographical limits. While no cases have decided the issue directly, it is safe to assume that actual vice constructive knowledge is required. United States v. Wake, 32 C.M.R. 536 (A.B.R. 1962). Actual knowledge may be proved by circumstantial evidence, however. The accused is usually informed of his restricted status in writing by the use of a document called "restriction orders." He need not be informed in writing, however, as long as he has actual knowledge of his status and of the geographical limits of the restriction.

F. Fourth element. Before the accused was set at liberty by proper authority, he went beyond the limits of the restriction.

1. The actual "breaking" consists of the going beyond the geographical limits.

2. Failing to comply with another provision of the order establishing the restriction, such as muster, does not constitute a breach of restriction. However, it could be prosecuted as a violation of articles 92 or 86. But see United States v. Miller, 16 M.J. 858 (N.M.C.M.R. 1983) (specification alleging breaking restriction by consuming alcoholic beverages which was prohibited by restriction order does state an offense).

G. Last element. "C to "P" or "SD." Not every departure from the limits of the area of restriction constitutes a "breach" of restriction.

1. Example: Duty assignment. Accused ordered to perform duty outside the area of restriction. United States v. Modesett, 9 C.M.A. 152, 25 C.M.R. 414 (1958).

2. A "breach," therefore, consists of an unauthorized departure beyond the limits of restriction and must actually be found to be "C to P" or "SD."

H. Pleading. Part IV, para. 102f, MCM, 1984.

I. LIO. Attempt under Article 80, UCMJ

J. Multiplicity. A short unauthorized absence is multiplicious for findings with breaking restriction. United States v. DiBello, 17 M.J. 77 (C.M.A. 1983); United States v. Campfield, 20 M.J. 246 (C.M.A. 1985).

0708 ESCAPE FROM CORRECTIONAL CUSTODY. Article 134, UCMJ; Part IV, para. 70, MCM, 1984.

A. General

1. Part V, para. 5c(4), MCM, 1984, states, in pertinent part, "correctional custody is the physical restraint of a person, during duty or nonduty hours, or both, imposed as a punishment, under Article 15, and may include extra duties, fatigue duties or hard labor as an incident of correctional custody."

2. Part IV, para. 70c(1), MCM, 1984, provides:

> Escape from correctional custody is the act of a person undergoing the punishment of correctional custody . . . who, before being set at liberty by proper authority, casts off any physical restraint imposed by his custodian or by the place or conditions of custody.

B. Essential elements

1. That the accused was placed in correctional custody by a person authorized to do so;

2. that, while in such correctional custody, the accused was under physical restraint;

3. that the accused freed himself/herself from the physical restraint of this correctional custody before being released by proper authority; and

4. "C to P" or "SD."

5. The Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-135, adds another conditional element:

> That the accused knew of this correctional custody, and the limits of the physical restraint imposed upon him.

The Benchbook states that this element must be instructed upon

> ... if there is any evidence from which it may justifiably be inferred that the accused may not have known of his correctional custody and its limits.

C. Pleading. See Part IV, para. 70f(1), MCM, 1984.

D. Related offenses. Note the similarity to "Escape from Confinement" under article 95 (discussed above) and "Breach of Restraint During Correctional Custody" under article 134, which is discussed in the next section.

0709 BREACH OF RESTRAINT DURING CORRECTIONAL CUSTODY, Article 134, UCMJ; Part IV, para. 70, MCM, 1984.

A. General. Part IV, para. 70c(2), MCM, 1984, states that:

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

B. Essential elements

1. That the accused was placed in correctional custody by a person authorized to do so;

2. that, while in such correctional custody, a certain restraint was imposed upon the accused;

3. * that the accused knew of this correctional custody and the limits of the restraint thereby;

* The Military Judges' Benchbook, supra, at paragraph 3-136, states that this element must be instructed upon if "there is any evidence from which it may justifiably be inferred that the accused may not have known of his correctional custody and its limits or of the restraint and its limits."

4. that the accused went beyond the limits of the restraint before having been released (or relieved of the restraint) by proper authority; and

5. "C to P" or "SD."

C. Distinction between this offense and "escape from correctional custody." The primary distinction between the offense of breach of restraint during correctional custody and the offense of escape from correctional custody discussed in the preceding paragraph is that the restraint involved in this one is moral only. Thus, it is similar to a breach of restriction. The restraint involved in the escape offense is physical and, hence, it is more like escape from confinement. In most circumstances, breach of restraint during correctional custody is not a lesser included offense of escape from correctional custody. United States v. Whitmire, 13 M.J. 587 (N.C.M.R. 1982).

D. Pleading. See Part IV, para. 70f(2), MCM, 1984.

E. LIO: Attempt under Article 80, UCMJ.

0710 RELATIONSHIP BETWEEN RESISTANCE, ESCAPES, AND BREACHES

A. There is one resistance offense -- Resisting apprehension (article 95).

B. There are three escape offenses:

1. Escape from custody (article 95);

2. escape from confinement (article 95); and

3. escape from physical restraint of correctional custody (article 134).

C. There are three breach offenses:

1. Breach of arrest (article 95);

2. breach of restriction (article 134); and

3. breach of restraint during correctional custody (article 134).

D. The escapes all involve an element of <u>physical restraint</u>

1. Custody involves the personal, bodily control by the apprehending official. It may consist of forcible and corporeal restraint or simply peaceable submission.

2. Confinement (article 95) and correctional custody with physical restraint (article 134) both involve a control by means of a physical enclosure or the presence of physical force to prevent escape.

E. The breaches all involve a mere moral restraint (i.e., restraint imposed by a moral obligation to obey the order directing the accused to remain within a certain area).

1. Arrest (article 95) is nonpunitive in nature.

2. Arrest-in-quarters is punitive (NJP).

3. Restriction may be nonpunitive (i.e., restriction in lieu of arrest or administrative restriction -- e.g., quarantine). However, it may also be punitive (i.e., imposed by NJP or court-martial).

F. The escapes are complete upon the casting-off of the physical restraint before being set at liberty by proper authority.

G. The breaches are complete upon unauthorized departure from the limited area within which the individual is morally obligated to remain.

H. The resisting apprehension offense is different from all others in this group.

1. It occurs prior to the achievement of control over the accused.

2. It consists of a physical overt act in opposition to the attempt to take the individual into custody. Resistance may be:

a. By an assault; or

b. by flight.

3. Once custody has been effected, any further resistance is not a resisting apprehension. It may be:

a. An attempt to escape from custody;

b. an attempt to escape from confinement;

c. an escape from custody or an escape from confinement, if he was successful in casting off the physical restraint and pursuit, if any; or

d. an assault or a battery, which would generally be an article 128 offense, if there is no intent to escape.

I. It is important to understand these distinctions precisely and to analyze the facts carefully prior to pleading these offenses, particularly in a resisting apprehension or escape from custody situation.

-- If there is any doubt as to whether or not the apprehension was completed, provide for any reasonable alternative. For example: A sat in a bar making a loud noise. B, an MP, walked up to A and said, "Come with me. You are under arrest." A stood up, looked at B, then dashed out the door with B in hot pursuit. A ran through several alleys, was out of B's sight for five minutes; but, after fifteen minutes of chasing, B caught A, put handcuffs on him, and turned him in at the base.

a. Query: What should be pleaded?

b. Answer: Provide for the contingencies of proof and allege both resisting apprehension and escape from custody. In that manner, the court will be able to resolve the factual question and convict on the proper allegation.

c. Query: Any need to plead an attempt to escape from custody?

d. Answer: No. It is an LIO. If it is clear, however, that he did not completely free himself, then an attempt should be alleged under article 80 instead of the completed offense under article 95.

SECTION B

DRUNKENNESS OFFENSES

0711 INTRODUCTION. This section discusses offenses pertaining to drunkenness. It is not a crime in the military to be drunk; however, it is a crime to be drunk in certain places, while in certain duty states, or to do certain things while intoxicated. While the standard by which drunkenness is determined does not change from offense-to-offense, the maximum punishment which may be awarded does vary considerably.

0712 DRUNK ON DUTY. Article 112, UCMJ; Part IV, para. 36, MCM, 1984.

A. Text of article 112

> Any person subject to this chapter, other than a sentinel or lookout, who is found drunk on duty, shall be punished as a court-martial may direct. (Emphasis added.)

B. Elements

1. That the accused was on duty as alleged (other than as a sentinel or lookout); and

2. that the accused was found drunk while on duty.

C. First element. That the accused was on duty as alleged.

1. Duty includes:

a. Duties of routine or detail, in garrison, at station, or in the field;

b. duties which are of an anticipatory nature, such as a standby for a flight crew or guard duty; and

c. every duty which an officer or enlisted member may legally be required by superior authority to execute.

2. "On duty" does not relate to periods when no duty is required, such as when a person is on liberty or on leave.

a. A commanding officer of a ship is constantly on duty when he is on board ship. Part IV, para. 36c(2), MCM, 1984.

b. When exercising command, a CO of a post, command, or of a detachment in the field is on constant duty. Part IV, para. 36c(2), MCM, 1984.

c. "In a region of active hostilities," the circumstances may be such that all members of a command may properly be considered as being continuously on duty within the meaning of this article. Part IV, para. 36c(2), MCM, 1984.

3. To commit this offense, the accused must have undertaken the responsibility or entered upon the duty. Part IV, para. 36c(3), MCM, 1984, states: "The fact that he became drunk before going on duty . . . does not affect the question of guilt." If, however, the accused is known by superior authorities to be intoxicated at the time he is assigned a duty, a defense may exist if the authorities allow him to assume that duty. United States v. Burroughs, 37 C.M.R. 775 (C.G.B.R. 1966); United States v. Burke, 5 C.M.A. 56, 17 C.M.R. 56 (1954) (an article 113 case). [If the accused is too intoxicated to assume the duty, he may be charged with article 134 - incapacitation for duty.] See the following discussion.

a. Commencement of the duty status requires an affirmative act, such as:

(1) Relieving someone of the duty - United States v. York, 11 C.M.R. 422 (A.B.R. 1953);

(2) performing the duties required even though there has not been an identifiable act of relieving - United States v. Roberts, 9 C.M.R. 278 (A.B.R. 1953); or

(3) mustering with the duty section to which assigned, signing the log book, reporting to a senior, etc.

b. The duty status may be terminated by:

(1) Being relieved;

(2) dismissal;

(3) expiration of the period of duty; or

(4) abandonment of the duty. But see United States v. York, supra, in which OOD left the post in an official car and got drunk in a civilian club. He then returned to his post before the time at which he was to be relieved. Held: Conviction of being under the influence of alcohol while acting as duty officer, in violation of article 134, affirmed.

D. Second element. That the accused was found drunk while on duty.

1. Drunk defined. Part IV, para. 35c(3), MCM, 1984.

a. "[A]ny intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties is drunkenness. . . ."

(1) Drunkenness may be caused by liquor or drugs.

(2) This definition applies to drunk on duty (article 112), drunk driving (article 111), and drunk in camp, aboard ship, and in public (article 134).

b. ". . . [A] sensible impairment of the faculties is an impairment capable of being perceived by the senses. If the accused's conduct is not such as to create the impression within the minds of observers that he is unable to 'act like a normal rational person,' there can be no sensible impairment of his faculties. If, because of intoxicating liquors [or drugs], there was a perceptible lessening of the accused's ability to act like a normal rational person, then it may be said that accused's faculties were sensibly impaired." United States v. Bull, 3 C.M.A. 635, 14 C.M.R. 53 (1954). See also United States v. Gossett, 14 C.M.A. 305, 34 C.M.R. 85 (1963).

c. Compare the approach of the Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-76, in defining drunkenness:

> A person is drunk who is under the influence of an intoxicant so that the use of his faculties is materially impaired. Such impairment did not exist unless the accused's conduct ... was such as to create the impression within the minds of observers that he was unable to act like a normal rational person.

2. It must appear that he was drunk while on duty. Drunkenness before or after duty is not sufficient. A hangover is also insufficient to constitute a violation of article 112.

3. The drunkenness need not be the result of alcohol or drugs which are consumed while on duty, but can be, of course. United States v. Dreschnack, 1 C.M.R. 193 (A.B.R. 1951).

4. Proof of drunkenness

a. By nonexpert witness

(1) Rule 701 of the Military Rules of Evidence states:

> If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

One commentary has said that the first requirement is really composed of two qualifications:

> The first is that the witness has perceived that which the witness testifies about. This may mean that the witness

> has seen something; it may mean that the witness has heard something; or in some cases it may mean that the witness has felt or touched something. All of these would qualify as perceptions of the witness. The second requirement is that the perceptions be rationally based.

Saltzburg, Schinasi, Schlueter, Military Rules of Evidence Manual, 322-23 (1981).

(2) Thus, it would appear that any witness who has observed the accused could testify as to his observations; and, if his observations were sufficient to allow him to form an opinion, the witness could also testify as to his opinions concerning the accused's drunkenness. The underlying observations could include such things as the manner in which the accused walked, talked, appeared, smelled, etc.

(3) United States v. Pratt, 34 C.M.R. 731 (C.G.B.R. 1963) is an example of a case in which lay witnesses testified about the condition of the accused under the former rules of evidence. See United States v. Fetherson, 8 M.J. 507 (N.C.M.R. 1979).

b. By expert witness

(1) Rule 702 of the Military Rules of Evidence concerns testimony by an expert witness. It is generally considered broader than the previous rules. An expert should have no difficulty testifying about his opinion of the accused's state of drunkenness under its terms. Rule 703 indicates that the expert may base his opinion on facts which are not themselves admissible in evidence if "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

(2) Experts may also testify about the results of tests which they performed in order to form their opinion. Thus, blood and other medical tests can be utilized to aid in resolving the drunkenness question.

c. Drunk on duty is a general intent offense. The trial counsel need not prove that the accused's drunkenness was intentional or resulted from culpable or ordinary negligence.

(1) However, it must be the result of a voluntary act. Involuntary intoxication, coercion, and duress are viable defenses. See R.C.M. 916, MCM, 1984.

(2) Furthermore, involuntary intoxication as a result of an accidental overdose administered for medicinal purposes is a valid defense. United States v. Gossett, 14 C.M.A. 305, 34 C.M.R. 85 (1963).

d. Although Part IV, para. 36e, MCM, 1984, prescribes a maximum punishment of a BCD and CONF for 9 months for this offense, there is authority for the proposition that this is not a minor offense. In United States v. Fretwell, 11 C.M.A. 377, 29 C.M.R. 193 (1960), the accused was an officer of the deck aboard an aircraft carrier. After assuming the duty, he

was found drunk in uniform, "lying unconscious in a passageway." The court held that trial was not precluded by the previous administration of nonjudicial punishment for the same offense because, under the circumstances, the offense could not be considered a minor one. Whether a less egregious set of facts would yield the same result is a question that has not yet been decided.

E. Pleading

1. A sample specification is provided in Part IV, para. 36f, MCM, 1984.

2. The specification should allege the specific duty of the accused.

F. Lesser included offenses

1. Drunk on board ship, station, or camp in violation of article 134.

2. Dereliction of duty under article 92 may also be an LIO if the specification is carefully tailored so as to incorporate its essential elements. See United States v. Pratt, 34 C.M.R. 731 (C.G.C.M.R. 1963), for an example of conduct which could have constituted both offenses.

0713 DRUNK ON BOARD SHIP OR IN SOME OTHER PLACE

A. These offenses are violations of Articles 133 and 134, UCMJ

B. Essential elements

1. That the accused, at the time and place alleged, was drunk on board ship or in some other place; and

2. that, under the circumstances, the conduct was "C to P" or "SD."

C. "Drunk" has the same definition previously discussed: "Any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental or physical faculties is drunkenness...." Part IV, para. 35c(3), MCM, 1984. See United States v. Straub, 12 C.M.A. 156, 30 C.M.R. 156 (1961).

D. Aggravating factor. Disorderly conduct, drunkenness, and drunk and disorderly conduct can be aggravated if the behavior is under service-discrediting conditions. This aggravating element authorizes enhanced punishment and must be both pled and proven. Part IV, para. 73c(3), MCM, 1984; United States v. Hein, 23 M.J. 610 (A.F.C.M.R. 1986) (guilty plea to service-discrediting drunkenness improvident where MJ informed accused terminal element was "C to P" or "SD").

E. Related offenses

1. Disorderly conduct under article 134. See Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-140.

2. Drunk and disorderly conduct, article 134. See Military Judges' Benchbook, supra.

F. Special defense. If the accused was involuntarily brought to the camp, station, etc. after he was already intoxicated, he has a defense to this charge. United States v. Bailey, 10 C.M.A. 95, 27 C.M.R. 169 (1958). United States v. Patterson, 14 C.M.A. 441, 34 C.M.R. 221 (1964). However, the court may still find him guilty of being disorderly on station, etc., if he has been charged with being drunk and disorderly. United States v. Patterson, supra. The fact that the drunkenness occurs under semi-private conditions does not preclude findings that such conduct is service-discrediting. United States v. McArdle, 27 C.M.R. 1006 (A.B.R. 1958).

G. Proof note. As in most crimes, proof of other offenses may not be shown in order to support a conviction of this offense. However, if the conduct consists of acts of erratic behavior committed immediately prior to the time that the accused is alleged to have been drunk on station, etc., they are admissible. United States v. Thacker, 36 C.M.R. 954, (A.B.R. 1966).

H. Pleading. See Part IV, para. 73f, MCM, 1984. This sample specification covers a wide range of drunkenness offenses under article 134. Care must be exercised to select the desired allegation. Jurisdictional facts should be added when appropriate.

0714 INCAPACITATION FOR DUTY THROUGH PRIOR INDULGENCE IN LIQUOR OR ANY DRUG

A. This is a violation of Article 134, UCMJ

B. Essential elements

1. That the accused had certain assigned duties to perform;

2. that the accused was incapacitated for the proper performance of such duties;

3. that such incapacitation was the result of previous wrongful indulgence in intoxicating liquor or any drug; and

4. "C to P" or "SD."

C. The Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-143, adds a conditional element in addition to those listed above: "That the accused knew or should reasonably have known prior to the time of his incapacitation that he had duties to perform." As to this conditional element, the Benchbook notes that this element must be instructed upon "if there is any evidence from which it may justifiably be inferred that the accused did not have knowledge, prior to the time of his incapacitation, that he had duties to perform." Id. at n.3.

1. United States v. Roebuck, 8 C.M.R. 786 (A.B.R. 1953) indicates that lack of knowledge is an affirmative defense, but that failure to instruct upon it is not error unless the question of knowledge was at issue. The court went on to say: "Even if he had been without a specific assigned duty, but was required to be on duty, available for a specific assignment, if any, his lack of knowledge of the specific assignment would not be a defense to the offense...." The court also concluded, "Lack of knowledge--relative to the offense here under discussion--if a result of an accused's own neglect or misconduct is not a defense." Id. at 789.

2. The Roebuck case seems to clash with United States v. Pratt, 34 C.M.R. 731 (C.G.B.R. 1963). The Pratt case involved a dereliction of duty charge in which the accused was on duty at a life-saving station. A boat was found to be in extremis but the accused was drunk and asleep in his rack. Efforts to awaken him and tell him of the boat's peril proved unsuccessful. The Pratt court stated:

> While it is clear enough as a general proposition of law, that the accused had a legal duty to render assistance to a boat in distress in the area, it is not so clear, under the evidence here adduced that a criminally punishable omission to act was established. For while the general duty to undertake a rescue plainly existed, the duty of a particular person to go to the rescue of a particular boat in distress at a particular time could exist only if the person had been made aware of the occasion for action on his part.

Id. at 734.

D. "Duty" was previously discussed in section 0712.C above and has the same meaning here.

E. "Incapacitated" means rendered unfit or unable to perform the required duties properly.

1. Incapacitation can be the result of the accused's drunkenness at the time he is required to perform. Thus, if the accused cannot perform his military duties properly because he is drunk, he is "incapacitated."

2. However, incapacitation can also be the result of a hangover, even if the accused was no longer intoxicated at the time he was required to perform. For example, if Private Sluggo is assigned duty as a sentinel at 0800 tomorrow morning and gets drunk, he is guilty of being incapacitated for duty if, tomorrow, he does not or cannot assume his duties because he is too drunk or because he is hung over.

3. Suppose the accused is incapacitated at the time he arrives to perform his duties. If he then assumes his duties in that condition, is he guilty or not guilty of incapacitation? Neither the Manual nor the case law speaks to this issue so there is certainly room for the aggressive defense counsel to argue that the act of assuming the duty in question negates any criminal liability for incapacitation. The better view, however, would appear to be that assumption of the duty is not a defense to an incapacitation charge.

After all, the accused was clearly guilty of incapacitation when he first arrived at his duty. It would seem anomalous, to say the least, to permit an accused to acquire a defense to his incapacitation offense because he took the additional step of assuming the duty he was unfit to perform. After all, this is a circumstance which would appear to aggravate the offense, not mitigate it.

F. Pleading. See Part IV, para. 76f, MCM, 1984.

-- The sample specification does not provide for the specific duty of the accused to be alleged; but, in light of the instructions usually given, it is suggested that drafted specifications include an allegation of the accused's specific duty. See Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-143.

0715 DRUNKEN, RECKLESS, OR WANTON DRIVING. Article 111, UCMJ; Part IV, para. 35, MCM, 1984.

A. Text of article 111

> Any person subject to this chapter who operates any vehicle while drunk, or in a reckless or wanton manner, shall be punished as a court-martial may direct.

B. Essential elements

1. That the accused was operating a vehicle;

2. that the accused was operating it while drunk (or in a reckless or wanton manner or both); and, in aggravated cases

3. that the accused thereby caused the vehicle to injure a person.

The last element is a factor in aggravation and authorizes an increased punishment if pled and proved by the prosecution.

C. Definitions

1. Vehicle. The term "vehicle" includes all types of land transport, whether or not motor driven or passenger carrying. See United States v. Webber, 13 C.M.A. 536, 33 C.M.R. 68 (1963), in which it was held that an aircraft was not a "motor vehicle" in connection with a wrongful appropriation charge.

2. Operating. "Operating" includes not only driving or guiding a vehicle while in motion, either in person or through the agency of another, but also the setting of its motive power into action or the manipulation of its controls so as to cause the particular vehicle to move. Part IV, para. 35c(2), MCM, 1984.

3. Reckless

a. "Reckless" means "a culpable disregard of foreseeable consequences to others." Part IV, para. 35c(4), MCM, 1984. See United States v. Fuller, 27 C.M.R. 540 (A.B.R. 1958).

b. The MCM also indicates: "The accused's manner of operation was of that heedless nature which made it actually or imminently dangerous to the occupants or to the rights or safety of others." Part IV, para. 35c(4), MCM. 1984.

c. See United States v. Eagleson, 3 C.M.A. 685, 14 C.M.R. 103 (1954); United States v. Lawrence, 18 C.M.R. 855 ((A.F.B.R. 1955). Drunken driving is not the equivalent of culpable negligence or recklessness. However, drunkenness is some evidence of culpable negligence. United States v. Beardsley, 9 C.M.R. 458 (A.B.R. 1953), petition denied, 11 C.M.R. 248 (1953); see also United States v. Bull, 9 C.M.R. 520 (A.B.R. 1953), aff'd, 14 C.M.R. 53 (1954).

4. Wanton. "Wanton" includes "reckless," but in describing the operation of a vehicle, it may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense. Part IV, para. 35c(5), MCM, 1984.

D. The aggravated offense

1. Drunken or reckless or wanton driving that results in an injury is an aggravated form of the basic offense. Thus, the maximum punishment that may be imposed increases from a BCD and 6 months CONF to a DD and 18 months CONF. A court composed of members must be instructed on this element if a conviction is to be affirmed. United States v. Bernard, 10 C.M.R. 718 (A.B.R. 1953).

2. Although it does not appear to have been decided, it is safe to assume that the injury alleged must have been the proximate result of the accused's drunken or reckless driving in order to constitute an aggravating factor.

3. What if the accused alone is injured? Because the effect on the military service (i.e., loss of the accused's services) may be the same or even worse than if another individual were injured, it would appear that injury to the accused alone would permit the enhanced punishment to be imposed. See Part IV, para. 35 drafters' analysis, MCM, 1984, app. 21-93. But cf. United States v. Seeger, 2 M.J. 249 (A.F.C.M.R 1976), in which the Air Force Court of Military Review held, with regard to the similar offense of leaving the scene of an accident without making one's identity known, that if the accused's car was the only one damaged, no requirement to report the driver's identity existed. (Note that the driver in Seeger, supra was injured.)

E. Proof

1. Drunkenness. See the discussion in 0712.D above. The manner in which the accused operated the vehicle, his appearance, his ability to speak with clarity, or lack thereof, etc. may all be considered on the question.

In United States v. Ward, 34 C.M.R. 506, (A.B.R. 1963), it was held that evidence that the accused's vehicle weaved from curb to center line while being operated at an estimated speed of 15 miles per hour, and two witnesses expressed the opinion that the accused was intoxicated, based on the way he looked -- his "bloodshot" eyes, unstable gait, and slurred speech -- was sufficient to uphold a conviction of the accused even though three other witnesses testified to the contrary.

2. Recklessness. "Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation, but all these factors may be admissible and relevant...." Part IV, para. 35c(4), MCM, 1984. See United States v. Lawrence, 18 C.M.R. 855 (A.F.B.R. 1955), for a good discussion of this problem.

F. Pleading. See Part IV, para. 35f, MCM, 1984.

G. Lesser included offenses

1. Reckless driving is a lesser included offense of driving in a wanton manner.

2. Drunk on duty (article 112), on station, and in public (article 134) are LIO's of drunk driving in some circumstances.

H. Relationship between "drunken driving" and "reckless or wanton driving"

1. Part IV, para. 35c(6), MCM, 1984, states: "While the same course of conduct may constitute both drunken and reckless driving, the article proscribes these as separate offenses, and both offenses may be charged." In United States v. Grossman, 2 C.M.A. 406, 9 C.M.R. 36 (1953), the court members were instructed on both reckless and drunken driving where only drunken driving was charged. This was held to be prejudicial error.

2. It is common for these offenses to occur simultaneously.

a. "Thus, on a charge of reckless driving, evidence of drunkenness might be admissible as establishing one aspect of the recklessness." Part IV, para. 35c(6), MCM, 1984.

b. Indeed, evidence of one tends to establish the other.

(1) Evidence of drunkenness tends to show a disregard for the safety of others.

(2) Likewise, evidence of the reckless or wanton method of operation may, together with other evidence, tend to indicate a lack of sobriety.

3. Since they are mutually supporting, it is usually advisable to plead both to provide for the contingencies of proof. See United States v. Grossman, supra, and United States v. Beene, 4 C.M.A. 177, 15 C.M.R. 177 (1954).

I. Relationship between drunk driving and involuntary manslaughter. In the case of United States v. Beene, supra, the accused was charged under article 111 (drunk driving resulting in injury) and under article 119 (involuntary manslaughter). The Court of Military Appeals held that the accused could be punished for both since the crimes were separately punishable even though the same victim was the subject of both charges, and the injuries alleged in the former caused the death of the victim alleged in the latter. Recent C.M.A. opinions concerning multiplicity place the continued vitality of Beene in some doubt. See United States v. Baker, 14 M.J. 361 (C.M.A. 1983).

J. Relationship between drunk driving and negligent destruction of government property. In United States v. Schwarz, 24 M.J. 823 (A.C.M.R. 1987), the accused was found guilty of both drunk driving and negligently destroying the Army ambulance he was driving while drunk. The court found the two offenses to be multiplicious for findings and amended the drunk driving specification to include the negligent destruction of government property charge. This opinion is unusual for two reasons. First, the two offenses are rarely considered multiplicious for findings, making this ruling an exception to the rule. Id. at 827 citing United States v. Straughan, 9 M.J. 991, 993 (A.C.M.R. 1984), petition denied, 19 M.J. 322 (C.M.A. 1985). Second, headnote no. 4 and the opinion's opening paragraph misstate the court's ruling as finding multiplicity for sentencing. Schwarz, 24 M.J. at 824. The rationale of Schwarz and Straughan may be applied to drunk driving combined with any other offense when evidence establishing the second offense is also used to establish the drunk driving.

0716 RELATIONSHIP BETWEEN DRUNKENNESS OFFENSES

A. Just about every situation in which intoxication in public occurs is prohibited by the code. The primary difficulty is in determining precisely what the facts are and then selecting the most appropriate article with which to charge the accused.

B. With two exceptions, all of the offenses in this group have a common element of drunkenness on the part of the accused.

1. Reckless and wanton driving is one exception. It is frequently accompanied by drunkenness on the part of the accused, but the accused need not be drunk in order to be convicted.

2. Incapacitation for duty by prior indulgence in intoxicating liquor is the other exception. It is not necessary to prove that the accused was drunk at the time duty was to commence, nor even that he was drunk previous to that time. It is sufficient to show that he was in fact unfit for or unable to perform his duty properly, and that this unfitness or inability was due to previous indulgence in intoxicating liquor or drugs. Of course, if he is incapacitated, he may still be drunk, but this circumstance is not essential to constitute this offense.

C. With the exceptions of drunken, reckless, or wanton driving and drunk on duty, all of the drunkenness offenses are chargeable under article 134 and, hence, have an essential terminal element of "C to P" or "SD."

D. Drunkenness offenses frequently overlap

1. Example: The accused was the NJS duty driver. Before reporting for duty, he drank a fifth of whiskey He staggered to NJS and assumed the duty by crawling into the vehicle after falling down three times and breaking the window while trying to enter the car. Then, pursuant to an order received the previous day, he meandered to Newport. He drove down Thames Street at high noon at 65 mph, went through two red lights, and narrowly missed a dozen pedestrians and half a dozen cars.

a. This conduct clearly constitutes a violation of article 111 (i.e., drunken and reckless driving). It also may amount to wanton driving.

b. It is also a violation of article 112, drunk on duty.

c. He was clearly incapacitated for duty by previous indulgence, which was "C to P" and "SD."

d. Additionally, his conduct was "service discrediting" in that he was "drunk in uniform in a public place," to wit: Thames Street, Newport.

e. He was also "drunk and disorderly on station," which was conduct prejudicial to good order and discipline.

f. Query: With what should the accused be charged?

Answer: While it is largely a matter of judgment, a reasonable solution would be to charge him with:

(1) Reckless driving (article 111). Maximum punishment -- BCD and six months CONF.

(2) Drunken driving (article 111). Maximum punishment -- BCD and six months CONF.

(3) Drunk on duty (as NJS driver) (article 112). Maximum punishment -- BCD and nine months CONF.

These cover the most serious aspects of his misconduct while allowing for the contingencies of proof. See section 0714, supra.

2. Example. Accused, a flight crewman, was scheduled to fly at 0800. Pursuant to an order received the previous day, he reported to his superior NCO at 0730, but, immediately upon reporting, requested release from the assignment. He stated that he was "in no condition" to make the flight. The request was granted. Accused was later tried for being drunk on duty under article 112. The NCO testified to all of the above and added that the accused was definitely drunk.

a. Query: Conviction valid?

Answer: No. He was drunk, but not on duty. Appearing at the aircraft and requesting relief from the assignment was not an assumption of duty.

b. Query: With what should he have been charged?

Answer: Incapacitation for duty by prior indulgence in intoxicating liquor (article 134).

3 Example. Accused, a flight crewman, was scheduled to fly at 0800. The night before he becomes intoxicated and, when he arrives to fly the next morning, he is suffering from a ferocious hangover. He goes ahead and starts to fly at 0800 as scheduled, but is unable to complete the mission and has to return because his head is pounding so badly from the hangover.

a. Query: With what should the accused be charged?

b. Answer: Incapacitation for duty by prior indulgence in intoxicating liquor (article 134).

SECTION C

MISBEHAVIOR BY SENTINEL, LOOKOUT, AND WATCHSTANDER

Articles 92, 113, and 134 (also 86, 112)

0717 SENTINEL AND LOOKOUT OFFENSES UNDER ARTICLE 113, UCMJ. Part IV, para. 38, MCM, 1984.

A. Text of article 113

> Any sentinel or lookout who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct.

B. Scope. This article proscribes three types of misbehavior by sentinels and lookouts:

1. Being found drunk on post;

2. sleeping on post; and

3. leaving post before being regularly relieved.

C. Essential elements

1. That the accused was posted or on post as a sentinel or lookout;

2. that the accused was found drunk or sleeping while on post, or that the accused left post before being regularly relieved; and, if applicable

3. that the offense was committed in time of war or while the accused was receiving special pay under 37 U.S.C § 310.

D. Discussion

1. First element. That the accused was posted or on post as a sentinel or lookout.

a. "Post"-- defined. The area where the sentinel or lookout is required to be for the performance of his duties. A post is not limited by an imaginary line, but includes, according to orders or circumstances, such surrounding area as may be necessary for proper performance of the duties for which the sentinel or lookout was posted. Part IV, para. 38c(2), MCM, 1984. United States v. Seeser, 5 C.M.A. 472, 18 C.M.R. 96 (1955); United States v. Reynolds, 6 C.M.A. 535, 20 C.M.R. 251 (1955); United States v. Getman, 2 M.J. 279 (A.F.C.M.R. 1976); United States v. Bogdan, 30 C.M.R. 679 (N.B.R. 1960).

b. "Sentinel or lookout" -- defined. The terms "sentinel" and "lookout" are used interchangeably and are defined as an observer whose duties include the requirement that he maintain constant alertness. United States v. Seeser, supra; Part IV, para. 38c(4), MCM, 1984. Exactly what is to be observed is often a difficult question to answer. In Seeser, supra, C.M.A. spoke of the accused's duties to "be vigilant, remain awake, observe for possible approach of the enemy, and to sound the alert, if necessary." Id. at 474, 18 C.M.R. at 98.

(1) This article does not include a person whose duties as a watchman or attendant do not require that he be constantly alert. Part IV, para. 38c(1), MCM, 1984.

(2) Examples of persons who ARE sentinels or lookouts

(a) Soldier in front lines who has been stationed in observation against approach of the enemy. United States v . Seeser, supra. This case is informative because it demonstrates that in some instances an accused can be considered a sentinel or lookout even though his entire unit is "100% on alert." This fact alone was not deemed controlling, but it was considered by the court. Together with the accused's duty to observe and warn of the approach of the enemy, it was sufficient to show that he was a sentinel within the meaning of article 113.

(b) Persons detailed to use any equipment designed to locate friend, foe, or possible danger. Examples: Radar, sonar, and radio operators, when required to perform the duty in order to detect possible danger. United States v. Harris, 25 C.M.R. 766 (A.F.B.R. 1957).

(c) Persons stationed to preserve internal security or discipline. Examples: Warehouse sentry, restricted area sentry, brig guards, and chasers.

(d) Underway lookouts.

(3) Examples of persons who are NOT sentinels or lookouts

(a) A command telephone watch, not posted as an observer. (But if the accused was acting as a telephone operator with the duty of watching and reporting hostile planes, he is a sentinel. United States v. Harris, supra.)

(b) A person who is merely in a standby status (e.g., supernumerary of the guard). Reason: Not required to stay alert; not yet an observer; not yet on post.

(c) Captain's orderly. Reason: Not an observer.

c. "On Post" -- defined". A sentinel or lookout gets "on post" by:

(1) Being given a lawful order to go "on post" as a sentinel or lookout. United States v. Seeser, supra; and

(2) being formally or informally posted. The fact that the sentinel or lookout is not posted in the regular way is not a defense. It is sufficient if he has taken his post in accordance with proper instructions, whether or not formally given. See Part IV, para. 38c(3), MCM, 1984.

2. Second element. The accused (was found drunk while on his post) or (sleeping while on his post) or (left his post before being regularly relieved).

a. First offense - sleeping while on post

(1) "Sleeping" -- defined. That "condition of insentience which is sufficient sensibly to impair the full exercise of the mental and physical faculties of the sentinel.... [T]his requirement is not met by a mere dulling of the perceptions through, say, physical exhaustion not amounting to slumber." United States v. Williams, 4 C.M.A. 69, 74, 15 C.M.R. 69, 74 (1954); United States v. Muldrow, 48 C.M.R. 63 (A.F.C.M.R. 1973). It is not necessary to show that the accused was in a "wholly comatose condition." United States v. Williams, supra, at 74. Part IV, para. 38c(6), MCM, 1984.

(2) Proving the accused was sleeping

(a) "Fact" testimony of a person who directly witnessed the accused's condition with his own eyes and ears is admissible to prove sleep. See, e.g., United States v. Muldrow, 48 C.M.R. 63 (A.F.C.M.R. 1973).

(b) "Opinion" testimony of a person who directly witnessed the accused's condition with his own eyes and ears may also be utilized. United States v. Johnson, 9 C.M.A. 178, 25 C.M.R. 440 (1958), sets forth an example of compelling evidence of sleep and a discussion on proving sleep.

(3) Sleeping on post is a general intent offense.

(a) The prosecution need not prove that the accused's sleeping was intentional nor that it resulted from culpable or ordinary negligence.

(b) The fact that the accused's sleeping resulted from a physical incapacity caused by disease or accident, however, is an affirmative defense. United States v. Cook, 31 C.M.R. 550 (A.B.R. 1961). The question in such a case is not one of reasonableness.

> The case, however, is different when one's physical condition is such as actually to prevent compliance with the orders or, as here, to cause the commission of the offense. Upon such a showing, the question is not one of reasonableness vis-a-vis willfulness, but whether the accused's illness was the proximate cause of his crime.

United States v. Cooley, 16 C.M.A. 24, 27, 36 C.M.R. 180, 183 (1966).

(c) Another possible affirmative defense is that the accused's superiors knew that he was in no condition to assume the duty as a sentinel at the time that they posted him. United States v. Burke, 5 C.M.A. 56, 17 C.M.R. 56 (1954); United States v. McGowan, 21 C.M.R. 902 (A.F.B.R. 1956).

b. Second offense - being drunk while on post

-- "Drunk" -- defined. Any intoxication, by liquor or drugs, which impairs sensibly the rational and full exercise of the mental or physical faculties. Part IV, para. 35c(3), MCM, 1984.

c. Third offense - leaving post before being regularly relieved

(1) When has the sentinel or lookout left his post?

(a) When his ability fully to perform the duty for which he was posted is impaired. Part IV, para. 38c(2), MCM, 1984. See United States v. Bodgan, United States v. Seeser, and United States v. Reynolds, all supra.

(b) The exact distance required for leaving post depends upon the nature of the post and other circumstances of the case. United States v. Reynolds, 6 C.M.A. 535, 20 C.M.R. 251 (1955); United States v. Foster, 48 C.M.R. 414 (N.C.M.R. 1973).

(c) Examples

-1- H was manning a machine gun post which commanded an avenue of approach. During his tour his telephone went out of order, so he moved his gun to a point near another machine gun post some 100 feet away. However, he could not guard the particular draw assigned to him with machine gun fire from that new point. Held: Left his post. United States v. Hattley, 3 C.M.A. 114, 11 C.M.R. 114 (1953).

-2- A radar operator might move only a few inches and have left his post because he would no longer be able properly to observe the scope. United States v. Harris, 25 C.M.R. 766 (A.F.B.R. 1957).

-3- A roving sentinel or lookout, such as a security guard at a brig, may move hundreds of feet throughout his patrol area and remain on post. United States v. Reynolds, supra.

(d) The sentinel or lookout has not left his post when he has gone beyond the defined area for the purpose of carrying out some duty for which he was posted. For example: Accused was posted along a fence at an armory. He heard a noise originating inside the compound and then he was hit with a rock. He recognized one of the individuals as one with whom he had had a previous argument, so he entered the compound and fought with him. He had gone no further than 30 feet from his post. Held: It could be inferred that the accused was merely seeking to end distractions that imposed on the performance of his duty and the charge was dismissed. United States v. McCurtis, NCM 78-0330 (N.C.M.R. 1978).

(2) When is the sentinel "regularly relieved"?

(a) When relieved by another sentinel or lookout authorized to relieve him;

(b) when his tour of duty has expired and his orders permit him to leave without relief (For example: If an accused is told to stand guard until sunrise, then he may lawfully leave his post when the sun rises); or

(c) when relieved by competent superior authority. (For example: If accused is a bow lookout, becomes ill, and asks OOD by telephone for permission to go to sick bay at once and receives that permission, then the lookout will be considered relieved.)

3. Element in aggravation

a. If it is alleged and proved that the offense was committed while the accused was serving in a capacity authorizing entitlement to special pay for duty subject to hostile file, a higher scale of punishment (10 years confinement vice one year) is authorized. Part IV, para. 38e(2), MCM, 1984.

b. The text of the article indicates that if the misbehavior occurs during time of war it is a capital offense. Determining whether capital punishment applies to a particular offense is not difficult if Congress has formally declared war; however, such a declaration seldom occurs. In considering the question in the context of article 113, the Court of Military Appeals has held that a formal declaration of war is not necessary to make an accused liable to the increased punishment. United States v. Gann, 3 C.M.A. 12, 11 C.M.R. 12 (1953); United States v. Bancroft, 3 C.M.A. 3, 11 C.M.R. 3 (1953); United States v. Aldridge, 4 C.M.A. 107, 15 C.M.R. 107 (1954). Although all of these cases dealt with the Korean War, the court has also reached the same result when dealing with a similar question in the context of the Vietnam War. United States v. Anderson, 17 C.M.A. 588, 38 C.M.R. 386 (1968); see United States v. Michaud, 48 C.M.R. 379 (N.C.M.R. 1973).

E. Lesser included offenses

1. As to drunk on post

a. Drunk on board ship or other place. (Depending upon the allegations and proof of the particular case. Article 134, UCMJ.)

b. Drunk and disorderly. (Depending upon the allegations and proof of the particular case. Article 134, UCMJ.)

2. As to sleeping on post. Loitering or wrongfully sitting down on post while a sentinel or lookout in violation of Article 134, UCMJ; United States v. Muldrow, 48 C.M.R. 63 (1973).

3. As to leaving post before regularly relieved

a. Going from appointed place of duty. Article 86(2), UCMJ. It is not proper, however, to allege failure to assume a security watch on a ship (or other place) as a failure to go to (or going from) an appointed place of duty where the security watch is a roving watch and there is no proof of any particular place, smaller than the whole ship, where the accused was to stand the watch. United States v. Little, 33 C.M.R. 655 (C.G.B.R. 1963); see United States v. Barbour, NMCM 80-0497 (N.M.C.M.R. 1980).

b. Absence from unit, organization, or other place of duty. Article 86(3). United States v. Little, supra.

c. It is improper, however, to find an accused guilty of lying down on post when he was charged with leaving his post as a sentinel because the former is not a lesser included offense of the latter. United States v. Jones, 43 C.M.R. 663 (A.C.M.R. 1971).

4. Depending upon the allegations and facts of a case, dereliction of duty under article 92 might be an LIO of any of the misbehavior offenses. See United States v. Little, supra.

F. Pleading. Part IV, para. 38f, MCM, 1984.

0718 SENTINEL AND LOOKOUT OFFENSES UNDER ARTICLE 134. LOITERING AND WRONGFULLY SITTING DOWN. Part IV, para. 104, MCM, 1984.

A. Essential elements

1. That the accused was posted as a sentinel or lookout;

2. that, while posted, the accused loitered or wrongfully sat down on his post; and

3. "C to P" or "SD."

B. Definition. "Loiter" means to stand around, to move about slowly, to spend time idly, to saunter, to linger, or to lag behind when such conduct is in violation of known instructions or accompanied by a failure to give complete attention to duty. Part IV, para. 104c(2)(b), MCM, 1984.

C. Example: Accused was a gate guard. He was observed standing with his back to incoming traffic and his eyes closed for a "count of 10." Held: Loitering on post. United States v. Muldrow, 48 C.M.R. 63 (A.F.C.M.R. 1973).

D. Defense. If the accused was physically incapable of standing on his feet when he sat down, he has a defense. United States v. Woltmann, 22 C.M.R. 737 (C.G.B.R. 1956).

E. Pleading

1. Part IV, para. 104f(2), MCM, 1984.

2. When alleging and instructing on "sitting on post" offenses, be sure to include expressly the word "wrongfully" before the words "sat down." Omission of "wrongfully" results in a failure to state an offense, because some sentinels may properly sit on post. For example: In a foxhole in combat.

3. Note that, similar to article 113, these offenses are aggravated if they occur in time of war or in a hostile pay environment. These aggravating elements must be pled and proved.

0719 RELATIONSHIP BETWEEN THE SENTINEL AND LOOKOUT OFFENSES. Articles 113 and 134.

A. General. There are five recognized "sentinel and lookout" offenses. Three are proscribed by article 113 -- drunk on post, sleeping on post, and leaving post; two are charged under article 134 -- loitering on post and wrongfully sitting on post.

B. There are two factors common to all of these offenses

1. The accused must be a sentinel or lookout (One who is expected to remain alert, whose primary duty is to observe the possible approach of the enemy or for any other danger, and to sound a warning is a sentinel or lookout. United States v. Seeser, supra); and

2. the accused must have assumed his post.

C. With only one exception: It is not enough that the accused was a sentinel or lookout, and that he assumed his post, but he must also have actually been on post at the time of the commission of the offense.

1. Example. A, a sentinel, assumed his post; but 15 minutes later he departed without authority, sat down, loitered, got drunk, and finally fell asleep in his rack (not in his post area).

a. Query: With what offense(s) could he properly be charged?

b. Answer: Leaving his post, under article 113. All of the other offenses require the accused to be on post. (Article 86, UA with intent to abandon guard or watch may also be a possibility).

2. Suppose, in the preceding example, that the accused was assigned as a sentinel to patrol continuously the outside and inside of the tent where his rack was located.

a. Query: With what offense(s) could he properly be charged?

b. Answer: Drunk and sleeping on the post, under article 113; and loitering and sitting on post, under article 134. But, he has not left his post.

3. Suppose, in the preceding example, the accused was simply assigned to patrol outside the tent.

a. Query: Did he leave his post if he entered the tent?

b. Answer: This is a difficult question. Look at all the circumstances, including the purpose of the patrol, any specific instructions on limits and duties of the post, the size of the tent and relative location of the rack within the tent, plus the purpose and circumstance of his initial entry. Weigh all factors carefully; then, if in doubt, provide for contingencies of proof by pleading both alternatives (i.e., he left the post, and he was drunk, sleeping, sitting, and loitering on post).

4. In the preceding example, could he properly be charged with drunk on duty under article 112? Answer. No. Article 112 expressly excepts sentinels and lookouts from its scope.

0720 MISBEHAVIOR BY WATCHSTANDERS

A. General

1. The term "watchstander" is used here in the sense of one who is on watch, but does not qualify as a sentinel or lookout.

-- There are two reasons that could disqualify one who is on a watch from the category of sentinel or lookout:

(1) Not required to remain constantly alert; or

(2) not posted primarily as an observer.

2. Some watchstanders may not be required to observe or remain alert. For example: Personnel in a standby status, such as the next relief of the guard, who are permitted to sleep but are nevertheless considered "on watch" for the entire 24 hours that they are in such a status.

B. Many possible offenses by watchstanders

1. Articles to consider: 86, 92, 112, 133, and 134

2. Suppose a watchstander has a duty to be alert. For example: A telephone switchboard operator falls asleep. What offense has he committed? Answer: Dereliction of duty, article 92(3).

3. Suppose a watchstander has no duty to be alert. For example: The supernumerary of the guard, but he gets drunk while on watch. What offense has he committed? Answer: Drunk on duty, article 112.

4. Suppose the admiral's orderly, without permission, leaves his post and sneaks down to the "gedunk" where he is seen by the admiral's chief yeoman. What offense? Answer: Going from his appointed place of duty without authority, article 86(2).

5. Suppose an officer of the deck drinks while on duty, but does not get drunk. Any offense? Answer: Violation of a lawful general regulation, Article 1150, U.S. Navy Regulations, possessing and using alcoholic beverages on board ship. Articles 133 and 134 could possibly be employed, but Navy Regulations via article 92 would cover this situation.

C. Special problem. Accused is charged under article 92 as follows: "In that Seaman Recruit James Arnold McCall, U.S. Navy, USS Butner, on board USS Butner, on or about 0145, 19 May 19CY, was derelict in the performance of his duties in that he was found lying down and asleep while on watch in the aft steering compartment." The accused pleaded guilty.

1. Query: Does this state an offense?

2. Answer: Yes. The allegation that he was derelict fairly implies that he had a duty to be alert. Furthermore, the allegation of his particular assignment (i.e., watch in the aft steering compartment) clearly implies a duty to be alert in the event an emergency arose requiring immediate action. United States v. McCall, 11 C.M.A. 270, 29 C.M.R. 86 (1960).

3. Caveat: If the watch requires alertness, and the accused was derelict in that respect, it is safer and better to allege this requirement expressly. ADD - "and thereby failed to remain alert, as it was his duty to do." See Part IV, para. 16f(4), MCM, 1984, and review the section on dereliction of duty in Chapter IV of this text.

SECTION D

FALSIFYING OFFENSES

Articles 107 and 134

0721 INTRODUCTION. There are several offenses in the military that involve falsification: False official statements (article 107); false swearing (article 134); fraudulent enlistment or appointment (articles 83 and 84); malingering (article 115); forgery (article 123); making, etc. worthless checks with intent to deceive or defraud (article 123a); perjury (article 131); false claims (article 132), etc. Only the first two, false official statements and false swearing, will be discussed in this section.

0722 FALSE OFFICIAL STATEMENT. Article 107, UCMJ; Part IV, para. 31, MCM, 1984.

A. Text of the article

> Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order or other official document, knowing it be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.

B. Essential elements

1. That the accused signed a certain official document or made a certain official statement;

2. that the document or statement was false in certain particulars;

3. that the accused knew it to be false at the time of signing it or making it; and

4. that the accused signed the document or made the statement with an intent to deceive. See United States v. Hutchins, 5 C.M.A. 422, 18 C.M.R. 46 (1955); United States v. DeWayne, 7 M.J. 755 (A.C.M.R. 1979).

C. Discussion

1. Official document or statement

a. "Official documents and official statements include all documents and statements made in the line of duty." Part IV, para. 31c(1), MCM, 1984; United States v. Thomas, 10 C.M.A. 54, 27 C.M.R. 128 (1958); United States v. Rhodes, 28 C.M.R. 427 (A.B.R. 1959); and United States v. Lile, 42 C.M.R. 852 (A.C.M.R. 1970). Even such matters as one's personal history may constitute official statements. For example, in the case of United States v. Flowers, 7 M.J. 659 (A.C.M.R. 1979), the court held that a false statement in the accused's Statement of Personal History (DD Form 398)

was an official document for purposes of article 107, since the accused was under a duty to make the statement. However, "official" as used in article 107 is the substantial equivalent of the phrase "any matter within the jurisdiction of any department or agency of the United States" as found in 18 U.S.C. § 1001 (the Federal statute dealing with false or fraudulent statements). United States Aronson, 8 C.M.A. 525, 25 C.M.R. 29 (1957).

b. The seminal case in this area is Aronson, supra. There the accused was interviewed by government investigators inquiring into a shortage of funds in an account of which the accused was the custodian. The accused waived his right to remain silent, made a false statement denying he had stolen the money, and then later confessed. The false statement was used as the basis for an article 107 charge. The accused's conviction was upheld on the basis that he had an independent duty to account for the funds entrusted to his custody. While article 31 gave him a right to remain silent, if he chose to speak, he had an obligation to speak truthfully.

c. That the accused's position as a custodian was central to the outcome in Aronson can be seen from a series of cases decided in its wake, all with startlingly different outcomes. In United States v. Washington, 9 C.M.A. 131, 25 C.M.R. 393 (1958), the accused was under investigation for bad checks. When interviewed by military police investigators, he gave a statement falsely claiming that his account had some $1100.00 in it. Held: The statement was not official, since the accused did not have an independent duty to speak. Similarly, in United States v. Geib, 9 C.M.A. 392, 26 C.M.R. 172 (1958), the accused was under investigation for falsely stating in a request to terminate an allotment that he was divorced. When interviewed by government investigators, he reiterated the false statement. Held: The statements were not official. In United States v. Johnson, 9 C.M.A. 442, 26 C.M.R. 222 (1958), the accused was placed under investigation for breaching the peace. When interviewed by government investigators, the accused falsely denied being present at or participating in the incident. Held: The statement was not official (again, no independent duty to speak). In United States v. Osborne, 9 C.M.A. 455, 26 C.M.R. 235 (1958), the accused had falsely stated in a personal history statement that he had no record of any civilian arrests or courts-martial. When interviewed by his commanding officer about this, he waived his article 31 rights and again falsely stated that he had no such record. Held: The statement to the commanding officer was not official, since the accused had no independent duty to speak (though the original false statement in the personal history statement could have been the basis of an article 107 charge had it been alleged).

d. As these cases suggest, the custodial obligation of the accused in Aronson to account for government funds is really the exception and not the rule for the accused under government investigation. Most suspects will not have an independent duty to speak. It is not much of an exaggeration, therefore, to say that the line of cases from Aronson to Osborne stands for the proposition that a suspect may lie to government investigators without violating article 107. Of course, if the false statement is given under oath, the accused is probably guilty of false swearing under article 134. See section 0723, infra.

e. One notable exception to the Aronson-Osborne authorities is United States v. Collier, 23 C.M.A. 173, 48 C.M.R. 789 (1974). In that case the accused was not under investigation at all, but rather, on his own initiative, filed a false report with the military police to the effect that his stereo had been stolen. The potential of such unsolicited false reports to generate groundless Federal investigations, thereby perverting the investigatory process, was deemed sufficient by C.M.A. to make the statement official under article 107. In a similar vein is United States v. Gilfilen, 6 M.J. 699 (N.C.M.R. 1978), where the accused was interviewed by a criminal investigator. The accused falsely stated that two other sailors had tried to buy hashish from a third sailor. Noting that this statement was unrelated to the matter about which the accused was being interviewed, N.C.M.R. held the statement to be official (citing Collier). Likewise, in United States v. Kupchik, 6 M.J. 766 (A.C.M.R. 1978), the accused, though under investigation by Army CID, was never actually interviewed by CID. Instead, the accused contacted another soldier who had been interviewed by CID and who had implicated the accused in a larceny. The accused dictated a new, false statement for the soldier, had him sign it, and caused it to be delivered to CID. Held: The statement was official. (It should be noted that both Gilfilen and Kupchik had pled guilty to the article 107 offenses at the trial level.)

f. As can be seen from those cases cited above dealing with statements by the accused to his commanding officer, superiority of rank seems to have little, if anything, to do with whether the false statement is official. For example, an enlisted member falsely told an Air Force captain that he was a member of the air police and therefore not subject to apprehension. Held: The statement was not official. United States v. Arthur, 8 C.M.A. 210, 24 C.M.R. 20 (1957) (the fact that the captain was in the process of apprehending the accused because the captain had caught the accused in the act of assaulting a female did not seem to impress C.M.A.). Similarly, in United States v. Cummings, 3 M.J. 246 (C.M.A. 1977), where a noncommissioned officer ordered the accused to obtain a permanent motorcycle registration (required by Army Regulations) and where the same NCO later asked the accused if he had obtained the vehicle registration, and the accused falsely said that he had done so, the statement was held not to be official.

g. Notice that the false statement does not necessarily have to be given to the government in order for the statement to be official. For example, in United States v. Ragins, 11 M.J. 42 (C.M.A. 1981), C.M.A. held that the accused violated article 107 when, in his capacity as a commissary official, he gave false invoices to a bakery which overstated the amount of bread delivered to the commissary. The fact that the false invoices enabled the bakery to bill the government for bread it never received made the false statements official, in the sense that they constituted matters within the jurisdiction of a department or agency of the United States. In United States v. Azevedo, 24 M.J. 559 (C.G.C.M.R. 1987), the accused's statement concerning his duties as a worker for the Coast Guard's equivalent of Navy Relief was held to be official. Contra United States v. Lauderdale, 19 M.J. 582 (N.M.C.M.R. 1984) (accused's false statements in a Navy Relief Society case-work form held not official).

h. As can be seen, C.M.A. has defined the term "official" rather narrowly with regard to suspects. This is largely the legacy of Aronson and its progeny. Query: Is Aronson still good law? Certainly C.M.A. seemed to think so as recently as 1980, in United States v. Davenport, 9 M.J. 364 (C.M.A. 1980). There, the accused, who had escaped from the custody of his brig chaser, was seen later by a brig official in downtown Honolulu. When the brig official approached the accused and asked him who he was, the accused gave a false name. C.M.A. held that the false statement was official, but only because it found a duty to speak on the part of the accused. In short, C.M.A. analyzed the issues in the same manner as in Aronson and in fact cited Aronson approvingly. But, even Aronson held that the scope of the term "official" under article 107 is the same as the phrase "any matter within the jurisdiction of any department or agency of the United States" as found in 18 U.S.C. § 1001. And, in United States v. Rodgers, 466 U.S. 475, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984), the U.S. Supreme Court found the scope of that phrase to be much broader than many had thought. The phrase "any matter" was held to embrace criminal investigations (which would presumably include the various interrogations in the cases from Aronson to Osborne, supra). The term "jurisdiction" was construed to mean simply all matters confided to the authority of an agency or department. Thus, since both the FBI and the Secret Service are authorized to detect and investigate crimes against the United States, the accused's false reports to the FBI (that his wife had been kidnapped) and the Secret Service (that she was involved in a plot to murder the President) were violations of 18 U.S.C. § 1001.

i. Of course, the specific facts of the Rodgers case would constitute a violation of article 107 even as C.M.A. presently interprets it. United States v. Collier, supra. But, in truth, the Supreme Court in Rodgers seemed really less concerned with the specific facts of the case than with the language of 18 U.S.C. § 1001 itself. And its expansive reading of the language might well dictate a different result in cases such as Washington, Geib, Johnson, and Osborne, supra. More to the point, perhaps, is that Rodgers specifically addressed one of the same concerns raised by C.M.A. in the Aronson case. There, C.M.A. (relying on Federal cases giving a restrictive interpretation to 18 U.S.C. § 1001 for this same reason) declared that Congress simply could not have intended every lie (no matter how trivial) told to a government investigator to be punishable by a sentence greater than that provided for perjury. The Supreme Court in Rodgers rejected this very argument in adopting its expansive definition of 18 U.S.C. § 1001. (Additionally, it might be pointed out that the maximum authorized punishments for perjury and false official statements are now the same. See Part IV, paras. 31c and 57e, MCM, 1984).

j. One military case since Rodgers has found the scope of article 107 to be broader than previously supposed. In United States v. Jackson, 26 M.J. 377 (C.M.A. 1988), the accused was an acquaintance of the primary suspect in a murder case. When criminal investigators attempting to locate the suspect approached the accused and asked when she had last seen him, the accused falsely said she had last seen him two weeks ago when in fact she had seen him that very morning. Held: The statement was official (citing United States v. Rodgers, supra). Whether Jackson actually marks the beginning of a move away from Aronson, however, is far from clear since Jackson may also be read as consistent with the rather more flexible construction of officiality in cases where the false statement is given by one who is not a suspect. See, e.g., United States v. Gilfilen, supra.

k. What, then, is the bottom line with regard to Rodgers and Aronson? While it appears that Rodgers expands Aronson, the nature and extent of this expansion are far less clear. Until C.M.A. clarifies its position on this issue in future case law, practitioners of military law would be well advised to proceed cautiously, especially when drafting charges in cases where the false statement was made to a government investigator by a suspect with no independent duty to speak. Careful consideration should be given to possible alternative charges such as false swearing, which will frequently be available. See section 0723, infra. In the absence of such alternatives, a false official statement charge might be considered but, even then, should be reserved for those cases where the falsehood is serious and the possibility of perverting the investigative process is substantial. After all, it was C.M.A.'s fear of every falsehood giving rise to a Federal conviction which resulted in the restrictions of Aronson in the first place.

l. When determining whether a statement is official, the "exculpatory no" doctrine may come into play. The "exculpatory no" doctrine states that, when a person merely gives a negative response to a law enforcement agent's question, he or she should not be prosecuted under 18 U.S.C. § 1001. United States v. Davenport, 9 M.J. 364, 370 (C.M.A. 1980). The rationale here is that a simple negative response, without more, falls outside the type of statement contemplated by the statute; that is, statements that subvert or frustrate government administrative programs. United States v. Gay, 24 M.J. 304, 305 (C.M.A. 1987). Given the general analogy between 18 U.S.C. § 1001 and Article 107, UCMJ, the "exculpatory no" doctrine can be a defense in certain false official statement prosecutions. Id. Here, a military member who has an obligation to account may have a defense if the falsehood is no more than a negative response to the question asked.

2. Knowledge that the document or statement was false

a. To be guilty of the offense, the accused must know that the statement or document was false. Actual knowledge may be established by circumstantial evidence. Part IV, para. 31c(5), MCM, 1984.

b. An honest, albeit erroneous, belief that a statement made was true is a defense. Part IV, para. 31c(5), MCM, 1984. Extreme caution must be used in framing instructions in this area. United States v. Acosta, 19 C.M.A. 341, 41 C.M.R. 341 (1970).

3. Intent to deceive

a. "Intent to deceive" means an intent to mislead, to cheat, to trick another, or to cause to believe as true that which is false. Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-65.

b. The government must prove that the accused signed the document or made the statement with an intent to deceive. Evidence that the accused actually knew an official document or statement signed or made by him was false is circumstantial evidence that the accused had an intent to deceive. United States v. Young, 9 C.M.A. 452, 26 C.M.R. 232 (1958). A court can also consider whether the act violated any law, regulation, or code which establishes standards of conduct reasonably related to the specific issues in the case. United States v. DeWayne, 7 M.J. 755 (A.C.M.R. 1979).

c. It is not necessary, however, that the "victim" be, in fact, deceived. Moreover, the "victim" can be either junior or senior to the accused. Part IV, para. 31c(2), MCM, 1984.

d. It is not necessary that the false statement be material to the issue under inquiry. Part IV, para. 31c(3), MCM, 1984. If, however, the falsity is in respect to a material matter, it may be considered as some evidence of the necessary intent to deceive, while immateriality may tend to show an absence of this intent. United States v. Hutchins, 5 C.M.A. 422, 18 C.M.R. 46 (1955).

e. Whether the accused had any expectation of material gain from his false document or statement is also immaterial. See United States v. Lile, 42 C.M.R. 852 (A.C.M.R. 1970). "The expectation of material gain is not one of the essential elements of the offense." Part IV, para. 31c(4), MCM, 1984. However, such expectation or lack of it is circumstantial evidence bearing on the element of "intent to deceive."

f. The fact that the accused signed the name of another to a document does not remove the offense from the ambit of article 107. United States v. Anderson, 12 M.J. 539 (A.F.C.M.R. 1981).

D. Pleading. Part IV, para. 31f, MCM, 1984.

1. If the act can be charged as a violation of article 107, it is improper to charge an accused with a violation of a statute assimilated under the provisions of the Federal Assimilative Crimes Control Act, 18 U.S.C. § 13, under article 134. For example, the accused, in the case of United States v. Heil, 5 M.J. 581 (A.C.M.R. 1978), was convicted under article 134 for a violation of a Texas statute assimilated under the Federal Assimilative Crimes Control Act. His specific misconduct was to make false reports of robberies. The court held that, since such conduct was chargeable as making false official statements, use of the Federal Assimilative Crimes Control Act was prohibited.

2. It is not erroneous if the specification fails to indicate that the statement was made to a particular person. United States v. Flowers, 7 M.J. 659 (A.C.M.R. 1979).

3. The specification must, however, allege that the statement was false. United States v. Montgomery, 43 C.M.R. 813 (A.C.M.R. 1971). Although the accused's knowledge of the statement's falsity is an essential element of the offense, failure to allege it may not be fatal (at least where the issue is first raised by the accused on appeal). United States v. Cooley, 21 M.J. 968 (A.C.M.R. 1986). The Army court was able to find the necessary knowledge fairly implied in the allegation that the false document was made with intent to deceive.

0723 FALSE SWEARING. Article 134, UCMJ; Part IV, para. 79, MCM, 1984.

A. General. Part IV, para. 79c(1), MCM, 1984, describes the offense of false swearing as "... the making under lawful oath or equivalent of any false

statement, oral or written, not believing the statement to be true. It does not include such statements made in a judicial proceeding ..." This definition is discussed in United States v. Smith, 9 C.M.A. 236, 26 C.M.R. 16 (1958); United States v. McCarthy, 11 C.M.A. 758, 29 C.M.R. 574 (1960); and United States v. Claypool, 27 C.M.R. 533 (A.B.R. 1958).

B. Essential elements

1. That the accused took an oath or its equivalent;

2. that the oath, or its equivalent, which was administered to the accused was required or authorized by law;

3. that the oath or its equivalent was administered by a person having authority to do so;

4. that, upon this oath or equivalent, the accused made or subscribed a certain statement;

5. that the statement was false;

6. that the accused did not then believe the statement to be true; and

7. "C to P" or "SD."

C. Discussion

1. Oath or its equivalent

a. As noted above, this offense cannot be committed in judicial proceeding or course of justice. Article 131, perjury, covers the offense of making a false statement under oath in a judicial proceeding. Article 131, therefore, preempts the use of article 134 to prosecute false swearing offenses in such settings. Article 131 not only requires that the false statement be made in a judicial proceeding, but it must be material to the issue as well. There are no such requirements for the offense of false swearing. United States v. Smith, 9 C.M.A. 236, 26 C.M.R. 16 (1958).

b. An "oath" includes an affirmation where authorized. Part IV, para. 79c(2), MCM, 1984.

2. Administered in a matter required or authorized by law

a. Article 136(b), UCMJ, provides: "The following persons on active duty may administer oaths necessary in the performance of their duties:- - - (4) all persons detailed to conduct an investigation."

b. C.M.A. has interpreted the word "necessary" in the above quoted section to mean "essential to a desirable end." Therefore, it held that an oath administered by an investigator to a suspect making a statement was authorized since it is clearly desirable for a criminal investigator to obtain a sworn statement from persons being questioned. United States v. Claypool, 10 C.M.A. 302, 27 C.M.R. 376 (1959); United States v. Whitaker, 13 C.M.A. 341, 32 C.M.R. 341 (1962).

c. Example. The accused was the chief suspect in a crime of attempted housebreaking. He was placed under oath by an MP investigator prior to asking him if he had attempted to break into the building. He replied, falsely, that he did not. This would constitute the offense of false swearing. Since the accused did not have an independent duty to respond, an article 107 false official statement offense was not committed. Since it did not occur in a "judicial proceeding," it did not constitute perjury.

3. Administered by a person having authority. See Article 136, UCMJ and JAGMAN, § 2502, for authorization; United States v. Whitaker, supra; and United States v. Savoy, 13 C.M.A. 419, 32 C.M.R. 419 (1962).

4. Statement must in fact be false. See United States v. McCarthy, 11 C.M.A. 758, 29 C.M.R. 574 (1960); United States v. Purgess, 13 C.M.A. 565, 33 C.M.R. 97 (1963). Proof of falsity involves special rules regarding proof. See Military Judges' Benchbook, DA Pam 27-9 (1982), Inst. 3-149; United States v. Tunstall, 24 M.J. 235 (C.M.A. 1987) (two-witness rule).

-- Even though a statement may be misleading, if it is literally, technically or legally true, it cannot serve as the basis for a conviction of false swearing. In the Purgess case, supra, the court held that the evidence was insufficient to support a conviction when the accused made a statement under oath that the seat covers in his car "came from a German concern," even though they had been stolen from government stock, since the government had in fact purchased them from a German company. See also United States v. Arondel de Hayes, 22 M.J. 54 (C.M.A. 1986).

5. "Exculpatory no." The "exculpatory no" defense, potentially available in false official statement cases, is not available in false swearing cases. United States v. Gay, 24 M.J. 304 (C.M.A. 1987). In fact, an "exculpatory no" statement during an interrogation could turn a potential false official statement into false swearing because the statement would be an "unofficial" false statement made under oath.

D. Pleading. See Part IV, para. 79f, MCM, 1984. If the specification fails to allege that the statement made under oath was false, it is fatally defective. United States v. Goldman, 14 C.M.A. 598, 34 C.M.R. 378 (1964); United States v. McCarthy, 11 C.M.A. 758, 29 C.M.R. 574 (1960); and United States v. Daminger, 30 C.M.R. 826 (A.B.R. 1960).

0724 MAJOR DISTINCTIONS BETWEEN FALSE OFFICIAL STATEMENTS (ARTICLE 107) AND FALSE SWEARING (ARTICLE 134)

A. False official statements, article 107, must be made with the intent to deceive; whereas false swearing, article 134, need not be made with such an intent.

B. A false official statement, article 107, must be official; whereas false swearing, article 134, need not be.

C. A false official statement, article 107, need not be under oath; whereas false swearing, article 134, must be under oath.

D. Example. A is a suspect in the larceny of a car. B, a CID agent, warns A under article 31, places him under oath, and interrogates A, who then lies, denying that he had anything to do with it. This is not a false official statement under article 107, but it is false swearing under article 134. See United States v. Aronson, United States v. Washington, and United States v. Whitaker, all supra.

CHAPTER VIII

OFFENSES AGAINST THE PERSON

0800 INTRODUCTION

This chapter discusses offenses against the person, primarily assault and its variations. The chapter's primary emphasis is on the four basic types of assault offenses encountered in military practice: simple assault, assault consummated by a battery, assault with a deadly weapon or means likely to produce grievous bodily injury, and assault with the intentional infliction of grievous bodily harm. These four offenses are the foundation upon which all other types of assaults are built and are all chargeable under Article 128, UCMJ. Although article 128 is the article of the UCMJ which deals directly with assaults, a number of other assault offenses are found in other articles and are discussed separately in this chapter. For example, assaults upon superiors in the execution of their offices are charged under articles 90 or 91. Several different types of assault (for example, indecent assaults and assaults with the intent to commit certain other offenses) fall under article 134. These offenses are examined only briefly since their basic assault element is identical to that discussed under article 128. The offense of robbery is addressed in chapter IX, since it is a composite of both larceny and assault. Maiming is a subject of brief examination. Defenses commonly asserted in assault cases are covered. Sexual offenses are briefly surveyed, since they usually involve assaultive acts. Sexual harassment is also included, though it need not involve an assault or actual sexual misconduct. The concluding sections discuss offenses against the peace of the community, otherwise known as disturbance offenses.

0801 ARTICLE 128, UCMJ. Part IV, para. 54, MCM, 1984. (Key Numbers 589-600, 693-698)

A. Text of Article 128, UCMJ

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

(b) Any person subject to this chapter who --

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

(2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon;

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

B. Definitions

1. "Assault" is an attempt or offer with unlawful force or violence to do bodily harm to another, whether or not the attempt or offer is consummated. Part IV, para. 54c(1)(a), MCM, 1984. Thus, an assault can be committed in any one of three separate ways: attempt, offer, or battery.

2. "Battery" is an unlawful and intentional or culpably negligent application of force to the person of another by a material agency used directly or indirectly. A "battery" is an assault in which the attempt or offer to do bodily harm is consummated. Part IV, para. 54c(2), MCM, 1984.

C. Offenses under article 128

1. There are four separate offenses specifically defined by Article 128, UCMJ:

a. Simple assault -- subsection (a);

b. assault consummated by a battery -- subsection (a);

c. assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm -- subsection (b); and

d. intentional infliction of grievous bodily harm -- subsection (b).

2. In addition to these four offenses, Part IV, para. 54c(3), MCM, 1984, lists three types of assault under article 128 which permit increased punishment because of the status of the victim:

a. Assault upon a commissioned officer, warrant officer, noncommissioned officer or petty officer;

b. assault upon a sentinel or lookout in the execution of his duty or upon a person in the execution of law enforcement duties; and

c. assault consummated by a battery upon a child under 16 years of age.

0802 SIMPLE ASSAULT (Key Numbers 595-600)

A. Elements. Part IV, para. 54b(1), MCM, 1984:

1. That the accused attempted or offered to do bodily harm to a certain person; and

2. that the attempt or offer was done with unlawful force or violence.

B. First element: Attempted or offered to do bodily harm

1. Distinction between "offer" and "attempt"

a. If the assailant actually intends to do bodily harm to the victim, the assault is of the attempt-type.

b. If the act puts the victim in reasonable fear that force will at once be applied to his or her person, it is an offer-type assault, even though the accused did not intend to inflict bodily harm.

Note: "Fear" does not mean only "afraid" or "frightened," it includes "apprehension" or "expectation of danger." United States v. Norton, 1 C.M.A. 411, 4 C.M.R. 3 (1952).

c. Illustrations

(1) If the accused swings his fist in the vicinity of another's head, intending to hit it but misses, the accused is guilty of an attempt-type assault, whether or not the victim is aware of the attempt.

(2) If the accused should do the same thing for the purpose of frightening the victim rather than hitting him, and the victim sees the blow coming and is thus placed in fear, the accused is guilty of an offer-type assault.

(3) If the accused swings at the victim intending to hit him, and the victim sees the blow coming and is thus put in fear of being struck, the accused has committed a single assault that may be characterized as both an offer and an attempt.

(4) If the accused does an act simply to frighten the victim intending not to hit him, and the victim does not see what was done and so is not placed in fear, then no assault has been committed.

2. Discussion of the attempt-type assault

a. If an accused intentionally performs an overt act which amounts to more than mere preparation, and it is done with the apparent ability to inflict bodily harm, an attempt-type assault has been committed. Part IV, para. 54c(1)(b)(i), MCM, 1984.

(1) The overt act must apparently tend to effect the intended bodily harm. That is, the accused must have the apparent ability to inflict bodily harm. United States v. Hernandez, 44 C.M.R. 500 (A.C.M.R. 1971). On the other hand, the accused does not have to be within actual striking distance of the victim. United States v. Smith, 4 C.M.A. 41, 15 C.M.R. 41 (1954). It is not necessary for the victim to be aware of the accused's actions.

b. Required state of mind: An attempt-type assault requires a specific intent to inflict bodily harm. United States v. Davis, 49 C.M.R. 463 (A.C.M.R. 1974) (shooting over head of another in a "playful mood" does not constitute assault by attempt, since no intent to harm existed). See also United States v. Hand, 46 C.M.R. 440 (A.C.M.R. 1972) (accused's denial of any intent to inflict bodily harm on anyone rendered plea improvident where MJ examined the accused only as to the attempt theory of assault).

c. Overt act: The overt act necessary to constitute an attempt-type assault, as in the case of an attempt to commit any other offense, must amount to more than mere preparation. Part IV, para. 54c(1)-(c)(i), MCM, 1984, states:

> Preparation not amounting to an overt act, such as picking up a stone without any attempt or offer to throw it, does not constitute an assault....

United States v. Acosta-Vargas, 13 C.M.A. 388, 32 C.M.R. 388 (1962); United States v. Berry, 6 C.M.A. 638, 20 C.M.R. 354 (1956); United States v. Crocker, 35 C.M.R. 725 (A.F.B.R. 1964).

3. Discussion of the offer-type assault

a. If an accused makes an intentional or culpably negligent and unlawful demonstration of violence which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm, he has committed an offer-type assault. Part IV, para. 54c(1)(b)(ii), MCM, 1984; United States v. Frazier, 14 M.J. 773 (A.C.M.R. 1982). See also United States v. Parker, 11 M.J. 757 (N.M.C.M.R. 1981) for a "classic example of an offer-type assault."

(1) Under this theory of assault, a specific intent to do bodily harm is not required.

(a) The act or omission may be intentional or the result of culpable negligence.

(b) Culpable negligence defined: "It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of such act or omission." Part IV, para. 44c(2)(a)(i), MCM, 1984. It is a gross, reckless, deliberate, or wanton disregard for the safety of others. Simple negligence is the absence of due care. It is an act or omission of a person who is under a duty to use due care. The act or omission must lack the degree of care for the safety of others which a reasonably prudent person would have exercised under the circumstances. Culpable negligence thus exhibits a greater lack of care than simple negligence. Chapter I of this text provides further discussion of negligence. In United States v. Cherry, 22 M.J. 284 (C.M.A. 1986), the accused argued that his conduct when driving a 2 1/2-ton truck did not constitute culpable negligence. The court found culpable negligence when the accused did not inspect his truck as required, failed to follow the safety instructions when his brakes failed, and continued to drive without his brakes in a congested area, rather than pull over when he had several opportunities to do so. In United States

v. Brown, 22 M.J. 448 (C.M.A. 1986), the accused pled guilty to involuntary manslaughter, then sought reversal. While the accused admitted during the providency inquiry that turning over the keys to his car to an intoxicated person was culpable negligence, he argued on appeal that he did not actually know of the risk he caused. The court rejected the appeal, noting that negligence involves conduct a reasonable person would be aware of under the circumstances. For a further discussion, see United States v. Leach, 22 M.J. 738 (N.M.C.M.R. 1986), wherein the accused cut a petty officer with an open knife, but denied any ill will or intent to harm. Both the accused and the petty officer testified that they engaged in friendly bantering and both described the incident as an accident. The court disagreed, holding that waving an open knife in the direction of another while in close quarters was culpable negligence.

(2) The victim's required state of mind

(a) The victim must reasonably apprehend immediate bodily harm. That is, the victim must apprehend upon reasonable grounds that force will at once be applied to his person. The victim need not be "afraid." It is sufficient if he realizes that unlawful force is about to be applied to his person. United States v. Norton, 1 C.M.A. 411, 4 C.M.R. 3 (1952). A "reasonable person" limitation is applied here. If a reasonable person under the same conditions would have been put in fear, then it is an offer-type assault.

(b) Actual present ability is not required; however, it must reasonably appear to the victim that the accused has the apparent present ability to inflict the injury. This does not require that the accused be within actual striking distance of the victim. A demonstration of violence which reasonably causes one to retreat to secure his safety from impending danger is an assault, even though the accused never reached actual striking distance of the victim. Part IV, para. 54c(1)(d)(ii), MCM, 1984. See United States v. Smith, 4 C.M.A. 41, 15 C.M.R. 41 (1954); United States v. Thompson, 13 C.M.A. 395, 32 C.M.R. 395 (1962); United States v. Bush, 47 C.M.R. 532 (C.G.C.M.R. 1973).

b. Mere preparation does not constitute an offer assault.

(1) Example: Picking up a stone without any attempt or offer to throw it is not an assault. Part IV, para. 54c(1)(c)(i), MCM, 1984.

(2) Contra example: X entered a room, created a disturbance and was told by Cpl Z to leave. X refused and Z got out of bed to enforce the order and was cut by X's knife. X testified that he merely drew the knife, opened it and held it in his hand, and Z impaled himself during the scuffle. Held: An assault. "... [M]ere preparation for an assault does not complete the offense, but holding an open knife in the hand, at the time of an impending affray, within reasonable striking distance, amounts to more than preparation.... It is an act in partial execution of the use of the knife, and completes the offense." United States v. Berry, 6 C.M.A. 638, 646, 20 C.M.R. 354, 362 (1956); United States v. Acosta-Vargas, 13 C.M.A. 388, 32 C.M.R. 388 (1962); United States v. Flowers, NMCM 77-2232 (21 Jun 78); United States v. Hernandez, 44 C.M.R. 500 (A.C.M.R. 1971).

(3) The court, in United States v. Hines, 7 C.M.A. 75, 21 C.M.R. 201 (1956), held that working the bolt of a loaded weapon so that it was ready for instant firing, coupled with a statement indicating a present intent to use the weapon, was more than mere preparation and hence constituted an assault.

c. Conditional offer of violence

(1) An offer to inflict bodily injury upon another instantly, if he does not comply with a demand which the assailant has no right to make, is an assault. Part IV, para. 54c(1)(c)(iii), MCM, 1984. For example: A draws a pistol and says to B, "If you don't give me your watch, I will shoot you." See United States v. Berry, supra.

(2) If the known circumstances clearly negate an intent to do bodily harm, however, there is no assault. Part IV, para. 54c(1)(c)(iii), MCM, 1984. For example: A raises a whip within striking distance of B, an old man, and says, "If you weren't an old man, I would knock you down." No assault. This is a conditional offer of violence. It is not an attempt because there clearly is no intent to injure. Nor is it an offer because there is no reasonable ground to apprehend harm.

d. Words alone do not constitute an assault.

(1) The mere use of threatening words does not constitute an assault. Part IV, para. 54c(1)(c)(ii), MCM, 1984. For example: Bully shouts through a window of his barracks to Meek who is in the adjoining barracks, "I'm going to punch you in the nose."

(2) Threats are not sufficient to constitute an assault. There must be evidence of violence actually offered. A threat of future violence is insufficient for an assault because it is neither an attempt to commit a battery nor should it place the victim in reasonable apprehension of receiving an immediate battery. United States v. Jessie, 2 M.J. 573 (A.C.M.R. 1977).

(3) If the threatening words are accompanied by a menacing act or gesture, however, there is an assault since the combination constitutes a demonstration of violence. For example: Accused's CO was notified that there was a disturbance in the accused's quarters. CO and others went there and as they approached the house a light flashed on and they saw a man inside with a carbine. The light went off. The CO went up to the door and, as he reached for the door handle, he heard the bolt action of a rifle and a statement, "Don't move." Held: An assault. Although the overt act must be more than mere preparation and though words alone are insufficient, "Working the bolt of a loaded weapon so that it is ready for instant firing, coupled with a statement indicating a present intent to use the weapon, certainly is more than mere preparation. It is a part of the use of the weapon itself, and such behavior constituted the overt act of the assault." United States v. Hines, 7 C.M.A. 75, 21 C.M.R. 201 (1956).

e. "Bodily harm" to another person. Any "attempt" or "offer" to touch, however slightly, another person or something closely associated with his person (e.g., briefcase, cane, hat, coat) is the "bodily harm" required for this offense. United States v. Van Beek, 47 C.M.R. 98, 99 (A.C.M.R. 1973). Touching another for an innocent purpose, however, such as gaining his or her attention, does not constitute assault. United States v. Henley, 9 M.J. 780 (A.F.C.M.R. 1980).

C. Second element: Unlawful force or violence

1. The terms "force" and "violence" include any application of force, even though it entails no physical pain and leaves no mark.

2. "Unlawful." Generally, any force applied to another person will be unlawful, if without:

a. Legal justification (e.g., lawful apprehension of another, shooting an enemy); or

b. legal excuse (e.g., acts done in self-defense); or

c. legal consent (actual or implied) (e.g., football game).

Note: See the discussion of these concepts as defenses at the end of this chapter.

D. Pleading simple assault

1. The specification need not indicate whether the assault was of the offer or attempt variety. It should merely allege that the accused did "assault" the victim.

a. Under this allegation, the prosecution can prove either or both varieties.

b. The word "assault" is a word of art importing criminality. See United States v. Priester, 4 C.M.R. 830 (A.F.B.R. 1952).

2. The specific act constituting the assault must be alleged. For example:

a. "By striking at him with his fist."

b. "By throwing a knife at him."

3. Sample specification. Part IV, para. 54f(1), MCM, 1984.

In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], assault Seaman Thomas P. Smith, U.S. Navy, by throwing a bottle at him.

0803 ASSAULT CONSUMMATED BY A BATTERY (Key Numbers 595-600)

A. Elements. Part IV, para. 54b(2), MCM, 1984.

1. The accused did bodily harm to a certain person; and

2. the bodily harm was done with unlawful force or violence.

B. Second element: With unlawful force or violence. See discussion above.

C. First element: Did bodily harm to another person.

1. The slightest unlawful touching of another person will constitute the "bodily harm" required. United States v. Van Beek, 47 C.M.R. 98 (A.C.M.R. 1973). In fact, "bodily harm" can be accomplished without actually touching the body. If the victim's clothes or anything closely attached to his body is touched, the offense is completed. For example:

a. Cutting the clothing which the victim is wearing;

b. spitting on the tie which the victim is wearing; and

c. knocking a box out of the victim's hand, or a pipe out of his mouth. Touching another for an innocent purpose, however, such as to gain another's attention, does not constitute a battery. United States v. Henley, 9 M.J. 780, 783 (A.F.C.M.R. 1980).

2. Means of perpetration. The force may be applied to another person by a material agency, either:

a. Directly (e.g., by the aggressor's hands, feet, or other part of his body, including spitting on another); or

b. indirectly (e.g., by some agency which the aggressor puts in motion -- such as by throwing a stone, shooting a gun, sending a dog to attack another, or by causing the victim to take poison or drugs). Part IV, para. 54c(2)(b), MCM, 1984.

3. Required state of mind. Assault consummated by a battery is a general intent crime which is committed if bodily harm is inflicted either intentionally or through culpable negligence. United States v. Turner, 11 M.J. 784, 787 (A.C.M.R. 1981); United States v. Pittman, 42 C.M.R. 720 (A.C.M.R. 1970).

a. Intentionally means a specific intent to inflict bodily harm upon another. It is not necessary that the intent be to inflict any particular type of bodily harm.

b. Through culpable negligence means a culpable disregard for the foreseeable consequences to others. Part IV, para. 44c(2)(a)(i), MCM, 1984. See discussion, infra.

4. Note that the distinction between attempt and offer which is made in a simple assault is not necessary in a battery because of the actual infliction of bodily harm.

D. Pleading

1. The word "unlawfully" must be alleged. The striking of another is a battery only if it is unlawful. Merely alleging that the accused did "strike" another is not sufficient, as that word alone does not import criminality. United States v. Priester, 4 C.M.R. 830, 831 (A.F.B.R. 1952). An allegation that he did "strike" another does not exclude the reasonable hypothesis of innocence that the striking was legally justified or legally excused. The addition of the word "unlawfully" before "strike" does exclude these and all other reasonable hypotheses of innocence.

2. The victim should be identified by first and surname, if known. If the victim is military, he or she should also be identified by grade and armed force.

3. The specific act constituting the battery must be alleged, including the specific part of the victim touched.

4. Sample specification. Part IV, para. 54f(1), MCM, 1984.

> In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], unlawfully strike Seaman John D. Smith, U.S. Navy, in the face with his fist.

0804 ASSAULT WITH A DANGEROUS WEAPON OR OTHER MEANS OR FORCE LIKELY TO PRODUCE DEATH OR GRIEVOUS BODILY HARM (Key Numbers 595-600)

A. Elements. Part IV, para. 54b(4), MCM, 1984.

1. That the accused attempted to do, offered to do, or did bodily harm to a certain person;

2. that the accused did so with a certain weapon, means, or force;

3. that the attempt, offer, or bodily harm was done with unlawful force or violence; and

4. that the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

B. General discussion of the elements. All of the definitions and rules discussed with respect to simple assault or battery are applicable to the first and third elements of this offense which is an aggravated assault or an aggravated battery. The second element merely describes with specificity the weapon, means, or force alleged. The fourth element describes how the weapon was used. The aggravating circumstances are presented in the second and third elements.

C. Dangerous weapon or other means or force likely to produce death or grievous bodily harm

1. This aggravated form of assault includes not only those assaults accomplished by means or instrumentalities normally considered to be weapons but also by any means which, according to the manner of their use, are potentially dangerous. United States v. Vigil, 3 C.M.A. 474, 13 C.M.R. 30 (1953) (use of fists as a means of force likely to produce grievous bodily harm); United States v. McGhee, 29 M.J. 840 (A.C.M.R. 1989) (accused guilty of aggravated assault through her gross negligence in leaving her daughter with boyfriend who had abused the child at least twice before and this time ruptured the child's small intestine).

2. If the instrumentality used is a weapon, it must, to constitute this offense, be a dangerous weapon in fact. Part IV, para. 54c(4)(b)(ii), MCM, 1984. A weapon is dangerous when used in such a manner that it is likely to produce death or grievous bodily harm. Id.

a. Under this definition, an unloaded rifle, when presented as a firearm, would not be a dangerous weapon; but, if presented as a bludgeon, it might be a dangerous weapon or other means or force likely to produce death or grievous bodily harm. See United States v. Bush, 47 C.M.R. 532 (C.G.C.M.R. 1973). The weapon need not have a round in its chamber, if it is loaded, in order to be considered dangerous. United States v. Lapp, 44 C.M.R. 504, 507 (A.C.M.R. 1971). This definition of a dangerous weapon may be broadened for other offenses, such as carrying a concealed dangerous weapon in violation of article 134. United States v. Powell, 22 M.J. 835 (N.M.C.M.R. 1986).

b. Belief of victim and accused. The belief of the victim and the accused as to the dangerous nature of the weapon used is not material.

(1) Example: A rifle is pointed at Willy by Rollo. Both believe it is loaded. In fact, it is not loaded. Hence, it is not a dangerous weapon. Part IV, para. 54c(4)(b)(ii), MCM, 1984.

(2) In this respect, this offense differs from simple assault where apparent present ability is sufficient. To constitute the aggravated assault, actual present ability to inflict harm with the weapon is required.

3. The weapon or other means or force must have been used in a specific manner (i.e., likely to produce death or grievous bodily harm).

a. Grievous bodily harm. This means a serious bodily injury, such as fractured or dislocated bones, deep cuts, torn members of the body, or serious damage to internal organs.

(1) It does not include minor injuries such as a black eye or a bloody nose. Part IV, para. 54c(4)(b)(iii), MCM, 1984.

(2) "Light pain, minor wounds, and temporary impairment of some organ of the body do not ordinarily, (individually) (or) (collectively)

establish 'grievous bodily harm.'" The results are common to most ordinary assault and battery cases. In making the determination of whether grievous bodily harm resulted, the absence or presence and extent of (the injury and its adverse effects) (degree of pain or suffering) (time of hospitalization or confinement to bed or room) (length and degree of unconsciousness) (amount of force or violence used) (interference with normal activities), may be taken into consideration." Military Judges' Benchbook, DA Pam 27-9 (1982), para. 3-110.

(3) In United States v. Spearman, 23 C.M.A. 31, 48 C.M.R. 405 (1974), the court provides a full discussion of this element, including the facts that the knife used had a pointed, 4-inch blade, that the victim was stabbed four times and that there were three wounds in the area of vital organs which required stitches.

b. *Used in a manner likely to produce.*

(1) "When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be said that means or force is 'likely' to produce that result." Part IV, para. 54c(4)(a)(ii), MCM, 1984. The use to which the particular instrumentality is usually put is immaterial.

(2) Examples of objects that could be used in a manner likely to produce death or grievous bodily harm:

(a) Bottle - United States v. Straub, 12 C.M.A. 156, 30 C.M.R. 156 (1961);

(b) rock - Part IV, para. 54c(4)(a)(ii), MCM, 1984;

(c) boiling water - id.;

(d) drug - id.;

(e) beer can opener - United States v. Holley, 5 C.M.A. 661, 18 C.M.R. 285 (1955);

(f) heavy belt buckle - United States v. Patterson, 7 C.M.A. 9, 21 C.M.R. 135 (1956);

(g) a fist or foot - United States v. Vigil, 3 C.M.A. 474, 13 C.M.R. 30 (1953);

(h) CS grenade - United States v. Schroder, 47 C.M.R. 430, 474 (A.C.M.R. 1973), United States v. Van Beek, 47 C.M.R. 98 (A.C.M.R. 1973);

(i) motor vehicle - United States v. Yoakum, 8 M.J. 763 (A.C.M.R. 1980); and

(j) bodily fluids containing HIV - United States v. Stewart, 29 M.J. 92 (C.M.A. 1989).

(3) It makes no difference in this aggravated form of article 128 whether or not the victim actually received any harm. A battery is not required. An assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm is sufficient. Indeed, this offense may be committed even if the victim remains completely unaware of his "close shave" (i.e., an attempt-type assault with the aggravated means). In United States v. Vigil, 3 C.M.A. 474, 13 C.M.R. 30 (1953), C.M.A. stated: "The crucial question is whether its use, under the circumstances of the case, is likely to result in death or grievous bodily harm.... Persuasive evidence upon this question is found in the nature of the means or force itself, the manner of its use, the parts of the body toward which it is directed, and where applicable, the extent of the injuries actually inflicted." Id. at 474-475, 13 C.M.R. at 32-33. Note that, in the situation in which bodily harm does not result, the accused's action must at least amount to an assault, either of the offer (mind of the victim in fear) or the attempt (intended by the accused) type.

(4) If a battery (bodily harm) does result from use of a dangerous weapon or a means or force likely to produce death or grievous bodily harm, however, an offer- or attempt-type assault does not have to exist; that is, the victim need not have been put in fear and the accused need not have intended the bodily harm. All that is necessary, as in the case of a simple battery, is that the accused acted in a culpably negligent manner. United States v. Yoakum, 8 M.J. 763 (A.C.M.R. 1980). In other words, the minimum state of mind is the same as that required for a battery and, where injury is actually inflicted, the existence of the attempt or offer situation required in simple assault is not a prerequisite to the commission of the aggravated crime of assault with a dangerous weapon or means or force likely to produce death or grievous bodily harm. United States v. Redding, 14 C.M.A. 242, 34 C.M.R. 22 (1963). United States v. Santiago-Vargas, 5 M.J. 41 (C.M.A. 1978).

D. LIO's of assault with a dangerous weapon, etc.

1. Attempted assault with a dangerous weapon, etc. See United States v. Polk, 1 M.J. 1019, 1021-1022 (N.C.M.R. 1976); United States v. Locke, 16 M.J. 763 (A.C.M.R. 1983).

2. Simple assault of either the offer or attempt type.

3. Assault consummated by a battery, if a touching is alleged and proved. Compare United States v. Clay, 9 C.M.A. 582, 26 C.M.R. 362 (1958) with United States v. Hamilton, 10 C.M.A. 130, 27 C.M.R. 204 (1959).

4. Disrespect. United States v. Van Beek, 47 C.M.R. 98 (A.C.M.R. 1973). This is an isolated holding not supported by any C.M.A. decision on this point. But cf. United States v. Virgilito, 22 C.M.A. 394, 47 C.M.R. 331 (1973).

E. Multiplicity with other offenses. Although the question of whether any given offense is mutiplicious with another is basically one of fact, the examination of a few cases will help determine the answer to any particular problem.

1. United States v. Jessie, 2 M.J. 573 (A.C.M.R. 1977) held that the offenses of assault with a dangerous weapon and carrying a concealed weapon were not multiplicious.

2. United States v. Phifer, 3 M.J. 761 (A.C.M.R. 1977) held that assault with a dangerous weapon and escape from confinement were not multiplicious when the accused pointed a pistol at a policeman as he departed the building.

F. Pleading an assault with a dangerous weapon, etc.

1. Sample specification. Part IV, para. 54f(8), MCM, 1984, provides for alleging the word "assault" in every case, whether or not the assault is consummated (i.e., whether it be an assault or a battery).

2. The manner in which the victim was assaulted must be alleged. If injury was inflicted, allege the specific location of the injury.

3. If the instrumentality used is commonly thought of as a "dangerous weapon," use that allegation. Otherwise, use the allegation "(means) (force) likely to produce grievous bodily harm." The failure to plead either one or the other of these allegations will obviously result in a failure to state this type of assault offense. United States v. Locke, 16 M.J. 763 (A.C.M.R. 1983).

4. Example:

> In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], commit an assault upon Seaman Apprentice Abner Peabody, U.S. Navy, by striking at him with a dangerous weapon, to wit: a knife.

0805 INTENTIONAL INFLICTION OF GRIEVOUS BODILY HARM (Key Numbers 595-600)

A. Elements. Part IV, para. 54b(4)(b), MCM, 1984.

1. That the accused assaulted a certain person;

2. that grievous bodily harm was thereby inflicted upon such person;

3. that the grievous bodily harm was done with unlawful force or violence; and

4. that the accused, at the time, had the specific intent to inflict grievous bodily harm.

This offense consists of an aggravated battery. Review the rules on battery and add to them the requirement that the bodily harm inflicted was "grievous" (as discussed in section 0804, supra) and that will constitute the first three elements of this offense.

B. Intentionally Inflicted

1. This is a specific intent offense. United States v. Groves, 2 C.M.A. 541, 10 C.M.R. 39 (1953). Culpable negligence will not suffice. In addition to proving that the accused inflicted grievous bodily harm, it must be proved that the accused's action causing such harm was done with the specific intent of accomplishing that result.

2. Proving intent

a. The intent can be proved by either direct or circumstantial evidence.

(1) Direct evidence of the specific intent will usually consist of statements or admissions by the accused.

(2) Circumstantial evidence of the specific intent is usually provided by the facts surrounding the assault. When grievous bodily harm has been inflicted by intentionally using force in a manner likely to achieve that result, it may be inferred that grievous bodily harm was intended. Part IV, para. 54c(4)(b)(ii), MCM, 1984.

(a) Specific intent may not be inferred merely because harm was foreseeable from the action.

(b) In order to warrant an inference of intent, it must appear that such harm was a natural and probable consequence of the intentional action.

b. Examples:

(1) A intentionally knocks B from the roof of a two-story building to the pavement below, causing several broken bones. Grievous bodily harm is certainly a natural and probable consequence of such an act. Such an injury is likely to result from such action. Hence, it may be inferred that A specifically intended that result.

(2) A and B engage in a fist fight and A lands a solid punch to B's face, causing a brain concussion. Query: May it be inferred from this that A specifically intended to inflict grievous bodily harm? Answer: No. A brain concussion is not likely to result from an ordinary fist fight. Although such an injury may be foreseeable, it is not likely or probable.

(3) C and D hold B, while A delivers a series of punches to B's head with his fist and causes a concussion. Query: May the specific intent be inferred in this situation? Answer: Yes. Repeatedly striking another under these circumstances could be found to be likely to result in "grievous bodily harm." Such an injury is a "natural and probable" result. See Part IV, para. 54c(4)(b)(ii), MCM, 1984.

C. LIO's

1. Assault with a dangerous weapon or other means or force likely to produce grievous bodily harm. Example: While B is asleep in bed, A punches B in the head and face with gloved fists. B loses 11 teeth, both eyes are completely shut, both cheekbones and both his upper and lower jaws are fractured. A was charged with assault by intentionally inflicting grievous bodily harm. The court-martial found him not guilty of that, but guilty of assault with a means likely to produce grievous bodily harm, to wit: his fists. Held: Affirmed. It was an LIO. United States v. Vigil, 3 C.M.A. 474, 13 C.M.R. 30 (1953).

2. Assault consummated by a battery.

3. Simple assault.

4. United States v. Waldron, 9 M.J. 811 (N.C.M.R. 1980), aff'd, 11 M.J. 36 (C.M.A. 1981) discusses a related issue. The accused in that case was charged with murder, but the trial court found him guilty of the "lesser included offense" of assault with the intentional infliction of grievous bodily harm. The court said that this was error, since the uncontroverted evidence showed that the accused shot the victim and that the victim died as a result. The court said the least offense of which the accused could be convicted was manslaughter. But see United States v. Rodwell, 20 M.J. 264 (C.M.A. 1985), where the court erred during prosecution on charge of assault with intent to murder by failing to instruct on the lesser included offense of assault with the intentional infliction of grievous bodily harm. On appeal, the court stated that the lesser included offense was reasonably raised by the evidence and fairly alleged by the language in the specification "by repeatedly stabbing ... [the victim] with a knife."

D. Sample specification. Part IV, para. 54f(9), MCM, 1984.

> In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], commit an assault upon Seaman Abner N. Peabody, U.S. Navy, by repeatedly striking him in the face with his fists and thereby did intentionally inflict grievous bodily harm upon him, to wit: a broken jaw.

0806 ARTICLE 128 OFFENSES AGGRAVATED BY THE STATUS OF THE VICTIM (Key Numbers 595-600)

A. Assaults upon commissioned officers, warrant officers, noncommissioned officers or petty officers

1. Elements. Part IV, para. 54b(3)(a), MCM, 1984.

a. That the accused assaulted the victim as alleged;

b. that the victim of the assault was a commissioned officer, WO, NCO, or PO; and

c. that the accused had actual knowledge that the victim was a commissioned officer, WO, NCO, or PO.

2. It is not necessary that the victim be superior to the accused, in the same armed force as the accused, or in the execution of his office.

3. This offense is an LIO of articles 90 (assault upon a superior commissioned officer) and 91 (assault upon a WO, NCO, or PO in the execution of office) which are discussed below.

4. Sample specification. Part IV, para. 54f(3) and (4), MCM, 1984.

> In that [Name, etc. and personal jurisdiction data], did [at/on board (location)], on or about [date], assault Colonel I. M. Arouge, U.S. Army, a commissioned officer, and known by the said Private Smith to be a commissioned officer, by striking the said Colonel Arouge in the face with his fist.

B. Assaults upon sentinels or lookouts in the execution of their duty or upon persons in the execution of law enforcement duties

1. Elements. Part IV, para. 54b(3)(b), MCM, 1984.

a. That the accused assaulted the victim as alleged;

b. that the victim of the assault was a sentinel or lookout in the execution of his duty or was a person who then had and was in the execution of air police, military police, shore patrol, master at arms, or other military or civilian law enforcement duties [See United States v. Gholston, 15 M.J. 582, 584 (A.C.M.R. 1983) (assault upon a sentinel en route to his guard post does not constitute assault upon sentinel in execution of his duty)]; and

c. that the accused knew of the law enforcement duties or status of the victim.

2. Note: Mistreatment by a person executing police duties may divest such person of his cloak of authority. United States v. Rozier, 1 M.J. 469, 472 (C.M.A. 1976); United States v. Garretson, 42 C.M.R. 472, (A.C.M.R. 1970); United States v. Meland, 8 C.M.R. 822 (A.B.R. 1953).

3. Sample specification. Part IV, para. 54f(5) and (6), MCM, 1984.

> In that [Name, etc. and personal jurisdiction data], did, [at on/on board (location)], on or about [date], assault Patrolman W. E. Earp, Newport Police Department, a person then having and in the execution of civil law enforcement duties, and known by the said [name of accused] to have and be in the execution of civil law enforcement duties by kicking the said Patrolman Earp in the shins with his foot.

C. Assault, consummated by a battery, upon a child under 16 years of age

1. Elements. Part IV, para. 54b(3)(c), MCM, 1984.

a. That the accused, with unlawful force or violence, did bodily harm to the victim as alleged; and

b. that the victim was under 16 years of age.

2. Knowledge of the age of the victim is not an element of this offense.

3. This is a battery only. Offer or attempt assaults do not constitute this form of aggravated assault.

4. Sample specification. Part IV, para. 54f(7), MCM, 1984.

> In that [Name, etc, and personal jurisdiction data], did, [at/on board (location)], on or about [date], unlawfully strike Thomas R. Sade, a child under the age of sixteen years, on the back with a whip.

5. When the abuse of a child consists solely of assaults, article 128 preempts the field and precludes the use of a state child abuse statute through the Federal Assimilative Crimes Act, 18 U.S.C. § 13. See Chapter X of this study guide. United States v. Irvin, 21 M.J. 184 (C.M.A. 1986) (difference in punishment was 8 years vice 2). On a rehearing of this case, the Air Force Court of Military Review was forced to set aside the finding of guilty. The court noted that, while there was evidence of bruises and injuries, there was no evidence that the accused caused the harm. United States v. Irvin, 22 M.J. 559 (A.F.C.M.R. 1986).

0807 ASSAULTS UPON SUPERIOR COMMISSIONED OFFICERS AND WO'S, NCO'S, AND PO'S IN THE EXECUTION OF THEIR OFFICE (Key Numbers 589-600, 693-698)

A. Text of Article 90(1), UCMJ:

> Any person subject to this chapter who --
>
> (1) Strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office ... shall be punished ... as a court-martial may direct.

B. Text of Article 91(1), UCMJ:

> Any warrant officer or enlisted person who --
>
> (1) Strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his officer ... shall be punished as a court-martial may direct.

C. Discussion

1. Article 90(1) denounces three varieties of assault:

a. Striking a superior commissioned officer in the execution of his office (a battery);

b. drawing or lifting up a weapon against a superior commissioned officer in the execution of his office (an assault with a weapon); and

c. offering violence against a superior commissioned officer in the execution of his office (an assault).

2. Article 91(1) denounces two varieties of assault:

a. Striking a WO, NCO, or PO in the execution of his office (a battery); and

b. assaulting a WO, NCO, or PO in the execution of his office (an assault).

3. In effect, the article 90(1) and 91(1) offenses are simply assaults aggravated by the status of the victim and the relationship between the accused and the victim. Unlike the offenses set out under article 128, superiority is an essential element under article 90(1) and execution of office is an element under both article 90(1) and 91(1).

D. Elements. Part IV, paras. 14b(1) and 15b(1), MCM, 1984.

1. Assault upon a superior commissioned officer. Article 90, UCMJ; Part IV, para. 14b(1), MCM, 1984.

a. That the accused struck, drew, or lifted up a weapon against, or offered violence against, a certain commissioned officer;

b. that the officer was the superior commissioned officer of the accused;

c. that the accused then knew that the officer was the accused's superior commissioned officer; and

d. that the superior commissioned officer was then in the execution of office.

2. Assault upon a WO, NCO, or PO. Article 91, UCMJ; Part IV, para. 15b(1), MCM, 1984.

a. That the accused was a warrant officer or enlisted member;

b. that the accused struck or assaulted a certain warrant, noncommissioned, or petty officer;

c. that the striking or assault took place while the victim was in the execution of office; and

d. that the accused then knew that the person struck or assaulted was a warrant, noncommissioned officer.

Note: If the victim was the superior NCO or PO of the accused, add the following elements in order to increase the maximum punishment:

e. That the victim was the superior noncommissioned or petty officer of the accused; and

f. that the accused then knew that the person struck or assaulted was the accused's superior noncommissioned or petty officer.

E. Superior. The meanings of the terms superior commissioned officer and WO, NCO, or PO are the same as have been previously discussed in connection with the offenses of disobedience and disrespect. See Chapter IV of this study guide. Acting noncommissioned officers cannot be victims of an article 91 assault. United States v. Lumbus et al., 23 C.M.A. 231, 49 C.M.R. 248 (1974).

F. Knowledge of the status of the victim. As in the offenses of disrespect to and disobedience of a superior commissioned officer, WO, NCO or PO, the accused must have had actual knowledge at the time of the offense that the victim was his superior. Thus, knowledge is an element.

G. Analysis of the several "types" of "assault" covered in articles 90(1) and 91(1):

1. Against a superior commissioned officer, article 90(1):

a. Strikes: "'Strikes' means an intentional blow, and includes any offensive touching however slight." Part IV, para. 14c(a)(iii), MCM, 1984.

b. Draws or lifts up any weapon against: The drawing of any weapon in an aggressive manner or the raising or brandishing of the same in a threatening manner in the presence of the superior, and at him, is the sort of act proscribed. The raising in a threatening manner of a firearm, whether or not loaded, or of a club, or of anything by which a serious blow could be given is within the description "lifts up." Part IV, para. 14c(a)(iii), MCM, 1984.

c. Offers any violence against him. This term includes "any form of battery or of mere assault not embraced in the preceding more specific terms 'strikes' and 'draws or lifts up.'" Part IV, para. 14c(a)(iv), MCM, 1984. Example: Placing cocaine in an officer's soft drink. United States v. Butler, 17 M.J. 222 (C.M.A. 1984).

d. Mere threatening words do not constitute this offense. Part IV, para. 14c(a)(iv), MCM, 1984.

2. Against a WO, NCO, or PO -- article 91(1):

a. Strikes: A battery as defined in Part IV, para. 54, MCM, 1984. United States v. Alexander, 11 M.J. 726 (A.C.M.R. 1981) provides an example.

b. Assaults: This term refers to either the offer or attempt proscribed by article 128. See Part IV, para. 54c, MCM, 1984.

H. In the execution of office. These offenses can be committed only if the victim was in the execution of office at the time of the assault.

1. A person "is in the execution of office when engaged in any act or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage." Part IV, para. 14c(1)(b), MCM, 1984. A person may be in the execution of office, even though not "on duty." United States v. Jackson, 8 M.J. 602, 603 (A.C.M.R. 1979).

2. The CO on board a ship or of a unit in the field is generally considered to be on duty at all times. Part IV, para. 14c(1)(b), MCM, 1984.

3. Generally, if the superior has a duty to maintain discipline over another at the time, acts done for this purpose would be in the execution of his office. Id. Example: An ensign walking down Thames Street sees two sailors about to get into a fight. He steps between them, identifies himself, and orders them to break it up. One of them punches the ensign in the nose. The ensign was in the execution of his office at the time. See United States v. Jackson, supra.

4. A person acting outside the scope of his or her authority or who is engaged in the commission of an offense is not in the execution of office. United States v. Revels, 41 C.M.R. 475, 481 (A.C.M.R. 1969). Example: A petty officer on guard duty in a brig entered a cell to have a drink of whiskey with the prisoners. While drinking with them, he was assaulted by the accused. Held: He was not in the execution of his office at the time. United States v. Gallines, 8 C.M.R. 606, 609 (C.G.B.R. 1953). Contra e.g.: United States v. Richardson, 6 M.J. 656 (N.C.M.R. 1978) (no right to assault superiors even though latter addressed accused as "boy"), aff'd, 7 M.J. 320 (C.M.A. 1979); United States v. McDaniel, 7 M.J. 522 (A.C.M.R. 1979) (administering a cold shower to an intoxicated soldier does not constitute abandonment of rank).

I. LIO's

1. If it cannot be proved that the victim was "in the execution of office" or was a "superior" commissioned officer, the accused may still be guilty of the LIO of assault or battery upon a commissioned officer, NCO, or PO in violation of article 128. See section 0806A, supra.

2. If knowledge of the status of the victim is not proved, the accused may still be guilty of a simple assault or battery in violation of article 128. United States v. Stegall, 6 M.J. 176, 177 (C.M.A. 1979).

3. If the accused is found guilty of a lesser included article 128 violation, it will be necessary for the court to include by exceptions and substitutions the word "unlawfully" in its findings. This is permissible since an allegation of striking a superior while in the execution of his office fairly implies that it was unlawful. United States v. Niemic, 14 C.M.R. 813, 816 (A.B.R. 1954).

J. Pleading

1. Sample specification of an article 90(1) offense. Part IV, paras. 14f(1), (2), and (3), MCM, 1984.

> In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], lift up a weapon, to wit: a crowbar, against Ensign Thomas G. Flubber, U.S. Naval Reserve, on active duty, his superior commissioned officer, and known by the said Seaman Jones to be his superior commissioned officer, who was then in the execution of his office.

2. Sample specification for an article 91(1) offense.

> In that Seaman Willie N. Jones, U.S. Navy, USS Tubbs, did, on board USS Tubbs, on or about 10 March 19__, strike Yeoman Third Class John M. Clump, U.S. Navy, a petty officer, and known by the said Seaman Jones to be a (superior) petty officer who was then in the execution of his office, by striking him on the face with a shoe.

a. Note that this sample alleges the aggravating factor of superiority of the victim. While superiority is one essential element of an article 90 assault, it is an optional element under article 91 which, if pled and proved, will increase the maximum available punishment. See Part IV, paras. 15e(2) and (3), MCM, 1984.

b. Note also that in the above specification there is no necessity to modify the word "strike" by any words importing criminality (e.g., "unlawfully" or "wrongfully"). The distinction between a specification under article 91 and article 128 is that the mere striking of a WO, NCO, or PO while in the execution of office, coupled with an allegation describing the manner of striking, fairly implies an unlawful act. United States v. Martin, 13 C.M.R. 587 (N.B.R. 1953); United States v. Jones, 12 M.J. 893 (A.C.M.R. 1982).

0808 MAIMING (Key Numbers 601-606, 845)

A. Text of Article 124, UCMJ:

> Any person subject to this chapter who, with intent to injure, disfigure, or disable, inflicts upon the person of another an injury which --
>
> (1) Seriously disfigures his person by any mutilation thereof;

(2) destroys or disables any member or organ of his body; or

(3) seriously diminishes his physical vigor by the injury of any member or organ,

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

B. Elements. Part IV, para. 50b, MCM, 1984.

a. That the accused inflicted a certain injury upon a certain person;

b. that this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished this person's physical vigor by the injury to an organ or member; and

c. that the accused inflicted this injury with an intent to cause some injury to a person.

C. Discussion

1. This offense requires only a specific intent to injure, not a specific intent to maim. Therefore, it is not a defense to a charge of maiming that the accused intended only a slight injury if in fact he did inflict serious harm. United States v. Hicks, 6 C.M.A. 621, 20 C.M.R. 337 (1956). The Manual for Courts-Martial, 1969 (Rev.) contained different language concerning the intent involved in maiming. The 1969 MCM stated that the offense required a general intent to injure rather than a specific intent to maim. Accordingly, in United States v. Tua, 4 M.J. 761 (A.C.M.R. 1977), it was held that, since maiming was a general intent offense, the defense of voluntary intoxication did not exist. Based on the language of Part IV, para. 50c(3), MCM, 1984, it can now be concluded that maiming does require a specific intent to cause some general injury. Accordingly, it would appear that voluntary intoxication could serve as a defense to negate the required specific intent. See the discussion of voluntary intoxication as a defense in section 1015, infra.

2. The offense is complete if a serious injury is inflicted, even though there is a possibility that the victim may eventually recover the use of the member or organ or the disfigurement may be corrected by surgery. Part IV, para. 50c(1), MCM, 1984.

D. LIO's. Among the offenses which may be included in a particular charge of maiming are aggravated assault, assault and battery, and assault. Part IV, para. 50d, MCM, 1984.

E. Sample specification. See Part IV, para. 50f, MCM, 1984.

0809 ARTICLE 134 ASSAULTS (Key Numbers 595-600, 759-764)

A. Article 134, UCMJ, makes punishable two types of assaults:

1. Indecent assaults, which are discussed below, and

2. assaults with the intent to commit certain serious offenses:

a. Murder;

b. voluntary manslaughter;

c. rape;

d. robbery;

e. sodomy;

f. arson;

g. burglary; and

h. housebreaking.

B. Discussion of the assaults with the intent to commit other offenses. See Part IV, para. 64, MCM, 1984.

1. Sample specification. Part IV, para. 64f, MCM, 1984.

2. Closely related to all of these varieties of assault are the attempt offenses. In any given case, there may be little difference between the assault with the intent to commit the underlying offense and an attempt to commit that offense. One significant difference is that the assault offense may be made out even though the attempt would not. The latter would result if the overt act involved did not amount to more than mere preparation. For example, an assault with the intent to commit arson may occur if the accused assaults a guard posted to protect the target of the intended arson; however, if the accused is apprehended at that point, he might not be convicted of attempted arson since the assault could be viewed as only preparation.

3. Care must be taken to plead, prove, and instruct on the specific intent aspect of these offenses. For example, in United States v. Henry, 1 M.J. 155 (C.M.A. 1975), the court held that the military judge erred in his instructions on assault with intent to commit voluntary manslaughter by defining voluntary manslaughter in a manner which permitted the court to find the accused guilty if he intended either to kill the victim or to inflict grievous bodily harm upon him. Only an intent to kill will suffice to sustain a conviction for assault with the intent to commit voluntary manslaughter. Accord United States v. Barnes, 15 M.J. 121 (C.M.A. 1983).

4. Whether the assault aspect of the accused's crimes will merge with any other consummated offenses for punishment purposes is a close factual question. For example, in United States v. Douglas, 2 M.J. 470 (A.C.M.R. 1975), it was held that in a case in which the accused was charged with assault with intent to commit murder, but convicted of aggravated assault in addition to attempted robbery of the same victim, an offense separate from the assault included in the attempted robbery was properly found and used by the panel in reaching its sentence, despite the defense's contention that the attempted robbery and the assault were multiplicious for sentencing purposes. See also United States v. Valenzuela, 15 M.J. 699 (A.C.M.R. 1983) (aggravated assault and attempted rape were not multiplicious for sentencing where the accused's use of force continued after he voluntarily abandoned the attempted rape).

0810 AFFIRMATIVE DEFENSES TO ALL FORMS OF ASSAULT (Key Numbers 832-842)

A. Scope of discussion. Defenses to be discussed apply generally to:

1. All of the article 128 offenses;

2. all assaults in violation of article 90(1) and 91(1); and

3. the article 134 assault offenses.

B. In general, the affirmative defenses to assault are based upon the following concepts:

1. Legal justification;

2. legal excuse; or

3. legal consent.

C. Legal justification. R.C.M. 916(c), MCM, 1984.

1. An act of force or violence committed in the proper performance of a legal duty is justified. United States v. McDaniel, 7 M.J. 522 (A.C.M.R. 1979) (no assault for NCO to place drunk and protesting soldier in a cold shower in order to sober him up).

a. A duty may be imposed by statute, regulation, or lawful order.

b. However, legal justification is a defense only to that degree of force necessary to carry out the legal duty. If any force is used in excess of that required, the excessive force may constitute a battery. See United States v. Rozier, 1 M.J. 469 (C.M.A. 1976).

2. The acts of a subordinate, done in good faith in compliance with his supposed duty or orders, are justifiable except:

a. When the acts are clearly beyond the scope of his authority;

b. when the order is such that a man of ordinary sense and understanding would know it to be illegal [see United States v. Keenan, 18 C.M.A. 108, 39 C.M.R. 108 (1969); United States v. Schultz, 18 C.M.A. 133, 39 C.M.R. 133 (1969); United States v. Cherry, supra (order to keep driving truck with defective brakes in a congested area patently illegal and person of ordinary sense would know it to be unlawful - accused's actions would not be excused)]; or

c. where the subordinate willfully or through culpable negligence endangers the lives of innocent parties in discharging his duty.

3. Examples of acts of force or violence that would be legally justified:

a. Shooting an enemy in battle;

b. physical contact during a lawful apprehension;

c. physical contact while a guard is subduing an unruly prisoner [United States v. Acosta-Vargas, 13 C.M.A. 388, 32 C.M.R. 388 (1962)]; and

d. resisting an unlawful apprehension which is executed in such a manner that self-defense is required or which divests the apprehending officials of their authority. United States v. Rozier, supra. See discussion, supra in Chapter VII of this study guide.

D. Legal excuse

1. Acts of force or violence are legally excused if done:

a. Through accident or misadventure;

b. in lawful self-defense;

c. in the lawful defense of another;

d. where a special privilege exists; or

e. under coercion or duress.

2. Accident or misadventure

a. The defense of accident is not raised by showing that the ultimate consequence of an act is unintended or unforeseen if the act was specifically intended and directed at another. United States v. Cohen, 2 M.J.

350 (A.F.C.M.R. 1976). See also United States v. Lett, 9 M.J. 602 (A.F.C.M.R. 1980) and United States v. Ferguson, 15 M.J. 12 (C.M.A. 1983). Accident is an unexpected act, not the unexpected consequences of a deliberate act. United States v. Leach, supra.

b. A detailed description of this defense can be found in Chapter X of this text.

3. Self-defense

a. General rule: One who is himself free from fault is privileged to use reasonable force to defend himself against immediate bodily harm threatened by the unlawful act of another.

b. Free from fault: One who intentionally provokes an altercation or who willingly engages in mutual combat is not free from fault and forfeits the right of self-defense. United States v. Green, 13 C.M.A. 545, 33 C.M.R. 77 (1963). Moreover, when the accused is a trespasser, the right of self-defense is limited. In United States v. Richey, 20 M.J. 251 (C.M.A. 1985), the court ruled that the accused could only defend himself against excessive force because the lawful occupant was entitled to use reasonable force to eject him as a trespasser.

(1) If one who provokes a fight withdraws in good faith, however, and his adversary follows and renews the fight, the latter becomes the aggressor and the one who originally started the altercation may resort to self-defense. In addition, even a person who starts an affray is entitled to use self-defense when the opposing party escalates the conflict using a greater level of force. United States v. Cardwell, 15 M.J. 124 (C.M.A. 1983).

(2) Where an issue of fact exists as to whether the accused or the injured party was the aggressor, the issue is for the finder of fact to decide after receiving proper instructions. United States v. Campbell, 14 C.M.A. 383, 34 C.M.R. 163 (1964).

(3) One is not per se deprived of the right to act in self-defense by the fact that he has armed himself with a gun and sought out his eventual victim following a prior violent encounter with such person. The existence of the defense of self-defense depends upon the factual question of the intent of the accused in returning and the provocation he offers the victim upon again contacting him. It is well settled that, where the accused armed himself for possible self-protection and his purpose in seeking out the victim was conciliatory, he does not become an aggressor and such testimony places self-defense in issue. United States v. Moore, 15 C.M.A. 187, 35 C.M.R. 159 (1964).

c. Reasonable force: The force to which one may resort in self-defense is that which he believes on reasonable grounds to be necessary, in view of all the circumstances of the case, to prevent impending injury. United States v. Acosta-Vargas, 13 C.M.A. 388, 32 C.M.R. 388 (1962); United States v. Wilson, 26 M.J. 10 (C.M.A. 1988).

(1) The theory of self-defense is protection and, if excessive force is used against an assailant, the defender becomes the aggressor. United States v. Straub, 12 C.M.A. 156, 30 C.M.R. 156 (1961).

(2) This principle, however, does not restrict one to the precise force threatened by the assailant. The degree of force permitted the defender need not be identical with the means employed by the assailant. United States v. Acosta-Vargas, supra. The phrase "a person may meet force with a like degree of force" has been condemned in several cases as being an unsatisfactory statement of the principle of self-defense. See United States v. Smith, 13 C.M.A. 471, 33 C.M.R. 3 (1963) and United States v. Hayden, 13 C.M.A. 497, 33 C.M.R. 29 (1963).

d. The MCM Tests: R.C.M. 916(e), MCM, 1984, sets forth three separate tests to be applied in determining the reasonableness of the accused's resort to self-defense when he anticipates impending harm. United States v. Perry, 16 C.M.A. 221, 36 C.M.R. 377 (1966); United States v. Armistead, 16 C.M.A. 217, 36 C.M.R. 373 (1966); United States v. Jackson, 15 C.M.A. 603, 36 C.M.R. 101 (1966); United States v. Shufford, 7 M.J. 716 (A.C.M.R. 1979); and United States v. Whitfield, 7 M.J. 780 (A.C.M.R. 1979).

(1) Self-defense when accused intends to kill or to inflict grievous bodily harm upon the aggressor. If the accused resorts to such force as is likely to kill or inflict grievous bodily harm upon the aggressor, he must meet two conditions before the defense of self-defense will be available to him. They are:

(a) The circumstances must be such that a reasonably prudent person would believe that death or grievous bodily harm was to be inflicted upon himself by the aggressor. This is an objective test and the intoxication or emotional instability of the accused is not a relevant consideration. R.C.M. 916(e)(1)(A), MCM, 1984; United States v. Judkins, 14 C.M.A. 452, 34 C.M.R. 232 (1964). Detached reflection under pressure or in a fast-moving situation is not, however, demanded. United States v. Regalado, 13 C.M.A. 480, 33 C.M.R. 12 (1963).

(b) The accused must believe that the force which he used was necessary to protect himself from death or grievous bodily harm. R.C.M. 916(e)(1)(B), MCM, 1984. This is a subjective test. The state of the sobriety or emotional stability of the accused is therefore a relevant factor to be examined. Thus, the resort to excessive force is justified if the accused believed that such force was necessary to repel the attack.

(c) R.C.M. 916(e)(1) allows the use of deadly force in cases of "homicide, assault involving deadly force, or battery involving deadly force." This means that the defense of self-defense is available whenever the factual circumstances involve deadly force, regardless of the specific assault offense the accused is charged with.

(2) Self-defense when the accused offers to utilize a dangerous weapon or other means likely to produce death or grievous bodily harm. If the accused is charged with an offer-type assault with a dangerous weapon, means, or force, he or she may still claim self-defense even though not in fear of death or grievous bodily harm. Two conditions must be met:

(a) The accused, on reasonable grounds, must believe that bodily harm is about to be wrongfully inflicted. R.C.M. 916(e)-(2)(A), MCM, 1984. This is an objectively reasonable fear of a simple battery.

(b) The accused, in order to deter the assailant, offered but did not actually apply or attempt to apply a means, force, or weapon which, if applied, would be likely to cause death or grievous bodily harm. R.C.M. 916(e)(2)(B), MCM, 1984; United States v. Lett, 9 M.J. 602 (A.F.C.M.R. 1980). This is an objective evaluation of the conduct of the accused. This then is an example of a situation in which the accused is not strictly required to meet force with like force. An accused who is facing a nondeadly battery may offer deadly force to repel the attacker. It may be helpful to examine some examples.

-1- A is confronted by B, an assailant. B raises his fist in order to strike A. A, in reasonable fear that he may be struck, picks up a tire iron and holds it over his head telling B that he'd better not come one step closer. B retreats. A has a valid claim of self-defense to a charge of assault with the dangerous tire iron.

-2- Assume the same facts, but this time A swings at B, trying to hit him in the head with the tire iron. A cannot claim self-defense because this assault with a dangerous weapon in response to non-deadly force was of the attempt-type.

-3- Assume the same facts as in -2- above, but this time also assume that A reasonably believes B to be a 7th degree black belt who can kill with one blow. A's actual application of deadly force is now justified. R.C.M. 916(e)(1), MCM, 1984.

(3) Self-defense when the accused uses less than deadly force. If the accused resorts to the use of force to protect himself against harm from an aggressor, he may use such force as is reasonably necessary to accomplish that result. To determine what is reasonable, the following tests must be applied.

(a) The circumstances must be such that a "reasonably prudent man" would believe that bodily harm was about to be inflicted upon himself. R.C.M. 916(e)(3)(A), MCM, 1984. This is an objective test.

(b) The accused must believe that the force he resorts to using is necessary to repel the attacker. R.C.M. 916(e)(3)(B), MCM, 1984. This is a subjective test.

(c) The force used must be less than that which could reasonably be thought likely to produce grievous bodily harm or death. Id. This is an objective test and the "reasonably prudent man" standard would be utilized.

(4) In order to raise self-defense, "there must be some evidence from which a reasonable inference can be drawn that ... self-defense was in issue. That evidence need not be compelling" nor must it support only that theory. United States v. Shufford, 7 M.J. 716, 719 (A.C.M.R. 1979). The defense may be raised even if an innocent bystander is injured. United States v. Taliau, 7 M.J. 845 (A.C.M.R. 1979). If more than one of the tests are reasonably raised, each must be instructed upon. United States v. Thomas, 11 M.J. 315, (C.M.A. 1981) and United States v. Jones, 3 M.J. 279 (C.M.A. 1977).

(5) Retreat. R.C.M. 916(e)(4), MCM, 1984 (discussion).

(a) United States v. Smith, 13 C.M.A. 471, 479, 33 C.M.R. 3, 11 (1963). Held: "The doctrine of 'retreat to the wall' has no place in self-defense.... There is no categorical requirement of retreat. Rather, the opportunity to do so safely is only a single factor to be considered by the triers of fact together with all the circumstances in evaluating the issue of the self-defense." In United States v. Hayden, 13 C.M.A. 497, 33 C.M.R. 29 (1963) C.M.A. stated: "...[T]he opportunity to ... [retreat] in safety is but one item to be considered with all other circumstances in determining whether the action taken was reasonably necessary." See also Brown v. United States, 256 U.S. 335 (1921); United States v. Hubbard, 13 C.M.A. 652, 33 C.M.R. 184 (1963); and United States v. Carmon, 14 C.M.A. 103, 33 C.M.R. 315 (1963). Lack of retreat is still a factor to be considered in determining self-defense. United States v. Clayborne, 7 M.J. 528 (A.C.M.R. 1979); United States v. Johnson, No. 80-2027 (N.M.C.M.R. 14 August 1981).

(b) The 1984 MCM carries forward the 1969 Manual's deletion of the "retreat to the wall" requirement found in the 1951 Manual, and instead indicates that available avenues of retreat is one factor to be considered in evaluating the reasonableness of the accused's apprehension and the necessity of the accused's actions. R.C.M. 916(e)(4), discussion, MCM, 1984.

4. Defense of others

a. General rule: A person may do in defense of another whatever the other could properly do in his own defense. Stated otherwise, a person may lawfully use force to protect another if the person protected would have been excused had he himself used such force to protect himself. See R.C.M. 916(e)(5), MCM, 1984.

b. If the person aided was in fact the aggressor, the person aiding him is likewise an aggressor. United States v. Styron, 21 C.M.R. 579 (C.G.B.R. 1956); United States v. Regalado, 13 C.M.A. 480, 33 C.M.R. 12 (1963). This puts the "protector" on the same footing as the "protected." The latter can only use force if he believes on reasonable grounds that it is necessary to protect himself from impending bodily injury.

c. Exception to general rule. The rule of common law is that, if a third party commits an assault in coming to the aid of another who is not entitled to commit an assault, then the third party may yet have a defense if he acted honestly and reasonably. Perkins, 1018-1022. In discussing

defense of another, however, R.C.M. 916(e)(5), MCM, 1984, merely states, "... the accused may not use more force than the person defended was lawfully entitled to use under the circumstances." In fact, the discussion following the MCM rule indicates that the accused, in coming to the aid of another, acts strictly at the accused's peril if the facts develop that the person aided had no lawful right to self-defense. R.C.M. 916(e)(5), (discussion), MCM, 1984.

5. Special privilege: There are certain situations where a special privilege exists to apply force to the person of another even though this is highly objectionable to the person to whom the force is applied. See Perkins, ch. 10, sec. 2.

a. Parent. A parent has the right to discipline his minor child by means of moderate chastisement. This authority will not excuse immoderate punishment and, if excessive force is used, it will constitute a battery. See United States v. Winkler, 5 M.J. 835 (A.C.M.R. 1978). A standard of reasonableness is the "majority rule," although it has been argued that the "minority" standard of malice has been adopted in the military. United States v. Winkler, supra; United States v. Moore, 30 C.M.R. 901 (A.F.B.R. 1960), rev'd on other grounds, 12 C.M.A. 696, 31 C.M.R. 282 (1962); United States v. Schiefer, 28 C.M.R. 417 (A.B.R. 1959). In United States v. Brown, 26 M.J. 148 (C.M.A. 1988), the court found the force used by the accused violated both the "improper motive" standard as well as the "reasonableness" standard. The distinction was held to be "academic" under the facts of the Winkler case, since the accused therein knew that his acts went beyond the scope of permissible physical discipline and were done with the knowledge that he was inflicting serious injury on his child.

b. Custodian. Any person entrusted with the care of small children or other incompetent persons may lawfully use reasonable force to accomplish acts necessary and incident to the exercise of their duty to care for such persons.

-- Example: Accused Singletary was charged with committing a lewd act upon a 7-year-old girl. He testified that, while serving as baby-sitter, the child was injured by striking the lower part of her body against the arm of a couch. He lowered her pants and saw a spot of blood on her privates. Then, in order to see where the blood was coming from, he inserted his index finger, to approximately the second knuckle, into the private parts of the child, and blood started coming down. The Board of Review set aside a finding of guilty of commission of a lewd act because the child had not been sworn prior to testifying against the accused. The board did consider the accused's testimony, as above-stated, as a judicial confession of assault and battery and affirmed a finding of guilty of that LIO of a lewd act. Issue: Was this a judicial confession of assault and battery? Held: No. C.M.A. stated:

> ...[A]ssault and assault consummated by a battery involve a general criminal intent, actual or apparent, to inflict violence or harm upon another.... [A]ccused admitted the act of touching, but he also declared that he did such acts only for the purpose of examining an apparent injury to the child in order to determine its extent. Accused's stated purpose was beneficent and intended to aid the child rather than to offer it harm.

There was no other evidence before the court to show that the touching was unlawful. United States v. Singletary, 14 C.M.A. 146, 33 C.M.R. 358 (1963).

c. Rightful occupant of premises: The rightful occupant of any premises, including the owner of a store as well as a home or other building, has a legal right to control it and to expel forcibly from the premises anyone who abuses the privilege by which he was initially allowed to enter and who fails to depart after being requested to do so and allowed a reasonable time to depart. United States v. Regalado, 13 C.M.A. 480, 33 C.M.R. 12 (1963). When one with the right to do so has ordered another person from the premises, the latter has no right to refuse or resist.

(1) The invitee has no right of self-defense to a lawful expulsion. If he refuses to leave and resists ejection, he is guilty of battery.

(2) If, however, the rightful occupant of the premises, in ejecting another, uses more force than is reasonably necessary under the circumstances, then he is guilty of a battery and the person being ejected can legally use force to protect himself from such violence. United States v. Regalado, supra, and United States v. Richey, 20 M.J. 251 (C.M.A. 1985).

6. Coercion or duress: An accused may be legally excused from assaultive conduct if accused was acting under circumstances giving rise to the defense of coercion or duress. Such circumstances are usually equivalent to circumstances giving rise to self-defense or defenses of another. For a discussion of the duress defense, see section 1011 of this text.

E. Lawful consent

1. General rule: The lawful consent of the victim of an alleged battery is a defense. To be an assault, the act must be done without the lawful consent of the person affected. Part IV, para. 54c(1)(a), MCM, 1984.

a. Consent obtained by duress: Submission obtained by threat of death or great bodily harm by one apparently able and willing to enforce his threat is not consent.

b. Consent obtained by fraud: Submission obtained by misrepresentation is not lawful and, hence, it is not a defense. Perkins, Criminal Law, ch. 9, sec. 3, pp. 856-861 (1957). United States v. Brantner, 28 M.J. 941 (N.M.C.M.R. 1989) (recruits' consent to acts of purported medical procedures did not make indecent contacts of recruiter lawful).

c. Capacity to consent: The consent will not be lawful if the person giving it is not legally capable of doing so. Perkins, supra, at 852-54.

(1) Some individuals cannot consent to certain acts because the law surrounds them with a protective status. Examples: Infants, insane persons, etc.

(2) There are some acts to which no one can lawfully consent.

(a) No one can lawfully consent to a battery that is likely to produce death or serious bodily injury. Exception: Where the act, though dangerous, is necessary to protect the health or to save the life of the victim. Example: A person with a defective heart could consent to a dangerous operation that might well result in death.

(b) No one can lawfully consent to an act that constitutes a breach of the peace. Example: Sally ran out of her house chased by Rollo, who caught her in the street, knocked her down, kicked her, and bruised her mouth and lips with his fist. At Rollo's trial, she testified that she had consented to the beating, saying she "wouldn't even go with a man unless he slapped me around" and that she desired and required physical abuse before engaging in sexual intercourse. Held: Sally could not lawfully consent to the beating since it was a breach of the peace. United States v. Holmes, 24 C.M.R. 762 (A.F.B.R. 1957). See also United States v. O'Neal, 16 C.M.A. 33, 36 C.M.R. 189 (1966).

d. Scope of the consent: If the scope of the consent given is exceeded, then the force or violence will be unlawful. Example: A football player, by entering the contest, consents to such physical contact as is customarily incident to the game. If one player intentionally kicks another in the face, however, this would constitute a battery. Perkins, supra, at 852-54.

2. Implied consent to certain touchings. Certain touchings, which normally occur in the course of everyday living, are considered to be lawful because consent is implied from necessity. Examples:

a. Grabbing another to prevent his falling;

b. bumping another while in a crowd; or

c. slapping a friend on the back as a greeting.

F. Voluntary abandonment. The affirmative defense of voluntary abandonment, as adopted in United States v. Byrd, 24 M.J. 286 (C.M.A. 1987), may apply to attempt-type assaults. Although the Byrd case dealt with an attempted drug distribution, the rationale should apply to all attempt offenses regardless of which UCMJ article they are pled under.

1. Attempted battery. Attempt-type assaults are nothing more than attempted batteries; that is, overt acts beyond mere preparation in furtherance of a specific intent to commit battery. An accused who commits an attempt-type assault that does not result in a battery may be entitled to this defense if the failure to complete the battery was a result of a voluntary abandonment of the criminal activity.

-- Example: The accused commits an attempt-type assault by swinging a stick at the victim's head with the specific intent of striking the victim. In mid-swing, the accused has a change of heart and diverts the stick away from contact with the victim. Although this is a completed attempt-type assault, the accused voluntarily abandoned the target offense (battery) and is entitled to the voluntary abandonment affirmative defense.

-- The result differs if the victim sees the accused swing the stick. Here, we have both an attempt-type and an offer-type assault. Voluntary abandonment pertains only to the attempt-type assault. The accused can be found guilty of an offer-type assault even though he abandoned the intent to commit battery. The prosecution may be able to prevent a defense-requested voluntary abandonment instruction by clearly asserting the government's theory as an offer-type assault vice an attempt-type assault.

2. WESTLAW. Voluntary abandonment is an evolving area in criminal justice. In order to track this issue as applied to assaults, use the following WESTLAW data base and inquiry:

a. Data base: all fed and all state

b. Inquiry: voluntary-abandonment & affirmative-defense & assault*

G. Character. The accused may offer evidence of a pertinent trait of character to prove that he acted in conformity with his character on the occasion at hand. In the area of assaults, the pertinent trait would be peaceableness. Mil.R.Evid. 404(a)(1) and para. 7-8 of DA Pam 27-9 (1982). See Chapter X of this study guide and Chapter VII of the Evidence Study Guide.

0811 SEX OFFENSES (Key Numbers 550, 553-576)

What follows is a brief outline of the more commonly encountered sex offenses. This discussion is included here because many, if not most, of these offenses involve assaults against the person of the victim. This section is not intended to be an exhaustive analysis, but rather a brief survey of the offenses noted.

A. Rape (Key Numbers 559-564). Article 120, UCMJ. Part IV, para. 45, MCM, 1984. An accused's act of sexual intercourse with a female not his wife, perpetrated by force and without her consent, is rape.

1. No specific intent is required by article 120. United States v. Polk, 48 C.M.R. 993 (A.F.C.M.R. 1974); United States v. Pugh, 9 C.M.R. 536, 542 (A.B.R. 1953) (intoxication not a defense).

2. Any penetration is sufficient to constitute the offense. Article 120, UCMJ; United States v. Aleman, 2 C.M.R. 269 (A.B.R. 1951).

3. The statute's application only to female victims and male perpetrators is not a constitutional defect. United States v. McCrary, No. 437500 (A.C.M.R. 29 Dec 1978) (Unpublished).

4. Lack of consent as an element

a. "Without her consent" is equivalent to "against her will." United States v. Short, 4 C.M.A. 437, 16 C.M.R. 11 (1954).

b. A child of tender years is incapable of consent. United States v. Aleman, supra; United States v. Thompson, 3 M.J. 168 (C.M.A. 1977); United States v. Huff, 4 M.J. 816 (A.C.M.R. 1978). (Because victim is under 16, proof of age is proof of nonconsent allowing fresh complaint evidence.)

c. No consent exists where victim is incompetent, unconscious, or sleeping. United States v. Robertson, 33 C.M.R. 828 (A.F.B.R. 1963).

d. Because both force and lack of consent must be shown to prove rape, the question of the degree of resistance may become a central issue. Part IV, para. 45c(1)(b), MCM, 1984. The amount of resistance required is that degree appropriate to the circumstances. This does not require the victim to risk her life to fend off her attacker. In some circumstances, no resistance at all is required. United States v. Henderson, 4 C.M.A. 268, 15 C.M.R. 268 (1954). When a victim fails to take measures required under the circumstances, however, it opens the door for a permissible inference that she did consent. United States v. Steward, 18 M.J. 506 (A.F.C.M.R. 1984) (Miller, J., concurring), petition denied, 19 M.J. 46 (C.M.A. 1984). This is a permissive inference only.

e. A victim's cooperation with her assailant after her resistance is overcome by numbers, threats, or fear of great bodily harm is not consent. United States v. Burt, 45 C.M.R. 557 (A.F.C.M.R. 1972), petition denied, 45 C.M.R. 928; United States v. Evans, 6 M.J. 577 (A.C.M.R. 1978); United States v. Lewis, 6 M.J. 581 (A.C.M.R. 1978), petition denied, 6 M.J. 194 (1979).

f. Sexual intercourse resulting from fraud in the factum is rape because there is no legally recognizable consent.

(1) In United States v. Booker, 24 M.J. 114 (C.M.A. 1987), a case of first impression, the Court of Military Appeals addressed the issue of "What is fraud in the factum in the context of consensual intercourse?" Id. at 116. The court held that "the better view is that the 'factum' involves both the nature of the act and some knowledge of the identity of the participant." Id. That is, "for there to be actual consent, a woman must be agreeable to the penetration of her body by a particular 'membrum virile'." Id. n.2.

In Booker, the victim, while in a state of alcohol intoxication and extreme fatigue, consented to and engaged in sexual intercourse with the accused's friend. Subsequently, the accused engaged in sexual intercourse with the victim while the victim believed she was still with her original partner. Applying the court's definition of fraud in the factum to these facts, the court upheld the rape conviction holding that, while the victim had consented to sexual intercourse with a particular person, the accused took advantage of the victim's mistaken belief that he was that particular person--*resulting in fraud in the factum*.

(2) Consensual intercourse resulting from fraud in the *inducement is not rape. Fraud in the inducement* "includes such general knavery as: 'No, I'm not married'; 'Of course I'll respect you in the morning'; 'We'll get married as soon as ...'; 'I'll pay you ___ dollars'; and so on."

United States v. Booker, supra, at 116. Here, the victim consents to penetration by a particular membrum virile.

g. Is mistake of fact as to victim's consent a valid defense? With regard to most general intent crimes, an honest and reasonable mistake of fact as to any element of the offense constitutes an affirmative defense. An honest and reasonable mistake of fact as to the victim's consent is an affirmative defense to rape. United States v. Baran, 22 M.J. 265 (C.M.A. 1986); United States v. Carr, 18 M.J. 297 (C.M.A. 1984); see also United States v. Booker, 25 M.J. 114 (C.M.A. 1987) (instruction on mistake of fact to consent in rape case not objected to). Whether the mistake of fact is reasonable hinges on how the consent was communicated (i.e., was it "implied" or "express" consent?). "Implied" consent is communicated through the victim's conduct; "express" consent is communicated through "words or affirmative acts manifesting agreement." United States v. Booker, supra, at 117. Both "implied" and "express" consent can be actual consent. Id. Mistake of fact will arise most often in "implied" consent cases. Here, the accused mistakenly infers consent from the victim's conduct when the victim did not actually consent. Although the accused's mistaken belief was honest, the real issue is: Would a reasonable man under the circumstances have inferred consent from the victim's behavior? If the answer is yes, then the accused's mistake of fact was both honest and reasonable, and the affirmative defense should prevail.

5. Special rules of evidence for sex offense prosecutions.

a. The accused's prior acts of uncharged rape are inadmissible to prove lack of consent, but the evidence may be admitted on the issues of motive, identity, or intent [United States v. Woolery, 5 M.J. 31 (C.M.A. 1978)], as well as to show opportunity, preparation, plan, knowledge or absence of mistake or accident. Mil.R.Evid. 404b. United States v. Watkins, 21 M.J. 224 (C.M.A. 1986) (prior acts of violence against women while under influence of alcohol reflect hostile feelings toward women and admissible to show motive).

b. The trial judge may exclude spectators, if necessary, during the victim's testimony in order to encourage victim's candor. United States v. Moses, 4 M.J. 847 (A.C.M.R. 1978). Before closure may be ordered, however, an evidentiary hearing must be held to establish the actual necessity of closing the trial. The trial judge must consider reasonable alternatives to closure and make adequate findings to support his decision. United States v. Hershey, 20 M.J. 433 (C.M.A. 1985).

c. Circumstances and purposes for which evidence of the victim's character for chastity may be introduced at trial are limited. Mil.R.Evid. 412.

6. Whether accused should be convicted of rape and other related offenses arising out of same event is largely a question of fact. See United States v. Gibson, 11 M.J. 435 (C.M.A. 1981) (accused should not have been convicted of both attempted rape and assault with intent to rape); United States v. Williams, 8 M.J. 826 (A.F.C.M.R. 1980) (permissible to convict accused of rape and kidnapping); United States v. Glover, 16 M.J. 397 (C.M.A. 1983)

(permissible to convict the accused of rape and assault with a dangerous weapon); United States v. Holliman, 16 M.J. 164 (C.M.A. 1983) (impermissible to convict accused of rape and communicating a threat); United States v. Valenzuela, 16 M.J. 305 (C.M.A. 1983) (impermissible to convict accused of attempted rape and aggravated assault); United States v. Martin, 21 M.J. 730 (N.M.C.M.R. 1985) (permissible to acquit accused of rape, but convict of indecent assault involving initial sexual contact when there is no proof of consent to initial touching); United States v. Watkins, supra (assault consummated by battery not multiplicious with rape when facts supporting assault occur before rape and did not constitute actual force used to accomplish rape). See also United States v. Perry, supra (assaults before rape upheld).

7. The Manual seems to authorize the death penalty for rape at Part IV, para. 45(e)(1). The Supreme Court, however, ruled that death was an excessive penalty for the crime of rape. In Coker v. Georgia, 433 U.S. 584 (1977), the court noted that only the state of Georgia imposed the death penalty for the rape of an adult woman. The court agreed that the death penalty was cruel and unusual in most rape cases, since the victim was still alive. The Manual may avoid these constitutional limitations by imposing a separate hearing procedure in capital cases and precluding the death penalty in rape cases, except when the victim is under 12 or the victim is maimed or also the victim of attempted murder. R.C.M. 1004(c)(9)(A) and (B).

B. Carnal knowledge (Key Numbers 559-564). Article 120, UCMJ. Part IV, para. 45, MCM, 1984. An act of sexual intercourse under circumstances not amounting to rape by a person, with a female not his wife who has not attained the age of 16 years, constitutes the offense of carnal knowledge.

1. Mistake of the age of the victim is no defense.

2. The victim is not an "accomplice" for purposes of witness credibility instruction. United States v. Cameron, 34 C.M.R. 913, 925-26 (A.F.B.R. 1964).

3. The 1984 MCM specifically deletes carnal knowledge as an LIO of rape and advises separate pleadings in proper cases. Part IV, para. 45, drafters' analysis, MCM, 1984, app. 21-96.

4. Constitutional attack

-- In the past, statutory rape laws came under attack as being violative of equal protection in that only men can be prosecuted under them. The Supreme Court settled the issue in Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464 (1981). Justice Rehnquist, writing for the majority, emphasized the state's legitimate concern over teenage pregnancies. Gender-based classifications are not subject to "strict scrutiny"; they are upheld if they contain a "fair and substantial" relationship to a valid state need. The legislative desires to protect women from unwanted pregnancies and to encourage reporting were held to be both necessary and permissible. The Court noted that it did not take a medical degree to realize that only women get pregnant.

C. Sodomy (Key Numbers 565-570). Article 125, UCMJ; Part IV, para. 51, MCM, 1984. The engaging in unnatural carnal copulation, either with another person of the same or opposite sex or with an animal, constitutes the offense of sodomy.

1. The prohibition of "unnatural and carnal copulation" is not unconstitutionally vague. United States v. Scoby, 5 M.J. 160 (C.M.A. 1978).

2. In Bowers v. Hardwick, 478 U.S. ____, 106 S.Ct. 2841, 92 L.Ed.2d 1040 (1986), the Supreme Court rejected the notion that consensual homosexual sodomy is protected under the Constitution. In upholding a Georgia sodomy statute, the Court ruled that the Bill of Rights did not protect this form of sexual activity. The Court refused to apply the right of privacy to homosexual acts of sodomy, since they lack the ties to family, marriage, or procreation. The Court declined to address consensual acts within the marital relationship. See United States v. Scoby, supra; see also Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976) (upholding Virginia's consensual sodomy statute).

3. "Unnatural carnal copulation" includes both fellatio and cunnilingus. United States v. Harris, 8 M.J. 52 (C.M.A. 1979).

4. The defense is entitled to an accomplice instruction when the victim participates voluntarily in the offense. United States v. Goodman, 13 C.M.A. 663, 33 C.M.R. 195 (1963); but cf. United States v. Cameron, 34 C.M.R. 913 (A.F.B.R. 1964).

5. Attempted rape and forcible sodomy arising out of the same transaction are separately punishable. United States v. Dearman, 7 M.J. 713 (A.C.M.R. 1979) (Burglary, rape, and sodomy were all separately punishable offenses since different societal norms were violated in each instance. Burglary is a crime against the habitation, rape an offense against the person, and sodomy an offense against morals.); accord United States v. Rose, 6 M.J. 754 (N.C.M.R. 1978).

6. Maximum confinement penalties:

a. Consenting adult victim: 5 years;

b. nonconsenting victim: 20 years; or

c. victim under 16 years of age: 20 years.

D. Indecent assault (Key Numbers 553-558, 595-600). Article 134, UCMJ; Part IV, para. 63, MCM, 1984. The taking of indecent, lewd, or lascivious liberties with a person of a female not the spouse of the accused, without consent and against will, with intent to gratify lust or sexual desires, constitutes the offense of indecent assault.

1. The offense is not limited to male accuseds or to female victims. See United States v. Gipson, 16 M.J. 839 (N.M.C.M.R. 1983).

2. It is a nonconsensual offense, requiring assault or battery.

3. It requires accused's specific intent to gratify lust or sexual desires. United States v. Jackson, 31 C.M.R. 738, 741 (A.B.R. 1962).

4. Indecent assault is an LIO of rape. United States v. Wilson, 13 M.J. 247 (C.M.A. 1982); United States v. Sampson, 7 M.J. 513 (A.C.M.R. 1979).

5. Maximum confinement penalty: 5 years.

E. Assault with intent to commit rape, sodomy, or other specified felony. Article 134, UCMJ. Part IV, para. 64, MCM, 1984.

1. These are specific intent offenses. United States v. Rozema, 33 C.M.R. 694, 698 (A.F.B.R. 1963).

2. See discussion on article 134 assaults, section 0809, supra.

F. Adultery. Article 134, UCMJ. Part IV, para. 62, MCM, 1984. Adultery is still an offense under military law, regardless of whether or not it is an offense under the law of the state where the act occurred. United States v. Johanns, 20 M.J. 155 (C.M.A. 1985), cert. denied, 474 U.S. 850, 106 S.Ct. 147, 88 L.Ed.2d 122 (1986). In United States v. Hickson, 22 M.J. 146 (C.M.A. 1986), the appellant argued his plea of guilty to adultery made his conviction of rape legally inconsistent. Chief Judge Everett concluded that people are guilty of adultery if either party is married to another, but that purely private sexual intercourse by unmarried persons is not punishable. The Chief Judge then examined the crimes of rape and adultery. The Court concluded that, while adultery is not an LIO of rape, Congress did not intend an accused to be convicted of both offenses arising out of a single act. The Court dismissed the adultery specification. But see United States v. Ambalada, 1 M.J. 1132 (N.C.M.R. 1977), petition denied, 3 M.J. 164 (C.M.A. 1977).

G. Indecent acts with another (Key Numbers 571-576). Article 134, UCMJ; Part IV, para. 90, MCM, 1984.

1. Indecent acts are defined as that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but which tends to excite lust and deprave the morals with respect to sexual relations. Part IV, para. 90c, MCM, 1984.

2. Examples

a. Consensual homosexual acts may constitute the offense of indecent acts with another. See United States v. Moore, 33 C.M.R. 667, 670 (C.G.B.R. 1963).

b. In United States v. Thacker, 16 C.M.A. 408, 37 C.M.R. 28 (1966), the court stated that a lewd and indecent act could be committed with or without consent. No examples were given.

c. Dancing naked in front of minor children constitutes indecent acts with another. United States v. Thomas, 25 M.J. 75 (C.M.A. 1987) (comparing indecent acts with another and indecent exposure).

3. No specific intent is required. United States v. Jackson, 31 C.M.R. 738 (A.B.R. 1962).

4. Lesser included offenses:

a. Indecent assault. United States v. Carter, 39 C.M.R. 764 (A.C.M.R. 1968).

b. Attempted rape. United States v. Anderson, 9 M.J. 530 (A.C.M.R. 1980).

H. Indecent acts or liberties with a child under 16 (Key Numbers 571-576, 753-758). Article 134, UCMJ; Part IV, para. 87, MCM, 1984.

1. Consent is no defense.

2. There must be evidence of a specific intent to gratify the lust or sexual desires of the accused or victim. United States v. Johnson, 35 C.M.R. 587 (A.B.R. 1965).

3. Two theories of misconduct are described in Part IV, para. 87b, MCM, 1984:

a. Indecent acts involve physical contact. United States v. Payne, 19 C.M.A. 188, 41 C.M.R. 188 (1970) (accused placed hand between child's legs); United States v. Sanchez, 11 C.M.A. 216, 29 C.M.R. 32 (1960) (accused exposed penis to child while cradling child in his arms). The physical contact need not, however, be directly on the victim's genitals. Touching an area in close proximity or the immediate area around the genitals is sufficient to allege this offense. United States v. Cuellar, 22 M.J. 529 (N.M.C.M.R. 1986).

b. Indecent liberties involve no physical contact, but act must be taken within the physical presence of the child. United States v. Brown, 3 C.M.A. 454, 13 C.M.R. 10 (1953) (accused's exposure of his penis to two young girls constituted an indecent liberty); United States v. Scott, 21 M.J. 345 (C.M.A. 1986) (reaffirming Brown decision); United States v. Ramirez, 21 M.J. 353 (C.M.A. 1986) (masturbation in presence of 9- and 10-year-old constitutes indecent liberties); United States v. Orben, 28 M.J. 172 (C.M.A. 1989) (display of picture of nude persons to young people may constitute taking indecent liberties if prohibited intent exists).

4. There must be some evidence of victim's age and marital status. United States v. Estrella, 21 M.J. 782 (A.C.M.R. 1986). (Conviction upheld despite prosecutor's failure to place age and status into evidence. Other evidence such as victim's responses to questions, demeanor on stand, and testimony to certain questions sufficed.)

I. Indecent exposure (Key Numbers 753-758). Article 134, UCMJ; Part IV, para. 88, MCM, 1984.

1. Negligent exposure is insufficient. The offense requires a willful exposure to public view. Part IV, para. 88c, MCM, 1984.

a. Charges of indecent exposure were filed against the accused when two air policemen observed him naked and drying himself in the

upstairs rear bedroom window of his quarters. His court-martial conviction of negligent exposure was overturned. Held: Negligent exposure not punishable under UCMJ. United States v. Manos, 8 C.M.A. 734, 25 C.M.R. 238 (1958).

b. The evidence was insufficient to sustain the accused's conviction of three specifications of indecent exposure where it appeared that, in each instance, the accused was observed nude in his own apartment by passers-by in the hallway looking in the partly open door of the apartment, but in none of the incidents did it appear that the accused made any motions, gestures, spoke, or otherwise indicated he was aware of the presence of persons in the hallway, or sought in any manner to attract their attention. Such evidence is as consistent with negligence as with purposeful action, and negligence is an insufficient basis for a conviction of indecent exposure. United States v. Stackhouse, 16 C.M.A. 479, 37 C.M.R. 99 (1967); accord United States v. Ardell, 18 C.M.A. 448, 40 C.M.R. 160 (1969).

c. A plea of guilty to indecent exposure was not rendered improvident by stipulated evidence that the accused did nothing to attract attention to himself and may not even have been aware of the presence of the young females who saw him where it was admitted the accused had exposed himself in the children's section of the base library, a place so public an intent to be seen must be presumed. United States v. Burbank, 37 C.M.R. 955 (A.F.B.R. 1967).

2. "Public" exposure. To be criminal the exposure need not occur in a public place, but only be in public view. United States v. Moore, 33 C.M.R. 667 (C.G.B.R 1963) (accused who exposed his penis and made provocative gestures while joking with fellow seamen on board ship was guilty of indecent exposure).

3. Exposure must be "indecent." Nudity per se is not indecent; there is nothing lewd or morally offensive about an unclothed male among others of the same sex. United States v. Caune, 22 C.M.A. 200, 46 C.M.R. 200 (1973). (Accused's conduct in removing all his clothing in the semiprivacy of an office and in the presence of other males, including his military superiors, may have been contemptuous and disrespectful, but did not constitute the offense of indecent exposure.)

J. Wrongful cohabitation (Key Numbers 753-758). Article 134, UCMJ. Part IV, para. 69, MCM, 1984.

1. It is not necessary to prove sexual intercourse. United States v. Melville, 8 C.M.A. 597, 25 C.M.R. 101 (1958).

2. The evidence must show that accused was openly and publicly dwelling or living with another as man and wife, but not that one was married to a third party. United States v. Melville, supra.

K. Fornication. Not a per se UCMJ violation. United States v. Snyder, 1 C.M.A. 423, 4 C.M.R. 15 (1952); United States v. Shober, 26 M.J. 501 (A.F.C.M.R. 1988). However, context in which the sex act is committed may constitute an offense (e.g., public fornication, fraternization, etc.). See United States v. Berry, 6 C.M.A. 609, 20 C.M.R. 325 (1956), where the court upheld a

conviction under article 134 of two soldiers who took two German girls to a Berlin hotel room where each soldier had intercourse with each of the girls in open view. The court found such "open and notorious" conduct to be service-discrediting. See also United States v. Hickson, supra.

L. Voyeurism. Not really a sex crime, but rather an aggravated form of disorderly conduct punishable under article 134. See United States v. Johnson, 4 M.J. 770 (A.C.M.R. 1978).

M. AIDS-related cases

1. General Article. In the case of United States v. Woods, 28 M.J. 318 (C.M.A. 1989), the Court of Military Appeals decided that a specification alleging conduct prejudicial to good order and discipline stated an offense, under a reckless endangerment theory, for engaging in unprotected sexual intercourse after having been diagnosed as having the AIDS virus.

The court found that the specification was not fatally defective though there was no allegation of lack of consent by the accused's sex partner and despite an absence of traditional words of criminality (such as "wrongfully"), though the court expressed a preference for such words in a "novel" specification.

2. Aggravated assault. United States v. Stewart, 29 M.J. 92 (C.M.A. 1989) (accused committed aggravated assault by exposing the victim to HIV). Testimony that there was a 30-50 percent chance of death resulting from exposure to the virus was sufficient to infer that the means used was likely to produce death or grievous bodily harm. See also United States v. Johnson, 27 M.J. 798 (A.F.C.M.R. 1988).

3. Violation of a safe sex order. United States v. Womack, 29 M.J. 88 (C.M.A. 1989) (safe sex order issued by commander to servicemember infected with AIDS did not violate any constitutionally protected privacy interest).

0812 SEXUAL HARASSMENT. Article 93, UCMJ; Part IV, para. 17, MCM, 1984.

Though sexual harassment, when charged under article 93, is not an offense that requires a sexual assault, the conduct proscribed usually involves comments or gestures of a sexual nature. It is a form of abuse of subordinates, and was first recognized as an offense by the MCM, 1984.

A. Text of Article 93, UCMJ, cruelty and maltreatment

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

B. Discussion and definitions

1. "Any person subject to his orders" means not only those military personnel under the direct or immediate command of the accused, but

extends to all persons whether subject to the code or not, who by reason of some duty or employment are required to obey the lawful orders of the accused. The accused need not be in the direct chain of command over the victim. Part IV, para. 17c, MCM, 1984. United States v. Dickey, 20 C.M.R. 486 (A.B.R. 1956) (Korean nationals performing contract work supervised by an Army lieutenant were "subject to the orders" of the lieutenant).

This element, that the victim was subject to the orders of the accused, creates an obvious loophole in the prosecution of sexual harassment cases under this article. It does not cover harassment between personnel of the same rank unless position or duties create a senior-subordinate relationship.

2. Assault, improper punishment, and sexual harassment may all constitute the cruelty, maltreatment, or oppression for article 93 purposes. Sexual harassment includes influencing, offering to influence, or threatening the career, pay or job of another person in exchange for sexual favors and deliberate or repeated offensive comments or gestures of a sexual nature. (Emphasis added.) Part IV, para. 17c(2), MCM, 1984.

a. The emphasized language in the discussion portion of paragraph 17 of MCM, 1984, is the only language in the Manual that expressly deals with sexual harassment. The elements, punishment, and sample specification for article 93, cruelty and maltreatment, remain identical to those first published in the 1951 Manual for Courts-Martial, United States.

b. "Deliberate or repeated offensive comments." This language suggests that the offense may be committed willfully or through culpable negligence. The "or repeated" terminology, standing alone, may seem to imply strict liability if it is found to be cruel or oppressive on an objective standard. Part IV, para. 17c(2), MCM, 1984. However, the same language appears in SECNAVINST 5300.26 (series) and MCO 5300.10, as well as the policy statements of other services on sexual harassment. Within these documents, the phrase "or repeated" is explained as referring to those comments or gestures of a sexual nature which are initially made innocently but become wrongful by repetition, particularly after the victim has complained.

C. Difficulties with article 93

1. Specification. The sample specification at paragraph 17f clearly contemplates the more traditional forms of cruelty towards subordinates, such as a drill instructor abusing a recruit. Hence, the sample specification must be extensively tailored. The specification should reflect sexual harassment as the specific type of abuse; whether it was deliberate or repeated; and should include an exact description of the acts of misconduct.

2. Lesser included offense. Paragraph 17d lists "attempts" as an LIO of article 93. While attempt is certainly an LIO of the more traditional form of cruelty to subordinates, it is difficult to imagine a situation that would qualify as attempted sexual harassment since the Manual definition includes threatening or offering to influence ... in exchange for sexual favors. (Emphasis added.)

3. Necessity of complaint. There is no requirement under article 93 that the victim complain though, certainly, if an innocent comment is made and the victim complains about the remark or gesture, such notice to the accused may go a long way in proving culpable negligence if the situation is repeated. Both SECNAVINST 5300.26 and MCO 5300.10 say the victim should complain and make the situation known to his or her superior. The commander is required to investigate under these orders.

4. Maximum punishment. The maximum punishment listed in paragraph 17e is a dishonorable discharge and one year confinement. This could create "ultimate offense" problems if the same misconduct is prosecuted under article 92 as an orders offense. Part IV, para. 16e, Note, MCM, 1984. See section 0404.1.

D. Defenses. It would appear that an honest and reasonable belief (mistake) that the questioned behavior is appropriate is a defense. It is not a defense that the comments or gestures were enjoyed, appreciated, or that the victim, by appearance or dress, somehow invited the comments except as it may affect the determination of cruelty or oppression.

E. Related orders. MCO 5300.10 was generated in response to Office of Personnel Management and the Secretary of Defense requests that each of the service secretaries generate policy statements emphasizing the inappropriateness of sexual harassment. Though the definition of sexual harassment is the same as that in the Manual, because of its origin as a policy statement, it is unlikely it will be found to be punitive order for article 92 prosecutions. The regulation requires commanders to train personnel about sexual harassment and requires victims of such misconduct to use their chain of command to report such offensive conduct.

1. SECNAVINST 5370.2 (series), Subj: Standard of Conduct and Government Ethics, is a punitive order. It prohibits naval personnel from misusing their official position for personal gain. This could be the basis of a sexual harassment prosecution. It applies to officers, enlisted, and civilians without reference to chain of command.

2. Section 703 of Title VII of the United States Code (Civil Rights Act) has been the basis of Federal prosecutions for sexual harassment. Federal courts treat sexual harassment as a form of sex discrimination. The Department of the Navy has been successfully sued under Title VII for sex discrimination. Bundy v. Jackson, 641 F.2d 934 (Ca. D.C. 1980); Trout v. Hidalgo, 517 F. Supp. 873 (D.C. D.C. 1981).

3. There are numerous other military orders and directives that deal with sexual harassment, including: OPNAV 12720.3, NAVAIR 5350.1, NAVSEA 5350.1, OPNAV 5350.5, NCPC 12410.1, and CMC White Letter Number 18-80 of 2 December 1980.

F. Alternatives to article 93 for sexual harassment. Prosecution of comments and acts alleged to be sexual harassment is an area as yet untested by the appellate courts. However, there are many other articles and theories under which the same misconduct could be prosecuted.

1. Comments may amount to disrespect under articles 89 or 91, provoking speech under article 117, communicating a threat under article 134, extortion under article 127, bribery under article 134, or indecent language under article 134. United States v. Linyear, 3 M.J. 1025 (N.C.M.R. 1977); United States v. Dornick, 16 M.J. 642 (A.C.M.R. 1982).

2. Where contact or acts are involved, articles such as 128 assaults, 134 indecent acts, 120 rape, 125 sodomy, or 134 adultery may also be alternatives depending upon the circumstances surrounding the alleged harassment.

3. Finally, dereliction of duty under article 92 and conduct unbecoming an officer under article 133 may also be charged when sexual harassment is alleged.

0813 DISTURBANCE OFFENSES. This section considers offenses that constitute disturbances of the peace. Not only are traditional breach of the peace offenses included, but offenses that do not have a readily identifiable counterpart in civilian law are also encompassed (e.g., provoking words and gestures). All of these offenses have a certain propensity for disruption of the peace of the community. The offenses are: Provoking words and gestures, a violation of article 117; communication of a threat, a violation of article 134; breach of the peace, a violation of article 116; disorderly conduct, a violation of article 134; and riot, a violation of article 116.

0814 PROVOKING SPEECHES AND GESTURES. Article 117, UCMJ and Part IV, para. 42, MCM, 1984.

A. Text of article 117

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

B. Essential elements

1. That the accused wrongfully used certain words or gestures towards a certain person;

2. that the words or gestures were provoking or reproachful; and

3. that the person towards whom the words or gestures were used was a person subject to the code.

4. Note that Part IV, para. 42c(2), MCM, 1984, specifically indicates that knowledge that the victim is a person subject to the code is not an element. Prior to the adoption of the MCM, 1984, there was conflicting authority on knowledge of the victim's status. Compare United States v. Bowden, 24 C.M.R. 540 (A.F.B.R. 1957), petition denied, 8 C.M.A. 767, 24 C.M.R. 311 (1957) (knowledge of victim's status is not an element) with United States

v. Lacy, 10 C.M.A. 164, 27 C.M.R. 238 (1959). (It was "assumed without deciding" that knowledge was an element.) Change 1 to para. 3-85 of the Military Judges' Benchbook, DA Pam 27-9 (1982), now specifically excludes knowledge as an element.

C. Scope of article 117

1. It applies only if the conduct is towards another person subject to the code.

2. It prohibits four types of conduct:

a. Provoking words;

b. provoking gestures;

c. reproachful words; and

d. reproachful gestures.

3. "This Article (117) is designed to prevent the use of violence by the person to whom such speeches and gestures are directed and to forestall the commission of an offense by an otherwise innocent party." United States v. Holiday, 4 C.M.A. 454, 458, 16 C.M.R. 28, 32 (1954); United States v. Thompson, 22 C.M.A. 88, 46 C.M.R. 88 (1972).

D. Constitutionality of article 117. The text of article 117 is very similar to that of a Georgia statute struck down by a Federal court on grounds of vagueness. See Wilson v. Gooding, 303 F. Supp. 952 (D.C. Ga. 1969), aff'd, 431 F.2d 855 (5th Cir. 1970). In striking down the Georgia statute, the court said that the requirement that the language must tend to cause a breach of the peace did not save it from being vague. It is noteworthy that the MCM defines "provoking and reproachful" words and gestures as those which are used in the presence of the person to whom they are directed and which tend to induce breaches of the peace. Nonetheless, the Coast Guard Court of Review held, in United States v. Peak, 44 C.M.R. 658 (C.G.C.M.R. 1971), that "... Article 117 of the Code is distinguishable from the outlawed Georgia statute despite the Manual's utilization of the standard of tending to induce breaches of the peace. The UCMJ offense has roots going back 800 years .... As a result of its long history and the large number of cases, the military offense has acquired content and meaning and limitations; it does not 'leave wide open the standard of responsibility.'" Id. at 661.

E. Definitions

1. "Towards" means in the presence of and directed to a certain individual.

a. Words spoken about another, no matter how provoking, do not constitute this offense if that person was not present when they were spoken.

b. A gesture made behind another's back and unknown by him, but observed by a third person, may constitute a violation of this article. United States v. Hughens, 14 C.M.R. 509 (N.B.R. 1954).

c. The words or gestures need not actually be addressed to the victim so long as they are directed toward him.

d. Example: A speaking to B, says in the presence of C: "I don't talk to persons who are abysmal idiots, such as C here."

2. "Provoking" means to incite, irritate, or enrage another. Example: "You yellow-bellied coward."

3. "Reproachful" means to express censure, blame, discredit or disgrace concerning one's life or character. Example: An accusation of maternal incest.

F. Sufficiency and the evidence

1. "Incitement of the victim to immediate action is the evil to be prevented and the crucial inquiry into the sufficiency of the evidence is the extent to which the words or gestures tend to do this." United States v. Thompson, 22 C.M.A. 88, 46 C.M.R. 88 (1972). Thus, if the words appear to be provoking on their face, they may nonetheless fail to amount to a violation of the article because of the circumstances under which they were used. For example, in Thompson, the accused said, "Don't yell at me or I'll wring your ____ neck." At the time he spoke, however, he was behind bars and was speaking to a guard on the outside of the cell. The court said that "there was no reasonable tendency that the accused's words would provoke a breach of the peace," primarily because it did not believe that a reasonable guard would unlock and enter the cell in order to respond to the accused's words. Id. at 90.

2. Whether conditional provoking words fail to amount to an offense has not yet been decided, although it was discussed in United States v. Rockenbach, 43 C.M.R. 805 (A.C.M.R. 1971). In that case the accused said to the victim, "If we have to go to court ... (and) if you say I physically held you back ... I'll rip your head off." The court noted that the accused had not, in fact, physically held the victim back and, consequently, if the victim had so testified, he would have perjured himself. "Thus, it may be argued that the 'words uttered expressed a contingency that neutralized the declaration, *since there was not a reasonable possibility that the uncertain even would* happen.'" Id. at 806, quoting United States v. Shropshire, 20 C.M.A. 374, 43 C.M.R. 214 (1971).

3. There is no requirement that the victim be senior or junior to, or even in the same armed force as, the accused.

4. The MCM anticipates one potentially awkward situation by providing that this offense does not include "reprimands, censures, reproofs, and the like which may properly be administered in the interests of training, efficiency, or discipline in the armed forces." Part IV, para. 42c(1), MCM, 1984.

G. Defenses

1. Since this is a general intent offense [United States v. Bowden, 24 C.M.R. 540 (A.F.B.R. 1951), petition denied, 8 C.M.A. 767, 24 C.M.R. 311 (1957)], voluntary intoxication would not appear to be a defense. If, however, lack of knowledge is an affirmative defense or an element, then intoxication could be a defense under some circumstances. For example, in the Lacy case, supra, the accused was intoxicated at the time of the offense. The court intimated that intoxication of the degree which would have "sufficiently dulled" the accused's mental faculties so as to "interfere with his capacity to identify the persons involved" would have been a defense. Id. at 240. Remember, however, that the knowledge element appears to have been eliminated by Part IV, para. 42c(2), MCM, 1984. Even the Bowden case, supra, states that "We have no doubt that there is involved in the offense a scienter, or general criminal intent--or even knowledge--but such matters have to do with the character of the speech or gestures...." Id. at 544. Thus, if the accused were so intoxicated that he did not know that his words or actions were provoking, it would appear that he would have a defense.

2. If the circumstances under which the provoking words are uttered reveal that there was no reasonable tendency that the accused's words would provoke a breach of the peace, then the accused will have a defense to the charge. United States v. Thompson, supra. Therefore, if the accused can show that the circumstances under which he said the words alleged would not have given rise to a likely breach of the peace, he may escape conviction of the offense. For example, if the accused said the provoking words in the course of a long-distance telephone call, it would be debatable whether the words would have the required "reasonable tendency."

H. Related offenses

1. Communication of a threat is a related offense. See United States v. Reid, 43 C.M.R. 612 (A.C.M.R. 1970); United States v. Cooper, 34 C.M.R. 615 (A.B.R. 1963); and United States v. Hazard, 8 C.M.A. 530, 25 C.M.R. 34 (1957).

2. Disrespect can also be related to this offense. United States v. Lacy, 10 C.M.A. 164, 27 C.M.R. 238 (1959).

3. Provoking words is an LIO of indecent language (article 134). Part IV, para. 42d, MCM, 1984. See also United States v. Linyear, 3 M.J. 1027 (N.C.M.R. 1977).

I. Pleading. Part IV, para. 42f, MCM, 1984.

1. Sample specification

In that [Name, etc, and personal jurisdiction data], did, [at/on board (location)], on or about [date], wrongfully use provoking words, to wit: "You are too much of a coward to step across the line," or words to that effect, towards Seaman Henry P. Howards, U.S. Navy.

2. Other possible allegations

a. Wrongfully use reproachful words;

b. wrongfully use provoking gestures; and

c. wrongfully use reproachful gestures.

0815 COMMUNICATING A THREAT. Article 134, UCMJ; Part IV, para. 110, MCM, 1984. (Key Numbers 613-618)

A. Essential elements

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

2. that the communication was made known to that person or to a third person;

4. that the communication was wrongful; and

5. "C to P" or "SD."

B. "Threat" -- defined. A threat is an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future. United States v. Sturmer, 1 C.M.A. 17, 1 C.M.R. 17 (1951) and United States v. Kelly, 9 C.M.A. 26, 25 C.M.R. 288 (1958). See also United States v. Johnson, 21 C.M.A. 279, 45 C.M.R. 53 (1972).

1. Even though the threat is conditional it is nevertheless an offense, unless the condition negated a present determination to injure (presently or in the future) or unless the condition was one the accused had a right to impose. In United States v. Shropshire, 20 C.M.A. 374, 43 C.M.R. 214 (1971), C.M.A. held that the words, "if you take this restraining gear off, I'll show you what I will do to you," were insufficient to state a threat because the threat was conditioned on a variable that would not reasonably occur. In addition, in United States v. Gately, 13 M.J. 757 (A.F.C.M.R. 1982), it was held that the words "if this were the civilian world ... he (accused) would take his .357 magnum and shoot him (victim) six times between the eyes" did not constitute communicating a threat. The conditional words neutralized the threat, particularly in a setting which could never be the "civilian world." (However, a lesser included offense of using provoking words was affirmed.) For a contrary example, consider the case of United States v. Johnson, 49 C.M.R. 278 (A.C.M.R. 1974). In that case, the threat was couched in the following terms, "[You'd] better take another cop with you, because I would try to kick the ___ out of you." The accused had just been arrested for a traffic offense by the policeman to whom the words were addressed and the accused had just learned that the same policeman might escort him alone back to the base. The court held that the words evidenced an intent to injure rather than a desire to avoid an altercation since the contingency expressed by the accused would very likely occur.

2. A threat to injure property or reputation, as well as a threat of personal injury, constitutes this offense. United States v. Frayer, 11 C.M.A. 600, 29 C.M.R. 416 (1960). The accused in Frayer threatened his victim by communicating to him a threat to falsely accuse him of having committed unspecified offenses and to get others to make false statements against him. See United States v. Sulima, 11 C.M.A. 630, 29 C.M.R. 446 (1960).

a. The threat must constitute a threat to injure as connoted from the word's ordinary meaning or proof of some particular meaning in the environment in which it is made. Hence, if the accused told his victim that "I'm going to pass the word on you," the offense will not be consummated unless the prosecution can offer some evidence of a special meaning in the military environment. United States v. Bush, 47 C.M.R. 532 (C.G.C.M.R. 1973). Query the outcome of the use of such words as "grease," "smoke," etc.

b. The mere statement of intent to commit an unlawful act not involving injury to the person, property, or reputation of another does not constitute this offense. Part IV, para. 110c, MCM, 1984. Additionally, it has been held that a mere invitation to fight is not a threat. On the other hand, disclaimers of involvement such as "I am not personally going to do anything to you, but in two days you are going to be in a world of pain. I would suggest you damn well better sleep light," will be looked at in light of the totality of the circumstances, and C.M.A. is not prone to react favorably to such disclaimers. United States v. Jenkins, 9 C.M.A. 381, 26 C.M.R. 161 (1958). United States v. Johnson, 21 C.M.A. 279, 45 C.M.R. 53 (1972).

c. In United States v. Hill, 22 C.M.A. 521, 48 C.M.R. 6 (1973), the court applied the "totality of the circumstances" test to a lovers' quarrel in which the scorned male told his estranged girlfriend that "she'd better not make him mad or he'd hit her." Although this case might have been disposed of on a conditional threat theory, the court looked at the overall facts to reverse the article 134 conviction.

C. Required intent

1. This is a general intent offense. The prosecution need not prove that the accused actually entertained the stated intention. United States v. Humphrys, 7 C.M.A. 306, 22 C.M.R. 96 (1956). The offense is complete when an avowed determination to injure another is announced or otherwise communicated. United States v. Holiday, 4 C.M.A. 454, 16 C.M.R. 28 (1954). The intent which establishes the offense is that expressed in the language of the declaration, not the intent locked in the mind of the declarant. The presence or absence of an actual intention to effectuate the injury set out in the declaration does not change the elements of the offense. This is not to say the declarant's actual intention has no significance as to his guilt or innocence. A statement may declare an intention to injure and thereby ostensibly establish this element of the offense, but the declarant's true intention, the understanding of the persons to whom the statement is communicated and the surrounding circumstances may so belie or contradict the language of the declaration as to reveal that it was made as a mere jest or in idle banter. United States v. Shropshire, 20 C.M.A. 374, 43 C.M.R. 214 (1971). United States v. Moody, 3 M.J. 729 (A.C.M.R. 1977) and United States v. Harrigan, 1 M.J. 550 (A.F.C.M.R. 1975).

2. A statement made in jest or idle banter is not a threat. If such a defense is reasonably raised, it must be instructed upon. United States v. Davis, 6 C.M.A. 34, 19 C.M.R. 160 (1955). One of the factors to consider is the understanding of the persons to whom the statement is made. United States v. Gilluly, 13 C.M.A. 458, 32 C.M.R. 458 (1963).

D. Communication. The threat can be communicated to the person threatened or to a third person. It is not necessary that the threat be communicated to the person threatened. A has committed this offense if he tells B that he intends to injure C. United States v. Rutherford, 4 C.M.A. 461, 16 C.M.R. 35 (1954); United States v. Gilluly, 13 C.M.A. 458, 32 C.M.R. 458 (1962); and United States v. Harrigan, 1 M.J. 550 (A.F.C.M.R. 1975). "The offense ... is not rendered more or less serious as a result of the threat being made directly or to a third person." United States v. Harrigan, supra, at 551.

E. Wrongful communication. The communication must be wrongful and without justification or excuse.

1. Example: If A, a challenger for the All-Navy heavyweight boxing title, says, "I'm going to deck B (the champ) with one punch," referring to their upcoming bout, no offense has been committed.

2. If the issue of legal justification or excuse is reasonably raised, it must be instructed upon. See United States v. Davis, 6 C.M.A. 34, 19 C.M.R. 160 (1955); United States v. O'Neal, 26 C.M.R. 924 (A.F.B.R. 1958).

F. Preemption. This offense is not preempted by articles 89, 91, 117, 127, or 128 (disrespect to officers, WO's, NCO's, and PO's; provoking words and gestures; extortion; and assaults, respectively). In United States v. Holiday, 4 C.M.A. 454, 6 C.M.R. 28 (1954), C.M.A. discussed each of the above offenses and concluded that communicating a threat under article 134 was a viable, independent offense.

G. Protected expression? In United States v. Schmidt, 16 C.M.A. 57, 36 C.M.R. 213 (1966), C.M.A. reversed the conviction of an accused under a standard of "fairness, integrity, and public reputation of judicial proceedings" where it appeared that the accused informed his CO that he was going to write to newspapers telling of conditions within the unit if proposed disciplinary action was taken against him. The court was cautious and noted the decision was based on the particular facts of the case.

H. Pleading. Part IV, para. 110f, MCM, 1984.

1. Sample specifications

a. To injure the person of another

> ...did wrongfully communicate to Airman Bronius Satkunas a threat to injure the aforesaid Airman Bronius Satkunas, U.S. Navy, by saying to him, "I'll knock your teeth down your throat," or words to that effect.

United States v. Holiday, 4 C.M.A. 454, 6 C.M.R. 8 (1954).

b. To injure the reputation of another

> ...did wrongfully communicate to Corporal John M. Smith, U.S. Marine Corps, a threat to accuse falsely Sergeant Lill E. White, U.S. Marine Corps, of having committed the offense of pandering.

But see United States v. Frayer, 11 C.M.A. 600, 29 C.M.R. 416 (1960) for another format.

2. Variance

a. A fatal variance between the pleadings and the proof will result if it is alleged that a threat was communicated to a named person but the evidence shows that the words set out in the specification were communicated to someone else. United States v. Gray, 40 C.M.R. 982 (C.G.C.M.R. 1969).

b. If a threat of a lesser degree of violence is proved than the one charged, a fatal variance will not result. United States v. Rowe, 47 C.M.R. 717 (A.C.M.R. 1973).

l. Lesser included offenses. The offense of provoking words can be an LIO of communicating a threat. See United States v. Hazard, 8 C.M.A. 530, 25 C.M.R. 34 (1957); United States v. Reid, 43 C.M.R. 612 (A.C.M.R. 1970); United States v. Cooper, 34 C.M.R. 615 (A.B.R. 1964); and United States v. Gately, 13 M.J. 757 (A.F.C.M.R. 1982).

1. Example. H, a prisoner, while on work detail outside the stockade, gave a guard, R, some difficulty. R reported the incident to the NCO in charge of the detail. Later, as the work party mounted a truck to return to the stockade, H said to R, "I'd better not catch you outside." H was charged with wrongfully communicating to Private R a threat to injure Private R by saying to him, "I'd better not catch you outside." This information was introduced into evidence by the prosecution. DC requested that the court-martial be instructed that it could consider the LIO of using provoking speech in violation of article 117. The MJ denied the request. Query: Error? Answer: Yes. "The words used by the accused could easily evoke from the guard an invitation to assume that the parties were already 'outside' and that the accused could proceed with the avowed declaration. Clearly, then, the words had at least a tendency to induce ... [a breach] of the peace.... The lesser offense, therefore, was in issue and should have been submitted to the court-martial for its consideration." United States v. Hazard, 8 C.M.A. 530, 25 C.M.R. 34 (1957).

2. Discussion

a. Note that whereas article 117, provoking speech, requires the victim to be subject to the code, the article 134 threat offense does not.

b. In Hazard, supra, this posed no problem since the military status of the victim was sufficiently alleged in the principal charge of communicating a threat and, hence, it fully encompassed the provoking speech offense. Remember this point when pleading a threat under article 134.

c. Absent such special pleading, however, the result in Hazard probably would have been the same in view of the defense request for the LIO instruction and in view of C.M.A.'s very liberal view on LIO's. Compare United States v. Duggan, 4 C.M.A. 396, 15 C.M.R. 396 (1954); United States v. Morgan, 8 C.M.A. 341, 24 C.M.R. 151 (1957); and United States v. Hobbs, 7 C.M.A. 693, 23 C.M.R. 157 (1957).

3. It should also be noted that in United States v. Baker, 14 M.J. 361 (C.M.A. 1983), the court determined that, although an aggravated assault and communication of a threat occurred on the same occasion, the two offenses could be charged separately, and the communication of the threat was not, as a matter of law, a lesser included offense of the aggravated assault.

0816 BREACH OF THE PEACE. Article 116, UCMJ; Part IV, para. 41, MCM, 1984.

A. Text of article 116

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

B. Scope of the article. Article 116 prohibits the causation of, or participation in, either a riot or a breach of the peace. Riot is discussed in paragraph 0721, below. Breach of the peace is a lesser included offense of riot and is based on the common law offense. United States v. Hewson, 13 C.M.A. 506, 33 C.M.R. 38 (1963).

C. Essential elements

1. That the accused caused or participated in a certain act of a violent or turbulent nature; and

2. the peace was thereby unlawfully disturbed.

D. Examples of prohibited acts: "A 'breach of the peace' is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature.... The acts or conduct contemplated by this article are those which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled." United States v. Haywood, 41 C.M.R. 939 (A.F.C.M.R. 1969); Part IV, para. 41c, MCM, 1984. In addition to the common street brawl, the following examples of misconduct have been held to be breaches of the peace:

1. Resisting apprehension in a violent manner United States v. Tuck, 29 C.M.R. 750 (C.G.B.R. 1960); United States v. Haywood, supra.

2. Shouting, striking the bars of a cell, shaking the cell door, and starting a fire in a cell within a brig. United States v. Hewson, supra.

3. Hammering on a cell door with a wooden bunk, smashing 38 windows with an iron pipe, ripping the shower head from the shower, and twisting out of place two iron bars in a cell within disciplinary barracks. United States v. Ragan, 10 C.M.R. 725 (A.B.R. 1953).

4. Part IV, para. 41c(2), MCM, 1984, states: "Engaging in an affray, unlawful discharge of firearms in a public street are examples of conduct which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace by the speaker."

5. Specifications alleging that accused painted a bull's-eye on his torso and wrongfully entered the flight deck of an aircraft carrier, disrupting flight operations and then later wrongfully boarded a plane on the flight deck and pulled the ejection system safety pins while threatening to kill himself, sufficiently alleged a breach of the peace. United States v. Stevens, 19 M.J. 284 (C.M.A. 1985).

E. "The peace of the community" means the public tranquility; the peace and good order to which the community is entitled. Part IV para. 41c(2), MCM, 1984.

F. Meaning of community

1. "The words 'community' and 'public' include within their meaning a military organization, post, camp, ship, aircraft, or station." Part IV, para. 41c(3), MCM, 1984. The Navy Board of Review noted, however, that "the crew's quarters of a United States man-of-war is not a public place." United States v. Sullivan, 3 C.M.R. 457, 459 (N.B.R. 1952). The specification in Sullivan, supra, at 458, had alleged that the accused did cause a "breach of the peace by wrongfully shouting and singing in a public place, to wit: the third division head, located on board said ship."

2. The Sullivan case notwithstanding, it would appear that the meaning of community in a physical sense is not controlling.

> The commission of a breach of the peace, then, does not depend upon whether an accused's acts occur in surroundings to which members of the public have a right to resort or generally repair. Rather, it depends upon whether his behavior, not otherwise privileged, tends to invade the right of the public or its individual members to enjoy a tranquil existence, secure in the knowledge that they are guarded by law from undue tumult or disturbance. In short, the important consideration is the disturbance of tranquility and not whether the misconduct occurs in a "public place" or one of such limited access as to be deemed unavailable to the citizenry in general.

United States v. Hewson, 13 C.M.A. 506, 33 C.M.R. 38 (1963). The accused in Hewson was found guilty of causing a breach of the peace in a brig.

G. "Unlawfully" means without justification or excuse

1. Part IV, para. 41c(2), MCM, 1984, states: "The fact that the opprobrious words are true, or used under provocation, is not a defense to a charge of breach of the peace, nor is tumultuous conduct excusable because it was incited by others."

2. If the accused acts in self-defense, however, his conduct is excused.

3. Example. A is attacked and fights back in self-defense. This disturbs the peace. Is A guilty of breach of peace? No. A did not unlawfully disturb the peace. United States v. Kilpatrick, 8 C.M.R. 555 (N.B.R. 1953).

H. Pleading. Part IV, para. 41f(2), MCM, 1984.

1. Sample specification

In that [Name, etc. and personal jurisdiction data], did, [at/on board (location)], on or about [date], cause a breach of the peace by wrongfully _____.

2. A specification alleging that the accused assembled with others in order to disrupt the operation of a stockade is insufficient to charge a breach of the peace, since it fails to allege any conduct constituting an outward demonstration resulting in a disturbance of the peace. United States v. Ludden, 43 C.M.R. 564 (A.C.M.R. 1970). Of similar import is United States v. Haywood, 41 C.M.R. 939 (A.F.B.R. 1969).

I. Lesser included offense. Disorderly conduct, Article 134, UCMJ. Cf. United States v. Burrow, 26 C.M.R. 761 (N.B.R. 1958), wherein it was held that the LIO of disorderly conduct was not reasonably raised by the evidence.

J. Multiplicity. Assault and breach of peace are not multiplicious when the breach of peace specification does not mention the battery as means by which the breach occurred. United States v. McCullar, 20 M.J. 218 (C.M.A. 1985).

0817 DISORDERLY CONDUCT. Article 134, UCMJ; Part IV, para. 73, MCM, 1984.

A. There is no specific article of the UCMJ which punishes simple disorders; consequently, they are charged under article 134 as conduct which is prejudicial to good order and discipline or which is service discrediting. Disorderly conduct is discussed in Part IV, para. 73, MCM, 1984, which lists two variations.

1. Disorderly conduct under such circumstances as to bring discredit upon the military service.

2. Other cases. (These "other cases" are those which constitute conduct prejudicial to good order and discipline.)

B. Essential elements

1. That the accused was disorderly onboard ship or in some other place; and

2. "C to P" or "SD."

C. "Disorderly" defined

1. Disorderly conduct is conduct of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby. United States v. Powers, 5 C.M.R. 206 (A.B.R. 1952); United States v. McGlone, 18 C.M.R. 525 (A.F.B.R. 1954); Part IV, para. 73c(2), MCM, 1984.

2. An act such as window peeping, which endangers public morals or outrages public decency, is punishable as disorderly conduct. United States v. Manos, 24 C.M.R. 626 (A.F.B.R. 1957); United States v. Foster, 13 M.J. 789 (A.C.M.R. 1982).

3. "Disorderly" also refers to any disturbance of a contentious or turbulent character." Military Judges' Benchbook, DA Pam 27-9 (1982), inst. 3-140.

D. Examples of disorderly conduct

1. Discharging a grenade simulator. United States v. NcNeil, 46 C.M.R. 894 (A.C.M.R. 1972).

2. Window peeping. United States v. Manos, 24 C.M.R. 626 (A.F.B.R. 1957); United States v. Foster, 13 M.J. 789 (A.C.M.R. 1982).

3. Unlawfully assembling for the purpose of resisting apprehension by police officers. United States v. Haywood, 41 C.M.R. 939 (A.F.B.R. 1969).

E. Disorderly conduct and breach of peace. It would appear that breach of the peace contemplates conduct of a more violent nature than that which would support a disorderly conduct specification. United States v. Burrow, 26 C.M.R. 761 (N.B.R. 1958) and United States v. Haywood, 41 C.M.R. 939 (A.F.B.M.R. 1969) discuss the difference between the two offenses.

F. Special defense. As with breach of the peace, an accused charged with disorderly conduct can assert self-defense and, if he/she convinces the triers of fact of his/her proper use of self-defense, he/she should be acquitted. United States v. Davis, 16 C.M.R. 874 (A.F.B.R. 1954).

G. Pleading. Part IV, para. 73f, MCM, 1984.

1. The allegation simply states that the accused was "disorderly"; no further details need be pled.

2. This offense is often committed by a drunk and the phrase "drunk and disorderly" is then alleged.

3. If the conduct invoived is not described as being disorderly, an offense may not be alleged. For example, in United States v. Regan, 11 M.J. 745 (A.C.M.R. 1981), the accused was charged with "throwing butter on the ceiling ..." of the mess hall. The court held that the specification failed to allege an offense because such activity could have been innocent and noted that, if the accused had been charged with "being disorderly on station by throwing butter on the ceiling. .," an article 134 violation would have been alleged.

4. Since disorderly conduct under service discrediting circumstances is an aggravated form of the offense (four months vice one month confinement), this is the one article 134 offense where the service discrediting element must be pled. If it is not included in the specification, the maximum punishment will be limited to one month confinement.

0818 RIOT. Article 116, UCMJ; Part IV, para. 41, MCM, 1984.

A. Text of article

> Any person subject to this chapter who causes or participates in any riot ... shall be punished as a court-martial may direct.

B. Essential elements

1. That the accused was a member of an assembly of three or more persons;

2. that the accused, and at least two other members of this group, mutually intended to assist one another against anyone who might oppose them in doing an act for some private purpose;

3. that the group or some of its members, in furtherance of such purpose, unlawfully committed a tumultuous disturbance of the peace in a violent or turbulent manner; and

4. that these acts terrorized the public in general in that they caused or were intended to cause public alarm or terror.

C. Interpretation. Part IV, para. 41c(1), MCM, 1984, defines a riot as:

> ... a tumultuous disturbance of the peace by three or more persons assembled together in furtherance of a common purpose to execute some enterprises of a private nature by concerted action against any who might oppose them, committed in such a violent and turbulent manner as to cause or be calculated to cause public terror.

D. "Three or more persons." No number less than three can commit a riot; therefore, if less than three are involved, a breach of the peace, assault, or disorderly conduct may have been committed instead. Numbers alone, however, are insufficient to prove the offense. For example, in the case of

United States v. Metcalf, 16 C.M.A. 153, 36 C.M.R. 309 (1966), the accused was one of four assailants who attacked two couples without provocation at a naval base. The court held this assault was not a riot even though more than three individuals had perpetrated it. Quoting from People v. Edelson, 169 Misc. 386, 7 N.Y.S.2d 323 (1938), the court said at 36 C.M.R. 316:

> The underlying element essential to constitute the statutory crime of riot, and distinguishing it from other crimes involving a breach of the peace, is the disturbance of the public peace, and that implies the idea of a lawless mob accomplishing or bent on accomplishing some object in such violent and turbulent manner as to create public alarm or consternation or as terrifies or is calculated to terrify people. It is not commonly applied to a brief disturbance even if violence and malicious mischief are involved in the commotion. (Emphasis added.)

E. "Common purpose" means an end, intention, object, plan, or project shared by all. United States v. Pugh, 9 C.M.R. 536 (A.B.R. 1953), petition denied, 11 C.M.R. 248 (1953); United States v. Bryson, 10 C.M.R. 164 (A.B.R. 1953), petition denied, 10 C.M.R. 159 (1953). The purpose of plan need not have been made prior to the assembly. It is sufficient if the assemblage actually begins to execute the common purpose formed after it assembled. United States v. Davis, 17 C.M.R. 473 (N.B.R. 1954); United States v. Lawrence, 10 C.M.R. 767 (A.F.B.R. 1953), petition denied, 12 C.M.R. 204 (1953); see also Part IV, para. 41c(1), MCM, 1984, and United States v. Murphy, 34 C.M.R. 550 (A.B.R. 1964).

F. Public alarm or terror. In United States v. Brice, 48 C.M.R. 368 (N.C.M.R. 1973), the court held that a specification was fatally defective because it failed to allege this element. Although it may be possible to plead facts which imply "public alarm or terror," the Brice case compels a literal pleading of the element. United States v. Randolph, 49 C.M.R. 336 (N.C.M.R. 1974) has an exhaustive discussion of this subject.

G. Pleading. Part IV, para. 41f(1), MCM, 1984.

Sample specification

> In that [Name, etc, and personal jurisdiction data], did, on or about [date], [at/on board (location)], participate in a riot by unlawfully assembling with Fireman Ignatius Provoker, U.S. Navy, and Seaman Recruit Jimmy Follower, U.S. Navy, for the purpose of resisting all naval brig authority and, in furtherance of such purpose, did wrongfully break and remain out of his own area of confinement in the naval brig, tear down the cell block fence, destroy and damage military property of the United States Government, and brandish weapons to the terror and disturbance of the naval brig.

H. Lesser included offenses

1. Breach of the peace, article 116. See United States v. Ragan, 10 C.M.R. 725 (1953), petition denied, 11 C.M.R. 248 (1953).

2. Disorderly conduct, article 134. United States v. Metcalf, supra, and United States v. Haywood, supra.

0819 RELATIONSHIP BETWEEN DISTURBANCE OFFENSES

A. General. This group of offenses does not encompass all disturbance offenses. For example, most of the assaults would come within this category; however, most of these offenses can be committed by mere words alone.

B. "Provoking" vis-a-vis "threat." Provoking speech, under article 117, is not necessarily a threat; however, a threat is most often provoking (i.e., "threat" may include "provoke" as an LIO).

1. The purpose of article 117, prohibiting provoking speech and gesture offenses, is to inhibit one from inciting another to breach the peace. United States v. Thompson, 22 C.M.A. 88, 46 C.M.R. 88 (1972).

2. The purpose of the article 134 threat offense is not merely to protect persons from such wrongful communication, but also to protect them from the greater harm thereby forecasted. United States v. Holiday, 4 C.M.A. 454, 6 C.M.R. 28 (1954).

3. The victim in a "provoking" must be a person subject to the code. The victim of a "threat" can be anyone.

4. Both offenses may be committed by mere words alone. "Provoking" offenses may be committed by gestures alone; however, if gestures are involved in the communication of a threat, it would also be proper to charge an offer-type assault. United States v. Fishwick, 25 C.M.R. 897 (A.B.R. 1958). United States v. Thurman, 42 C.M.R. 916 (N.C.M.R. 1970).

C. "Breach of peace" vis-a-vis "riot." A riot involves a breach of peace. United States v. Randolph, 49 C.M.R. 336 (N.C.M.R. 1974).

1. Number participating. It takes only one to breach the peace, but at least three to riot.

2. Breach of peace is a general intent offense. Riot requires a specific intent. United States v. Pugh, 9 C.M.R. 536 (A.B.R. 1952).

D. "Threat" vis-a-vis "breach of peace." A threat does not necessarily constitute a breach of the peace, but it may -- and commonly does.

1. The threat, which carries a maximum punishment of a DD and three years' CONF, is by far the more serious offense.

2. Both are general intent offenses.

3. Both may be committed by mere words, but breach of peace may and commonly is committed by boisterous conduct.

E. "Assault" vis-a-vis "disturbance" offenses

1. An assault may involve a provoking gesture, a breach of the peace, a riot, or the communication of a threat.

2. An oral threat alone falls short of an assault. A threat is simply an announcement of an avowed present determination to injure presently or in the future. Mere words cannot constitute an assault. Furthermore, an assault requires an attempt or an offer to do bodily harm immediately.

a. An assault may immediately follow or be contemporaneous with a threat.

b. A threat may be communicated to someone other than the victim, whereas an assault must be directed at the victim.

c. A threat includes an avowed determination to injure property or reputation as well as the person, whereas an assault is confined solely to bodily harm.

CHAPTER IX

OFFENSES AGAINST PROPERTY

0900 INTRODUCTION

This chapter discusses offenses against property. It begins with a detailed analysis of common law crimes against property, but it also examines several strictly military offenses as well. Larceny and its lesser included offense, wrongful appropriation, are the subject of the first section and consume approximately one half of the chapter. Robbery is discussed next, since it is a combination of larceny and assault. The related but separate crime of receiving stolen property is the subject of the next section. The military's "bad check" law is examined in the section after that, followed by a discussion of the military offenses of wrongful sale, disposition, damage, destruction, and loss of military property. Offenses against nonmilitary property are discussed next. That section is followed by a comparison of the crimes of burglary, housebreaking, and unlawful entry. The last section summarizes points of similarity and distinction for all of the offenses against property.

0901 LARCENY AND WRONGFUL APPROPRIATION (Key Numbers 705-716)

A. Text of Article 121, UCMJ

-- 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 ---

a. 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

b. 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. General: Article 121 describes two separate crimes -- LARCENY and WRONGFUL APPROPRIATION. The only difference in the elements of the two offenses is the intent required in each. Both are specific intent offenses. The accused must specifically intend to deprive permanently the owner of the property of the use and benefit of that property to be guilty of larceny.

Whereas, to be guilty of wrongful appropriation, the accused need only specifically intend to deprive temporarily the owner of the use and benefit of the property. Since temporary deprivation is less serious than permanent deprivation, wrongful appropriation is not punished as severely as larceny and is considered a necessarily lesser included offense. See Part IV, para. 46e, MCM, 1984. This is the only difference between the two offenses.

C. Elements of larceny and wrongful appropriation (Part IV, para. 46b, MCM, 1984):

1. That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

2. that the property belonged to a certain person;

3. that the property was of a certain value or of some value; and

4. that the taking, obtaining, or withholding by the accused was with the intent permanently (larceny) or temporarily (wrongful appropriation) to deprive or defraud another person of the use and benefit of the property or permanently (larceny) or temporarily (wrongful appropriation) to appropriate the property for the use and benefit of the accused or for any person other than the owner.

D. Wrongful taking: The wrongful taking type of larceny (or wrongful appropriation) is the most common form of larceny. It is essentially an offense of wrongful dispossession. For example: A customer takes a suit off a rack at the exchange with the intent to keep it and walks out without paying for it.

1. Generally, "taking" is accomplished by the "least removing of the thing taken from the place it was before" (asportation), and the exercise of control (dominion) over the property. United States v. Tamas, 6 C.M.A. 502, 508, 20 C.M.R. 218, 224 (1955). Part IV, para. 46c(1)(b), MCM, 1984, indicates "any movement ... or any exercise of dominion ... by any means ... is sufficient [for a taking]...." At common law, however, taking (dominion) and asportation (removal) were required for larceny (as distinguished from false pretense and embezzlement). Article 121 did not enlarge the common law, but combined the three offenses under the term larceny. United States v. Buck, 3 C.M.A. 341, 12 C.M.R. 97 (1953). Nevertheless, both dominion and asportation, however minimal, are required to establish a larceny of the taking type.

a. Accused removed a suit from a rack at the exchange and concealed it under his own clothes. The required asportation and dominion have occurred at this point, and, assuming the requisite intent, larceny has been committed. See United States v. Tamas, supra; United States v. Klink, 14 M.J. 743 (A.F.C.M.R. 1982).

b. Accused removed a suit from a rack and started for the door but, after three steps, he is brought to a halt -- the suit is chained to the rack. No taking occurred, even though there was a removal, because no dominion had been exercised over the article. Part IV, para. 46c(1)(b), MCM, 1984.

c. Accused took a typewriter from an office on an Air Force base and took it to his own office, also located on the base. He intended to use it for his own and for government use, and he also permitted others to use it. He told other persons that he had purchased it. Held: Guilty of larceny. United States v. Schocken, 1 M.J. 511 (A.F.C.M.R. 1975).

d. Accused directed the activity of one accomplice (acting as a government agent) who removed goods from a government building and loaded them into a vehicle to be driven away by another accomplice (also acting as a government agent). Held: Not guilty of larceny, since he never exercised dominion over the goods in question. United States v. Sneed, 17 C.M.A. 451, 38 C.M.R. 249 (1968). Compare United States v. McLeary, 2 M.J. 660 (A.F.C.M.R. 1976) and United States v. Klink, 14 M.J. 743 (A.F.C.M.R. 1982), where the accused was held to have exercised dominion and asportation over the stolen goods by loading such property into his vehicle and attempting to drive away.

e. Withdrawing excess funds from an accused's own account with an automatic teller card held to be a wrongful taking. United States v. Bushwell, 22 M.J. 617 (A.C.M.R. 1986).

2. Larceny as a continuing offense

a. The crime of larceny continues as long as the asportation or "carrying away" continues. The original asportation continues so long as the perpetrator indicates by action that he/she is dissatisfied with the location of the stolen goods immediately after the larceny and causes the flow of their movement to continue without relative interruption. Thus, because the crime of larceny continues through the asportation phase, anyone who knowingly assists in the initial movement of the stolen property is a principal in the crime. Note that, for purposes of drafting charges, the larceny is perfected once the asportation begins. The asportation does not have to end before larceny may be charged. It makes no difference whether the continuation of the asportation by one other than the actual taker was prearranged or was the result of decisions made on the spur of the moment. United States v. Escobar, supra; United States v. Bryant, 9 M.J. 918 (A.C.M.R. 1980).

b. A person who participated in an ongoing larceny may simply be an accessory after the fact, as opposed to a principal, if the motive is to assist the perpetrator to escape detection and punishment rather than to secure the fruits of the crime. United States v. Manuel, 8 M.J. 823 (A.F.C.M.R. 1980).

c. An accused may instead be guilty of the separate offense of receiving stolen property, as in the case of United States v. Henderson, 9 M.J. 845 (A.C.M.R. 1980). There the court held that the larceny of some field jackets and silverware was complete when a soldier having custody over them moved them to another part of the central issue facility in which he worked with the required intent. Consequently, when the accused received the property, his actions did not make him a principal to larceny, but rather a receiver of stolen property under article 134. (See section 0904). The accused must be acquitted of the larceny charge, since receiving stolen property is not an LIO.

d. It has been held that larceny continues until such time as its fruits are secured in a place where they may be appropriated to the use of the perpetrator, a slightly different concept than the one discussed above. United States v. Seivers, 8 M.J. 63 (C.M.A. 1979). There it was held that the offense of larceny by fraud (a different type of larceny, see below) was not complete until the insurer's possession of the proceeds of a false claim was "severed" by his taking actual possession of the proceeds.

e. The victim need not realize that a theft has occurred in order for the crime to be completed. United States v. Tschida, 1 M.J. 997 (N.C.M.R. 1976).

3. The taking must be wrongful to constitute an offense. Not all takings are wrongful. United States v. Harville, 14 M.J. 270 (C.M.A. 1982).

a. If consent for the taking is obtained from a person authorized to give it, the taking is not wrongful. Part IV, para. 46c(1)(d), MCM, 1984. Thus, a drill-sergeant who solicited and obtained money from trainees under his command to pay for his personal expenses could not be convicted of larceny under article 121 where such money was obtained with the trainee's consent. United States v. Tenney, 15 M.J. 779 (A.C.M.R. 1983). Note, however, that an accused may be guilty of a taking-type larceny of government property, even though the property was released to him by competent authority, if that authority could not consent to the taking. United States v. Cosby, 14 M.J. 3 (C.M.A. 1982). See United States v. Bushwell, supra, for discussion of when a bank may consent de facto to the use of its funds.

b. If a taking occurs pursuant to a lawful order or regulation, it is not wrongful. Part IV, para. 46c(1)(d), MCM, 1984. For example, the following actions are not wrongful if performed pursuant to lawful order:

(1) Seizure of a camera in a restricted area; or

(2) seizure of contraband found in locker.

c. When an accused is given what is clearly an order to steal, however, he is guilty of larceny if he executes the order because the order is illegal. For example, in United States v. Miles, 11 C.M.A. 622, 29 C.M.R. 438 (1960), the accused was told by his company commander to try to make up certain inventory shortages by "normal scrounging" activities. The accused broke into government buildings to make up the shortages. Held: Even though the accused acted in accordance with the terms of the order from his company commander, he was nonetheless guilty of larceny, since he knew the order was illegal.

d. Generally, a taking is wrongful if done by one who is not entitled to immediate possession of the property and done without the consent of the person from whose possession the property is taken. Part IV, para. 46c(1)(d), MCM, 1984. The wrongfulness of a taking, obtaining, or withholding, however, may also depend on the intent of the accused at the time of the taking, obtaining, or withholding. The concept of wrongfulness is discussed further below.

E. Wrongful obtaining: A wrongful obtaining type of larceny (or wrongful appropriation) involves acquiring possession of property by false pretenses. Part IV, para. 46c(1)(e), MCM, 1984. Possession is usually transferred to the thief voluntarily by the lawful owner or possessor as the result of a false representation made by the thief. "Consent" so obtained by fraud or false representation is not "consent" which will negate the requirement of wrongfulness. The false representation may be made by act, word, symbol, token, or even by silence. For example, in the case of United States v. Rodriguez, 24 C.M.R. 687 (A.B.R. 1957), the accused told the victim that he could get him a car cheaply. The victim gave the accused some money and later gave the accused more money to apply to the purchase price of the car. Still later, the victim gave the accused a $20 gratuity for the "services" he had rendered. The victim never saw a car. The C.M.A. held that the accused's silence when he received the $20 amounted to a false pretense in light of his previous conduct. A false representation may be made implicitly as well as expressly, even though a mere failure to disclose the truth is not generally regarded as a criminally actionable misrepresentation. See also United States v. Pond, 17 C.M.A. 219, 38 C.M.R. 17 (1967). The offense is not complete until the accused takes possession of the property. In the case of United States v. Seivers, 8 M.J. 63 (C.M.A. 1979), it was held that the larceny was not complete until the accused took possession of the proceeds, which was accomplished by his receiving, endorsing, and negotiating a check gained as result of a false claim. Claims by an accused that the distributed substance is an illegal drug, when the accused knows it to be innocuous, may be the basis of a wrongful obtaining. United States v. Lusk, 21 M.J. 695 (A.C.M.R. 1985).

1. There are three requirements which must be met in order to establish a wrongful obtaining larceny. Part IV, para. 46c(1)(e), MCM, 1984.

a. The representation must be false when made;

b. the accused must know it is false; and

c. the false representation must be an effective and intentional cause in inducing the victim to deliver possession of the property to the thief.

2. The representation must be false when made.

a. The false representation must relate to a present or past fact. Part IV, para. 46c(1)(e), MCM, 1984. For example:

(1) In obtaining a loan, the accused misrepresented his name, unit, and financial credit rating. These false representations regarded existing facts and resulted in a larceny. United States v. Urso, 3 C.M.R. 611 (A.B.R. 1952); United States v. Cummins, 9 C.M.A. 669, 26 C.M.R. 449 (1958).

(2) If, in the same circumstances, the accused falsely represents that he had never gone through bankruptcy proceedings, it would be a representation as to a past fact and would also result in larceny.

b. False predictions as to future events are not false representations. For example, if the accused obtained a quantity of perishable goods at an excessively low price because of his statement that "very soon it is going to turn quite cold," no larceny occurred because there has not been a representation of fact. The accused has merely stated an opinion. The following are additional examples of opinions not constituting representations of fact.

(1) A real estate dealer says a piece of property is "nicely located."

(2) A seller says his car is a "beautiful car."

Caveat: The line between opinion and fact may be very fine. If a seller says that his car is "in beautiful condition," he/she may have stated a fact, not just an opinion.

c. The state of a person's mind, however, is an existing fact. If a person represents that he presently intends to perform a certain act in the future when in fact he does not so intend, he/she has made a false representation of a present fact (i.e., state of his mind). For example, an accused represented that he had a check coming in and would repay a loan in two weeks. In fact, he was due to be transferred in two weeks. At his trial, he conceded making a false promise to repay, but argued he had not made a false representation of an existing fact. Held: His false statement as to his present intention was a false representation of an existing fact. United States v. Culley, 12 C.M.A. 704, 31 C.M.R. 290 (1962); United States v. Cummins, 9 C.M.A. 669, 26 C.M.R. 449 (1958).

3. The accused knew the representation was false.

a. Part IV, para. 46c(1)(e), MCM, 1984, states in part: "...the pretense must be in fact false when made and when the property is obtained, and it must be knowingly false in the sense that it is made without a belief in the truth."

b. If an accused makes a representation knowing that it is false or without an honest belief that it is true, he has the knowledge necessary for larceny by false pretense. United States v. Bethas, 11 C.M.A. 389, 29 C.M.R. 205 (1960); United States v. Jophlin, 3 M.J. 858 (A.C.M.R. 1977).

c. There are four relevant states of mind with respect to any given representation:

(1) Maker knows it to be false;

(2) maker believes it to be false;

(3) maker does not know whether it is false or not, and makes no effort to determine its accuracy; and

(4) maker believes the representation is true.

The test set forth in United States v. Bethas, supra makes the first three of these criminal if the representation is in fact false. Even if the maker believes a statement to be true when made, he may be guilty of a larceny by false representation if he finds out otherwise before he receives the property and fails to disclose the real facts when he takes possession of the property. His silence with full knowledge of the falsehood is equivalent to a repetition of the former statement at the moment of acquisition. Perkins, p. 311.

4. The false representation was an effective and intentional cause in inducing the victim to deliver possession.

a. "Although the pretense need not be the sole cause inducing the owner to part with his property, it is necessary that it be an effective and intentional cause of the obtaining." Part IV, para. 46c(1)(e), MCM, 1984. Some examples will demonstrate this distinction:

(1) The accused was an Army personnel clerk. He told the victim that for a fee of $25 he could get him $175 in advance travel pay. He also said that he kept only $5 of the $25 and the rest went to his superiors. This was false, since he actually pocketed the entire amount. Held: The false representation concerning who received the $25 did not induce the victim to part with his money and did not constitute larceny by false pretense. United States v. Hildebrand, 2 C.M.R. 382 (A.B.R. 1952).

(2) The accused purchased whiskey for black market resale. He advised the seller that he was purchasing for an American base club in Japan, of which he was the manager. Accused's false representation was an effective cause of seller's parting with the liquor. The court found larceny even though the accused had paid for the liquor. The seller would not have made the sale if he had known the true facts, because he could have lost his license for making bulk sales to individual personnel. Pecuniary loss was not essential because the seller was wrongfully deprived of his property by a false pretense. United States v. Rubenstein, 7 C.M.A. 523, 22 C.M.R. 313 (1957).

b. Since the false representation must induce the victim to deliver possession, a false representation made after the property was obtained will not result in larceny. Part IV, para. 46c(1)(e), MCM, 1984.

F. Wrongful withholding. In both the taking and obtaining types of larceny (or wrongful appropriation), the accused comes into possession of the property in question unlawfully. In withholding larcenies, however, the accused takes possession lawfully. United States v. McFarland, 8 C.M.A. 42, 23 C.M.R. 266 (1957) and United States v. Welker, 8 C.M.A. 647, 25 C.M.R. 151 (1958). Note, however, that Part IV, para. 46c(1)(b), MCM, 1984, contains the statement that a larcenous withholding may arise "whether the person withholding the property acquired it lawfully or unlawfully." (Emphasis added.)

The authors of the 1969 Manual expanded the concept of a withholding larceny to make it clear that the unauthorized taking of property to teach another a lesson [United States v. O'Hara, 14 C.M.A. 167, 33 C.M.R. 379 (1963)], and the finding of lost or mislaid property [United States v. Kantner, 11 C.M.A. 201, 29 C.M.R. 17 (1960)], while not necessarily larcenous in their inception, could become larcenous if the taker or finder subsequently formulated the requisite mens rea. Analysis of Contents for Draft, 1969, MCM, 1969 (Rev.), para. 200a(3). This concept was carried forward in Part IV, para. 46c(1)(b), MCM, 1984. Neither O'Hara nor Kantner, supra, do real violence to the concept that, in the withholding type larceny, the accused must initially come into possession lawfully since, in both instances, the accused had established a valid defense to a charge of larceny. In any event, the general rule that initial possession must be lawful in a withholding type larceny need not be discarded, although the possible exceptions represented by O'Hara and Kantner, supra, should be noted. United States v. Kastner, 17 M.J. 11 (C.M.A. 1983) eliminates the teaching-a-lesson defense.

1. Once an accused has come into possession of the property lawfully, the wrongful withholding may arise either:

a. As a result of a failure to return, account for, or deliver property to its owner when a return, accounting, or delivery is due (United States v. Bilbo, 9 M.J. 800 (N.C.M.R. 1980); Part IV, para. 46c(1)(b), MCM, 1984); or

b. as a result of devoting the property to a use not authorized by its owner. Part IV, para. 46c(1)(b), MCM, 1984. See also United States v. Gainer, 7 M.J. 1009 (N.C.M.R. 1979).

2. The "failure to return, account for, or deliver" type of wrongful withholding includes embezzlement-type offenses committed by one having custody of funds or other personal property. United States v. McFarland, supra. For example, in United States v. Lyons, 14 C.M.A. 67, 33 C.M.R. 279 (1963), the accused was in charge of the prisoners' deposit fund at a stockade. The fund consisted of money taken from prisoners for safekeeping. An audit disclosed false entries and a substantial shortage of funds. The accused was found guilty of larceny because he failed to account when an accounting was due.

a. See United States v. Higdon, 2 M.J. 445 (A.C.M.R. 1975). One having custody of funds is held to a high degree of care in the handling of those funds. Since it is so important that a custodian handle them properly, society holds him criminally liable when he cannot fully account for any loss at the time an accounting is due, unless there is a satisfactory explanation. The failure or inability to account permits an inference of larceny to be made. Unless there is evidence which negates this inference, the custodian may be convicted. [Any explanation which raises a reasonable doubt, negates this inference. United States v. Crowell, 9 C.M.A. 43, 25 C.M.R. 305 (1958)]. For example, the accused in the case of United States v. Haskins, 11 C.M.A. 365, 29 C.M.R. 181 (1960), was in charge of the Air Force Aid Society Office. In this capacity, he processed loans and received payments; but wrongfully withheld the funds from the society by pocketing the proceeds. Held: Conviction of larceny affirmed because the accused offered no explanation to rebut the inference of misconduct.

b. The mere failure on the part of a custodian to account for entrusted funds does not in and of itself constitute larceny. A refusal to account when demand is made or when an accounting is due, however, will permit an inference that the custodian has wrongfully converted the property to his/her own use. United States v. Lyons, supra; United States v. Crowell, supra; and United States v. Keleher, 14 C.M.A. 125, 33 C.M.R. 337 (1963).

(1) The inference is not mandatory and may be rejected or accepted by the court. United States v. Keleher, supra.

(2) An accounting must be due before a person can be said to have failed to account. United States v. Lyons, supra. A specific demand does not have to made if the accounting is otherwise due or required.

3. Wrongful withholding by diverting property to an unauthorized use is specifically designed to cover all other situations of conversion by one having lawful possession, whether or not there is embezzlement. For example, in United States v. Greenfeather, 13 C.M.A. 151, 32 C.M.R. 151 (1962), an accused was issued a government vehicle to use off post in patrol duties. He was to patrol local bars. He used the vehicle to take two friends to another town on their personal business. Held: Guilty of wrongful appropriation by unauthorized use of a vehicle. Cf. United States v. Taylor, 21 C.M.A. 220, 44 C.M.R. 274 (1972).

4. Larceny by wrongful withholding may occur even though the owner makes no demand for his property, so long as there is convincing proof of wrongful conversion. United States v. Valencia, 1 C.M.A. 415, 4 C.M.R. 7 (1952). There, the accused failed to purchase items for which he had been given funds; but there was no specific demand made upon him by the persons who had given him the money. It was held that the accused's failure to refund the money or deliver the items at the logical time (upon his return from Yokohama), together with his false story as to the whereabouts of the items, provided convincing proof of wrongful conversion. In other words, when he returned from Yokohama an accounting was logically due.

A withholding larceny did not occur, however, when an accused refused to return or pay for a ring which he ordered by mail. United States v. Searcy, 24 M.J. 943 (A.C.M.R. 1987). The court reasoned that only a creditor-debtor relationship existed, since the seller retained no possessory interest in the ring.

G. Property. Property is the subject of larceny whether the larceny be of the taking, obtaining, or withholding type.

1. Property for this purpose includes "any money, personal property or article of value of any kind." Article 121, UCMJ.

2. Real property (land and things attached to land) is never the subject of larceny. However, property which has been severed from the land (e.g., fruit off trees) may be the subject of larceny. Part IV, para. 46c(1)-(h)(iii), MCM, 1984.

3. In order to be the subject of larceny, the property must have some physical existence. Theft of services may not be charged under article 121. Part IV, para. 46c(1)(h)(iv), MCM, 1984.

a. The thing of which the owner is deprived "should have corporeal existence, that is, be something the physical presence, quantity or quality of which is detectable or measurable by the senses or by some mechanical contrivance; for a naked right existing merely in the contemplation of law, although it may be very valuable to the person..., it is not the subject of larceny." United States v. McCracken, 19 C.M.R. 876, 877 (A.B.R. 1955). Some examples:

(1) Accused "steals" a ride on a train -- not larceny, because a ride cannot be physically measured; however, it is larceny to steal a railroad ticket. Perkins, p. 237.

(2) "... [t]axicab services cannot be stolen in violation of [Article 121]." United States v. Abeyta, 12 M.J. 507 (A.C.M.R. 1981) [overruling United States v. Brazil, 5 M.J. 509 (A.C.M.R. 1978)]. Theft of services may be charged under article 134 "unlawful obtaining of services." United States v. Buckroth, 12 M.J. 697 (N.M.C.M.R. 1981).

(3) Accused was charged with stealing the use of a rental car. Held: No larceny. A "use" does not have a corporeal existence. (Could have charged misappropriation of the automobile itself.) The Board of Review refused to find that the larceny of the automobile was fairly implied. United States v. McCracken, supra.

(4) Accused was charged with attempted larceny for his failed efforts to deceive the Navy Exchange into believing he had already paid the $952.00 he owed on purchases made under a deferred payment plan. Held: A debt or the amount thereof is not the proper subject of a larceny. United States v. Mervine, 26 M.J. 482 (C.M.A. 1988).

(5) Accused was charged with stealing long distance telephone service, since he made calls on someone else's phone. Held: No larceny alleged. Telephone service is not an article of value. United States v. Jones, 23 C.M.R. 818 (A.B.R. 1956). See also United States v. Hitz, 12 M.J. 695 (N.M.C.M.R. 1981) (wrongfully obtaining telephone services at the expense of the Navy cognizable under article 134); United States v. Cornell, 15 M.J. 932 (N.M.C.M.R. 1983) (although telephone services were not properly charged under article 121, an LIO under article 134 could be affirmed).

(6) On the other hand, if an accused taps a gas or electric power line for his own use, his acts would constitute larceny since electricity and gas can both be measured. United States v. Jones, supra. Similarly, leave cannot be stolen -- but the money it represents can. United States v. Slubowski, 5 M.J. 882 (N.C.M.R. 1978).

b. Part IV, para. 78, MCM, 1984, provides an offense under article 134 covering the offense of "obtaining services under false pretenses."

4. In order to have a larceny by taking, obtaining, or withholding, the accused must exercise possessory control over the property. Taking or

obtaining title alone is not sufficient. In other words, larceny is a crime against possession, not title. For example, if A, with the intent to steal, misrepresents to B that "only personnel attached to the Naval Station can bring cars on base," and thereby gets B, who is attached to the Justice School, to transfer title of his car to A, there is no larceny of the car so long as B retains possession. Assuming that the title is a negotiable instrument, there may be a larceny of the title. Part IV, para. 46c(1)(h)(iii), MCM, 1984.

H. Greater right to the property. Another element of larceny (and wrongful appropriation) is that the property belonged to or was in the possession of a certain person with a greater right to possession than the accused. Part IV, para. 46c(1)(c), MCM, 1984.

1. This element requires the person from whom the property was taken, obtained, or withheld to have had an immediate possessory right superior to that of the accused at the time of the theft.

a. The property may be stolen from the general owner--one having title and possession, for this purpose, however, property may also be stolen from a special owner -- one who does not have title but does have lawful possession. For example, one who rents a car from Hertz is a special owner, while Hertz is the general owner.

b. Property may be stolen from one who has nothing more than a bare possessory interest. For example, thief #2 may steal from thief #1 even though thief #1 has nothing but a bare possessory interest, since his interest is superior to that of thief #2 -- who has no interest at all in the property.

c. Caveat. The last example illustrates the principle that, although property may be taken from any of several persons having contact with the property, it can only be stolen if such persons have a superior right to the property than the thief at the time of the theft. Thus, a general or special owner may take his property from a thief without being guilty of larceny.

2. Pleading ownership. It must be established that the property was taken, obtained, or withheld from someone with an immediate possessory right superior to the thief's at the time of the theft. Wrongful acquisition often dispossesses several persons, each of whom has an immediate possessory right superior to the accused's.

a. For example: A borrows B's car. C steals B's car from A. B is the general owner and has a superior right to possession over C. A is special owner and also has a superior right over C. Who should be alleged as the "owner" in a larceny specification? Answer: Either A or B may be alleged as owner; however, in order to establish that a theft occurred, it will be necessary to prove that C acquired it from A. Therefore, by pleading A as the owner, there will ordinarily be no need to establish B's interest in the car. This will usually be better for both sides since it:

(1) Simplifies the government's case;

(2) pleads the situation as it actually existed and as it was most likely understood by the accused; and

(3) tends to promote simplicity and clarity.

United States v. Schelin, 12 M.J. 575 (A.F.C.M.R. 1981). See also United States v. Leslie, 13 M.J. 170 (C.M.A. 1982) (where property is held in bailment, either bailor or bailee may be considered victim of theft).

b. In drafting a larceny or wrongful appropriation specification, the property should, ordinarily, be alleged as having been stolen or wrongfully appropriated from the person who was last in immediate possession before the theft. United States v. Schelin, supra. For example: Willy is issued an M-16 rifle by the Marine Corps. Rollo takes Willy's rifle without his consent and sells it. The specification alleged that Rollo did steal the (described) M-16 of some value, "property of the U.S. Government." Is the specification defective?

(1) No. There is sufficient allegation of larceny. The government did have a superior right to possession than Rollo, and a taking from Willy was also a taking from the government, since Willy was merely custodian of the M-16 for the government. In view of the nature of the item, Rollo could not have been misled by the allegation of "stealing from the government."

(2) Generally speaking, however, the best and safest method is simply to allege the person last in possession as the "owner." The indiscriminate practice of alleging the general owner instead of the person last in possession may cause the pleader to overlook the fact that a larceny was not committed. For example: A stole a government rifle, told B that he had done so and that he had hidden the rifle and B could have it. B got the rifle. B was apprehended and charged with larceny from the government (the general owner). Held: No larceny. Had the trial counsel followed the rule of determining whether there was a taking, obtaining, or withholding from the person last in possession (A), he would have realized that there wasn't a larceny. B, however, was guilty of receiving stolen property. United States v. Welker, 8 C.M.A. 647, 25 C.M.R. 151 (1958); United States v. McFarland, supra.

3. Variance between pleading and proof as to ownership. Variance between pleading and proof of ownership can arise in surprisingly subtle ways. Careful thought must be given to this issue in order to avoid difficulty at trial.

a. Example: M stole property from another Army unit for his own Army unit. It was alleged that he stole "property of the U.S. Government." He pleaded guilty. Query: Plea improvident? Answer: No. But ownership should have been alleged as "property of Company _____," the custodian-unit. Reason: Accused obviously did not intend to deprive the U.S. Government of the property, but he did intend to deprive the other Army unit. However, in view of all the circumstances in the case, the variance was not fatal and the plea was not improvident. United States v. Miles, 11 C.M.A. 622, 29 C.M.R. 438 (1960).

b. Example: Accused received deposits as Savings and Insurance Officer; he was required to deposit the money with the disbursing officer to be placed in the soldiers' savings accounts. He did not do so, and was charged with stealing from the individual depositors. Defense counsel contended larceny should have been alleged as from the U.S. Government.

Held: Assuming the funds were government funds and not individual depositors' funds after deposit with the accused (who was the government custodian of such funds), this fact, under these circumstances, was simply an immaterial variance (i.e., the accused was not misled). United States v. Craig, 8 C.M.A. 218, 24 C.M.R. 28 (1957). But see United States v. Leslie, 9 M.J. 646 (N.C.M.R. 1980), in which funds were paid to a postal clerk for the purchase of money orders and not as the consequence of the sale of money orders. The court held that such funds never became property of the United States and the United States was never a general or special owner. The court held the variance there to be fatal.

I. The property was of some value

1. Value is an element of larceny and must be proved. If property has no value, it cannot be the subject of larceny. United States v. Messenger, 2 C.M.A. 21, 6 C.M.R. 21 (1952); United States v. Peterson, 2 C.M.A. 645, 10 C.M.R. 143 (1953); United States v. Batiste, 11 M.J. 791 (A.F.C.M.R. 1981). The fact that the property is of some value must also be alleged expressly, or by clear implication, or the specification will fail to allege an offense. United States v. May, 3 C.M.A. 703, 14 C.M.R. 121 (1954). Note, however, that the value need not be monetary. It is sufficient if the property has value to someone. United States v. Batiste, supra. (The accused was charged with, and convicted of, stealing a urine sample. Held: The sample had a value to someone even though it was subjective and extrinsic.)

2. The specific value of the property should be alleged whenever possible. United States v. Askew, 22 M.J. 99 (C.M.A. 1986), summary disposition.

a. If several different kinds of articles are the subject of the larceny, the value of each should be stated, followed by a statement of the aggregate value. Part IV, para. 46c(1)(h)(ii), MCM, 1984.

b. The actual value of the property is a matter in aggravation for punishment purposes. Part IV, para. 46e(1), provides the maximum punishments for larceny.

c. Caveat. Failure to allege a specific value precludes punishment greater than the least permissible, irrespective of the proven value. United States v. Tamas, 6 C.M.A. 502, 20 C.M.R. 218 (1955).

3. The accused need not know that the specific property intended to be stolen is of a particular value. United States v. Davis, 6 M.J. 669 (A.C.M.R. 1978).

4. Proving value

a. Items issued by or procured from government sources. Official publications which contain price lists of items of government property are competent evidence of the value of such items at the time of theft, and, if the property is shown to have been in substantially the same condition at the time it was stolen, such evidence may be sufficient proof of value. Part IV, para. 46c(1)(g)(ii), MCM, 1984; United States v. Thompson, 10 C.M.A. 45, 27 C.M.R. 119 (1958).

(1) The price list is not conclusive evidence of value. It is entitled to consideration, but it is not binding upon the court-martial. Many other matters may be considered by the court-martial in determining value (e.g., the condition of the property at the time of the theft). Part IV, para. 46c(1)(g)(ii), MCM, 1984.

-- Example: The accused was charged with unlawful purchase of an Army pistol. The weapon was stolen several months before the purchase. This pistol was shown to be defective and missing parts when purchased by the accused. Defense introduced evidence that such pistols were readily obtainable in the local market at a price less than the $53.00 shown in the official Army price list. Held: Evidence insufficient to prove that the pistol had a value of $53. United States v. Thornton, 8 C.M.A. 57, 23 C.M.R. 281 (1957); United States v. Jancauskas, 3 C.M.R. 702 (A.B.R. 1952).

(2) Where there is a conflict between the official price list and market value, the market value will prevail. United States v. Jancauskas and United States v. Thompson, both supra.

b. Property other than that obtained from government sources. "As a general rule, the value of other stolen property is to be determined by its legitimate market value at the time and place of the theft." Part IV, para. 46c(1)(g)(iii), MCM, 1984. United States v. Stewart, 1 M.J. 750 (A.F.C.M.R. 1975) (legitimate market value at time and place of theft was face value of airline ticket, which had been issued and not capable of being used without further validation, rather than intrinsic and nominal value of the paper).

(1) If the property, because of its character or the place where it was stolen, has no legitimate value at the time and place of the theft, or if that value cannot readily be ascertained, its value may be determined by its legitimate market value in the United States as of the time of the theft, or by its replacement cost at the time -- whichever is less. Part IV, para. 46c(1)(g)(iii), MCM, 1984. But see United States v. Evanoff, NMCM 78-0820 (28 Nov 78), which held evidence of value of stolen items in United States inadmissible to prove value at an Okinawa court-martial, since items were from Okinawan pawn shop.

(2) Negotiable instruments: Writings representing value may be considered to have the value which they represented at the time of the theft. United States v. Sowards, 5 M.J. 864 (A.F.C.M.R. 1978); United States v. Windham, 15 C.M.A. 523, 36 C.M.R. 21 (1965). For example, when a check for $50 is stolen, the value of the property stolen is $50. See United States v. Frost, 22 C.M.A. 233, 46 C.M.R. 233 (1973) (unsigned instrument held to be of no value except for the intrinsic value of the piece of paper) with United States v. Payne, 9 M.J. 681 (A.F.C.M.R. 1980) (accounts receivable had nominal value); United States v. Stewart, 1 M.J. 750 (A.F.C.M.R. 1975) (blank checks may be subject of larceny, but their value is nominal); and United States v. Falcon, 16 M.J. 528 (A.C.M.R. 1983) (in prosecution for stealing blank check, trial court could find that blank check had "some value"). But see United States v. Harvey, 2 M.J. 856 (A.C.M.R. 1976) (money order initialed by issuing clerk on behalf of drawer, fee charged for its presentation, control number and amount payable imprinted thereon, and payee's name inserted but not signed by purchaser had value of face amount).

(3) Evidence of market value may be established by:

(a) Proof of recent purchase price (Part IV, para. 46c(1)(g)(iii), MCM, 1984);

(b) testimony of any person familiar with market value as a result of training or experience (e.g., appraiser or dealer) (Mil.R.Evid. 702 and 703);

(c) the owner or other layman may testify as to value if he is familiar with its quality and condition (Part IV, para. 46c(1)-(g)(iii), MCM, 1984); his lack of experience in the market goes only to the weight of his testimony (Mil.R.Evid. 701); or

(d) a stipulation of value between the parties. United States v. Upton, 9 M.J. 586, (A.F.C.M.R. 1980).

c. In United States v. Lewis, 13 M.J. 561 (A.F.C.M.R. 1982), the court upheld the accused's conviction for larceny of the entire value of a stereo, even though the accused had switched price tags on the stereo and had partially paid for it.

J. Intent. The taking, obtaining, or withholding by the accused must be with the intent to deprive or defraud permanently (larceny) or temporarily (wrongful appropriation) another person of the use and benefit of the property.

-- The accused must specifically intend to deprive. This intent is more than that the accused had it in his mind to remove or withhold the property from the possession of another at the time of the taking, obtaining, or withholding; it means that the accused had the specific intent to dispossess another wrongfully. It is in this sense that his intent becomes criminal. United States v. Bilbo, 9 M.J. 800 (N.C.M.R. 1980); United States v. Roark, 12 C.M.A. 478, 31 C.M.R. 64 (1961); United States v. Hayes, 8 C.M.A. 627, 25 C.M.R. 131 (1958); United States v. Keleher, 14 C.M.A. 125, 33 C.M.R. 337 (1963). Example: An accused obtains property from another under the honest though mistaken belief that it is his. Although he specifically intends to remove the property from the other person, he is not guilty of larceny because he did not intend to take the property wrongfully. United States v. Nix, 11 C.M.A. 691, 29 C.M.R. 507 (1960). United States v. Pitts, 12 C.M.A. 106, 30 C.M.R. 106 (1961) ("Cumshaw" may not involve criminal intent where the accused honestly believed it was legal). The specific intent required does not involve knowledge that the specific property to be stolen is of a particular value.

a. Friendly borrowing: In situations where the accused borrows property from a friend or acquaintance without the friend's express consent, C.M.A. has found no criminal intent and, hence, no larceny or wrongful appropriation.

(1) Example: A borrowed a uniform from B without B's consent; A testified that he thought, if B had been there, B would have given consent. A further testified he had left B a note regarding the whereabouts of his uniform. Held: A plea of guilty was improvident, since, if A's story

were believed, he did not possess the requisite criminal intent. United States v. Thomas, 14 C.M.A. 223, 34 C.M.R. 3 (1963); United States v. Caid, 13 C.M.A. 348, 32 C.M.R. 348 (1962). See also United States v. Harville, 14 M.J. 270 (C.M.A. 1982) (accused's conviction for wrongful appropriation of a motor vehicle reversed where accused left a note indicating where he had gone, when he would return, and how the victim could reach him).

(2) Example: A went to a hotel with B in B's car. B said he was going to leave the car parked at the hotel as he was too drunk to drive. A took the car and drove off. He stated he was going to drive B's car back to the base because B was too drunk to drive. A had an accident near the base. Held: The failure of the law officer to instruct on the necessity of criminal intent in wrongful appropriation was prejudicial because the court-martial could reasonably have found that the accused lacked the criminal frame of mind necessary for wrongful appropriation. The court noted that A and B were friends and that B stated he would have loaned A the car if he had asked for it. United States v. Bridges, 12 C.M.A. 96, 30 C.M.R. 96 (1961). In these cases, it appears that the court found that there was no criminal intent under circumstances where the accused could reasonably believe that the owner would have consented to the taking if asked.

(3) It is worthy of note that, in these "borrowing" cases, the taking has been from a friend or acquaintance. It appears that this relationship between the parties is significant in determining whether or not criminal intent exists. It may well be that the touchstone underlying the court's decision is that, because of the relationship, the acts of the accused have not impaired the interest of society to the extent that criminal liability should be assessed. Borrowing from strangers might well cause criminal liability to attach. Moreover, one cannot borrow from the United States government. In United States v. Lewis, 19 M.J. 623 (A.C.M.R. 1984), the accused used his advance travel and transportation allowance to purchase a car, intending to refund the amount when loans came through. As the money was advanced to the accused for the purpose of the trip, the court held it was wrongfully appropriated when used to buy an automobile.

b. Teach a lesson. It had previously been held, in United States v. Roark, 12 C.M.A. 478, 31 C.M.R. 64 (1961), that where the intent of the accused in taking the property was simply to teach the victim a lesson, there is no criminal intent and hence no larceny or wrongful appropriation. United States v. Kastner, 17 M.J. 11 (C.M.A. 1983) overruled this theory, holding that it is the accused's intent to permanently or temporarily deprive which determines his criminality and not his motive in teaching the victim a lesson. Kastner has been incorporated into Part IV, para. 46c(1)(f)(iii), MCM,1 1984. A further discussion of this objective/subjective test is found in United States v. Johnson, 17 M.J. 140 (C.M.A. 1984).

c. Intent to deprive permanently or temporarily will, in most cases, have to be inferred from circumstantial evidence. See, e.g., United States v. Higdon, 2 M.J. 445 (A.C.M.R. 1975). In determining whether the intent was to deprive permanently or temporarily, examine all the circumstances surrounding the taking and the accused's conduct thereafter, particularly the manner in which the accused dealt with the property (i.e., whether he dealt with it in such a way as to be likely to cause a permanent or merely a temporary loss to the owner). See United States v. Brookman, 7 C.M.A. 729, 23 C.M.R. 193 (1957).

(1) Willful consumption of property clearly establishes intent permanently to deprive. United States v. Speer, 2 M.J. 1244 (A.F.C.M.R. 1976).

(2) Concealing property may establish intent to deprive permanently. Part IV, para. 46c(1)(f)(ii), MCM, 1984.

(3) Willful destruction of property shows intent to deprive permanently. Id.

(4) Abandoning the property where the victim is likely to recover it may evidence only an intent to deprive temporarily. However, where accused abandons it under such circumstances that it is likely that the victim will not find it, then an intent to deprive permanently may be established. United States v. Brookman, 7 C.M.A. 729, 23 C.M.R. 193 (1957). See also United States v. Wooten, 13 C.M.A. 171, 32 C.M.R. 171 (1962).

(5) Pawning the property, depending on the facts, may indicate either a permanent or temporary intent to deprive. Factors bearing on the determination of intent would include:

(a) Accused still has pawn ticket;

(b) accused no longer has pawn ticket;

(c) accused pawned in his own name; or

(d) accused pawned in false name.

(6) Sale of property indicates an intent to deprive permanently. Part IV, para. 46c(1)(f)(ii), MCM, 1984.

(7) If the evidence shows the intent is to deprive only temporarily instead of permanently, the accused cannot be convicted of larceny but only of wrongful appropriation. United States v. Davis, 6 M.J. 669 (A.C.M.R. 1978); United States v. Diamond, 5 M.J. 650 (A.F.C.M.R. 1978). Thus, it is the intent element which makes wrongful appropriation a lesser included offense of larceny.

d. Alternate intent: An intent to appropriate the same to his own use or the use of any person other than the person last in lawful possession, or the true owner, can also be sufficient to make out the offense.

(1) Some civilian jurisdictions require that, in order to commit larceny, there must be an expectation of gain or benefit to the thief. Article 121 does not follow this view and makes it just as much the crime of larceny to steal for the benefit of another as for one's self.

(2) Remember, it is still larceny even though the accused has no intention of benefiting anyone (i.e., it is larceny if he intends simply to deprive the owner of it permanently). For example: Rollo wrongfully takes Will's watch and deliberately throws it in the ocean. A larceny results even though no one benefits.

K. Lost, mislaid, and abandoned property as the subject of larceny. Whether property is lost, mislaid, or abandoned is significant in determining the criminal liability of the one who finds it. See United States v. Malone, 14 M.J. 563 (N.M.C.M.R. 1982) for a comprehensive discussion of this area.

1. Lost property: Property with which the owner has involuntarily parted and does not know where to find or recover it is lost property. The term does not include property which has been intentionally concealed or deposited in a secret place for safekeeping. Black's Law Dictionary (4th ed. 1968).

a. When there is a clue to ownership, a finder who takes possession of lost property acquires lawful possession if his purpose is to restore it to the owner. But, he commits larceny or wrongful appropriation if his intent is to appropriate it to his own use. Part IV, para. 46c(1)(h)(i), MCM, 1984.

b. When there is no clue to ownership, a finder may lawfully take possession even if he intends to appropriate the property to his own use. If the finder later discovers a clue to ownership, he has a duty to take steps to restore the property to the owner if he still has it, or run the risk of being found guilty of a withholding type larceny or wrongful appropriation.

c. What is a "clue" to ownership? If, under all the facts and circumstances of the particular case, the finder would have reason to believe the owner and his property could be brought together again, there is a clue to ownership. Such clues may be furnished by the character, location, marketing of the property, or by other circumstances. Part IV, para. 46c(1)-(h)(i), MCM, 1984.

(1) Identifying marks, initials, serial number, etc. may provide clues to ownership.

(2) The nature of the property and the locality of the loss may be determining factors (e.g., a bos'n's pipe, a pilot's helmet, a wallet with no identification in it, found in a sleeping compartment for four men). United States v. Malone, supra.

(3) Value itself may be controlling (e.g., a dime found on the sidewalk in downtown Newport would offer no clue to ownership; a thousand dollar bill found in the Justice School would be property with a clue to ownership -- i.e., there would probably be little difficulty in discovering the true owner).

d. To determine the finder's intent where there is a clue, examine his conduct with respect to the property. If he has made a reasonable effort under the circumstances to have the property restored to its owner, it could be determined that his purpose was to restore the property to its owner. However, if he made no reasonable attempt to restore it, a court could find that he wrongfully took the item (i.e., without intent to restore it and with intent to deprive) and, hence, find him guilty of larceny.

2. Mislaid property: An article that is intentionally put in a certain place for a temporary purpose and then inadvertently left there when the owner goes away (e.g., a package left at a table in a bank lobby by a depositor who had written a check) is mislaid property. Mislaid property by definition always has a clue as to its ownership (i.e., there is always a strong probability that the owner could find it). Therefore, anyone who takes possession of mislaid property with the intent to appropriate it to his own use commits larceny or wrongful appropriation.

3. Abandoned property: Property to which the owner has relinquished all title, possession, or claim without vesting it in any other person (throwing property away) is abandoned property.

a. Abandoned property can never be the subject of larceny, since the owner has relinquished all claim to it (e.g., owner throws a broken radio into the trash). Anyone can take it without committing larceny.

b. When a thief "abandons" property, however, possession is deemed to revert to the person wrongfully dispossessed.

L. Possession of recently stolen property as evidence of theft

1. The conscious, exclusive, and unexplained possession of recently stolen property permits the inference that the person shown to have it in his custody was the individual who stole it. United States v. Weems, 11 C.M.A. 652, 29 C.M.R. 468 (1960); Tot v. United States, 319 U.S. 463 (1943). The strength of the inference depends upon the nature of the property and the degree of recentness of the offense. United States v. Irino, 1 M.J. 513 (A.F.C.M.R. 1975).

a. Such possession does not require the court to find the accused guilty; it merely permits them to do so. United States v. Boultinghouse, 11 C.M.A. 721, 29 C.M.R. 537 (1960).

b. Before the inference may be drawn and guilt found, the theft must have been recent and the possession must be conscious, exclusive, and unexplained. United States v. Ball, 8 C.M.A. 25, 23 C.M.R. 249 (1957).

(1) Conscious possession means that the accused must be aware that he has the property. It need not be established that he knew it was stolen property. See United States v. Adaszak, 13 C.M.R. 640 (A.F.B.R. 1953). All of the property need not be in his possession. "Even possession of part of recently stolen property may reasonably create the inference that the possessor had or has the remainder." United States v. Irino, supra, at 516.

(2) Exclusive possession means that the accused must be shown to have dominion over the property to the exclusion of everyone else. For example: Recently stolen fatigues were found hanging on the wall in accused's room. Accused had a roommate. Held: Not exclusive possession. His roommate also had a free access to the room and, hence, to the clothing. United States v. Adaszak, supra.

(3) Unexplained possession

(a) The purpose of this requirement is "to direct the attention of the triers of fact to the circumstances of the accused's possession and to the fact that they must determine whether the possession is explained or unexplained." United States v. Hairston, 9 C.M.A. 554, 556, 26 C.M.R. 334, 336 (1958); United States v. Ellis, 2 M.J. 616 (N.C.M.R. 1977).

(b) If there is no explanation for the accused's possession of the property in evidence, the basis for the inference is complete and the triers of fact are justified in finding that the possessor stole it if all the other elements are proved.

> The accused, of course, has an absolute right to remain silent. However, if the prosecution's case contains no evidence of an explanation for his possession which is 'consistent with innocence,' the accused runs the risk of the jury drawing the inference of guilty possession against him.

United States v. Hairston, supra, at 556, 26 C.M.R. at 336; United States v. McIver, 4 M.J. 900 (N.C.M.R. 1978). The drawing of this inference by the jury neither shifts the burden of proof to the accused nor denies him the right against self-incrimination. United States v. Pasha, 24 M.J. 87 (C.M.A. 1987).

(c) "To avoid the consequences of the absence, in the evidence, of an explanation, the accused naturally carries the duty of explaining his possession.... In other words, he has the burden of going forward with the evidence." United States v. Hairston, supra, at 556, 26 C.M.R. at 336.

(d) Inability to explain. The accused's mental condition at the time he came into possession may prohibit his explaining the circumstances of his possession, as where he was drunk or had amnesia. Such a circumstance would go to the weight to be given to the inference of guilt. See United States v. Boultinghouse, 11 C.M.A. 721, 29 C.M.R. 537 (1960) and United States v. Day, 14 C.M.A. 186, 33 C.M.R. 398 (1963).

(e) To establish the permissive inference of guilt, then, the government must establish that the accused was in conscious, exclusive, and recent possession of the stolen property in question. Then, unless the possession is explained by the accused or by other evidence and the explanation is consistent with innocence, the court may find the accused guilty. See Hairston, Weems, and Boultinghouse, all supra.

2. In determining whether there is possession of recently stolen property, all the circumstances must be considered. The character of the goods, their salability, and whether they are cumbersome or portable, are among the factors to be considered. United States v. Hairston, 9 C.M.A. 554, 26 C.M.R. 334 (1958). United States v. Moykkynen, 1 M.J. 978 (N.C.M.R. 1976).

In the case of United States v. Moten, 6 C.M.A. 359, 20 C.M.R. 75 (1955), the accused returned a government pistol two months after a theft. It is questionable whether accused was in possession of recently stolen property. In any event, the weight of such an inference is diminished by the passage of time. For example, the accused, in the case of United States v. Perkins, 17 C.M.R. 702 (A.B.R. 1954), was discovered in possession of stolen trousers one year after they were reported missing. Held: Not in possession of recently stolen property. Thus, it would appear that an accused may be held to be in possession of recently stolen property if the time span between the theft and his possession is, under the circumstances, not so long as to create the reasonable possibility of the goods having been disposed of by the thief and subsequently acquired innocently by the accused. An accused may be found in possession of "hot" goods (e.g., the Hope diamond) a considerable period after the theft and still be in possession of recently stolen property. On the other hand, in the case of readily negotiable items, possession may be "recent" only for a short period after the theft.

M. Common defenses to larceny

1. Absence of intent

a. Voluntary intoxication is a defense where it is sufficient to raise a reasonable doubt concerning the accused's mental capacity to entertain the requisite specific intent. United States v. Shaw, 13 C.M.A. 144, 32 C.M.R. 144 (1962); United States v. Backley, 2 C.M.A. 496, 9 C.M.R. 126 (1953); and United States v. Deavers, 7 M.J. 677 (A.C.M.R. 1979).

b. Honest mistake is a defense where a person takes, obtains, or withholds the property of another, believing honestly, although mistakenly and negligently, that he has a legal right to acquire or retain the property. United States v. Sicley, 6 C.M.A. 402, 20 C.M.R. 118 (1955); United States v. Rowan, 4 C.M.A. 430, 16 C.M.R. 4 (1954); United States v. Ward, 16 M.J. 341 (C.M.A. 1983) (mistake of fact need only be honest and not both honest and reasonable). United States v. Bushwell, 22 M.J. 617 (A.C.M.R. 1986). When the defense of mistake is reasonably raised by the evidence, it is incumbent upon the MJ to instruct thereon. There is, however, no necessity for such an instruction when the evidence at trial does not raise the issue. United States v. Greenfeather, 13 C.M.A. 151, 32 C.M.R. 151 (1962); United States v. Pitts, 12 C.M.A. 106, 30 C.M.R. 106 (1961); and United States v. Rodrigues-Suarez, 4 C.M.A. 679, 16 C.M.R. 253 (1954).

2. Impossibility. Accused, with the intent to steal, takes a coat off the coat rack, thinking that it belongs to someone else -- it turns out to be his own peacoat. He has not committed larceny because it is impossible to steal one's own property, but he is guilty of attempted larceny. See United States v. Thomas and McClellan, 13 C.M.A. 278, 32 C.M.R. 278 (1962).

3. Negligent loss. Cases involving withholding type larcenies have indicated that, where the evidence suggests the possibility that the accused's failure to account for the property in his custody was due to mere negligence, the court must be instructed that negligent loss constitutes a defense to both larceny and wrongful appropriation. United States v. Gustafson, 17 C.M.A. 150,

37 C.M.R. 414 (1967) and United States v. Kuchinsky, 17 C.M.A. 93, 37 C.M.R. 357 (1967). Negligent loss which occurs after the formulation of an intent to deprive permanently would not be a defense to larceny. Negligent loss which occurs after the formulation of an intent to deprive only temporarily would be a defense to larceny but would not be a defense to wrongful appropriation.

4. Duress

-- In United States v. Pinkston, 18 C.M.A. 261, 39 C.M.R. 261 (1969), the accused pleaded guilty to three specifications of larceny. In examining the accused, the defense counsel alluded to matters that might arise in mitigation and extenuation indicating a possible defense, particularly that the accused "...felt he was unable to withdraw because of his fear of harm to his fiancee and his child." The defense counsel indicated that the defense of duress would not be asserted. Held: The defense of duress is available to an accused who was acting under a well-grounded apprehension of immediate death or serious bodily harm. The legal officer erred in failing to recognize the potential defense to the charges and further inquiry should have been made regarding the providency of accused's plea.

5. An intention to pay for the property stolen, or to replace it with an equivalent.

a. Even though such an intention existed at the time of the theft, it is NOT a defense. Furthermore, the absence of a pecuniary loss to the owner is not a defense. United States v. Batiste, 11 M.J. 791 (A.F.C.M.R. 1981). The focus is on the accused's intent as to the original property taken, not that (s)he intends to get similar items to replace the goods taken.

b. Accused, Company CO, took food from a mess because his wife needed it immediately and he did not have the time to go out and buy it. He intended to replace it. Held: No defense. This is larceny. United States v. Krull, 3 C.M.A. 129, 11 C.M.R. 129 (1953).

c. The manager of a PX unlawfully sold cigarettes to unauthorized personnel, pocketed the price difference but paid the exchange for the cigarettes. Held: Larceny despite no material loss. United States v. Robinson, 7 C.M.R. 618 (A.B.R. 1952).

d. Exceptions. Part IV, para. 46c(1)(f)(iii), MCM, 1984.

(1) Money. Apart from circumstances which may impart special value to a coin or bill as a numismatic item, one dollar bill is the same as another. It is not larceny, for example, to take two five-dollar bills in exchange for a ten-dollar bill without the knowledge or consent of the owner. United States v. Hayes, 8 C.M.A. 627, 25 C.M.R. 131 (1958).

(2) An endorsed check may be replaced with an equivalent amount of cash and not be larceny, though it would still be wrongful appropriation. United States v. Epperson, 10 C.M.A. 582, 28 C.M.R. 148 (1959).

6. An intent to return the same item taken is a defense to larceny, but no defense to wrongful appropriation. United States v. Epperson, supra.

7. Repentance is no defense. If the accused wrongfully took, obtained, or withheld property with the intent to deprive permanently, the offense of larceny is complete and a subsequent repentant return is no defense to larceny but is mitigating for sentencing purposes. Part IV, para. 46c(1)-(f)(iii), MCM, 1984.

N. Lesser included offenses

1. Wrongful appropriation is a lesser included offense of larceny. Wrongful appropriation has all the elements of larceny except that the intent in wrongful appropriation is less serious than the intent in larceny. Hence, the offense of wrongful appropriation is lesser and included within larceny. United States v. Burr, 2 C.M.A. 182, 7 C.M.R. 58 (1953); United States v. Haynes, 8 C.M.A. 627, 25 C.M.R. 131 (1958).

2. In United States v. Eggleton, 22 C.M.A. 503, 47 C.M.R. 920 (1973), the accused took an $800 stereo as "security" for a $100 debt owed him by the victim. The court held that, even if the accused's "self-help" was condoned, there was a wrongful appropriation of the $700 difference.

3. The offenses of receiving stolen goods and accessory after the fact are not LIO's of larceny. United States v. McFarland, 8 C.M.A. 42, 23 C.M.R. 266 (1957); United States v. Greener, 1 M.J. 1111 (N.C.M.R. 1977).

4. Wrongful taking, without intent, is not an LIO; in fact, it is not an offense under the UCMJ. United States v. Norris, 2 C.M.A. 236, 8 C.M.R. 36 (1953). Nor is wrongful withholding, without intent, an offense under the code. United States v. Geppert, 7 C.M.A. 741, 23 C.M.R. 205 (1957).

5. Hence, larceny has only three LIO's: wrongful appropriation, attempted larceny, and attempted wrongful appropriation. Similarly, wrongful appropriation has only attempted wrongful appropriation as an LIO. Part IV, para. 46d, MCM, 1984.

6. The Manual for Courts-Martial contains certain aggravated forms of larceny that deal with the theft of military property. Part IV, para. 46e(1)(a), lists the maximum punishment for theft of military property with a value under $100.00 as confinement for one year and a bad conduct discharge. Part IV, para. 46e(1)(c), lists the maximum punishment for larceny of military property with a value over $100.00 or of any military vehicle, aircraft, vessel, firearm, or explosive as confinement for 10 years and a dishonorable discharge. Military property is still defined by Part IV, para. 32(c)(1), MCM, 1984. It is worthy of note that the Manual for Courts-Martial does not contain parallel changes to the lesser included offense of wrongful appropriation.

7. Determining whether LIO is reasonably raised by evidence

-- The general rule is that the lesser crime must be submitted to the factfinder along with the greater, unless the evidence positively excludes any inference that the lesser crime was committed. United States v. Clark, 1 C.M.A. 201, 2 C.M.R. 107 (1952). Ordinarily, any doubt should be resolved in favor of giving an instruction on the LIO. United States v. McGee, 1 M.J. 193 (C.M.A. 1975). There are certain circumstances in which it

is unnecessary and even improper to instruct on LIO's. United States v. Johnson, 1 M.J. 137 (C.M.A. 1975); United States v. Ricketts, 1 M.J. 78 (C.M.A. 1975). Some examples:

(1) In United States v. Dison, 8 C.M.A. 616, 25 C.M.R. 120 (1958), a taking was admitted, and the only question was intent. The evidence showed that the accused was very drunk, but it also permitted the finding that he had the mental capacity to form an intent to deprive, and the facts could be interpreted reasonably as showing that the accused's intent was to retain the money only temporarily. The court held that failure to instruct on the LIO was prejudicial error. C.M.A. cautioned, however, that "in some instances intoxication might pose an all-or-nothing charge." See United States v. Johnson and United States v. Ricketts, both supra.

(2) In United States v. Sims, 5 C.M.A. 115, 17 C.M.R. 115 (1954), the victim discovered that his money was missing. Accused's room was searched and the money was found. Accused was charged with larceny and testified that he found the money and that, since it was Sunday, he was going to turn it in the next day to his company commander. The law officer instructed the court members that no LIO was possible. Held: Instructions correct. Accused's testimony constituted a complete disclaimer of any criminal intent. As the issue was presented by the accused, acquittal was the only alternative to conviction for the offense charged. In short, the evidence presented an "all-or-nothing" theory. See United States v. Johnson and United States v. Ricketts, both supra.

(3) Accused was charged with larceny of clothing belonging to A. The accused testified that he had loaned B some money and B said that A could take B's clothing if B did not repay. The accused further testified that he took A's clothing in the belief that it belonged to B. Held: LIO was not fairly raised by this evidence for, if believed, it would constitute a total defense and the accused would be guilty neither of larceny nor wrongful appropriation. United States v. Smith, 2 C.M.A. 312, 8 C.M.R. 112 (1953).

(4) The accused and another wrongfully took a car, used it to escape from confinement at Quantico, VA, and drove to Washington, D.C., where they abandoned it upon running out of gas. Among other things, the accused was charged with larceny of the vehicle. Held: LIO not raised. "It is stating the obvious ... that neither the accused nor his companions intended to return it to the owner...." United States v. Brookman, 7 C.M.A. 729, 732, 23 C.M.R. 193, 196 (1957).

O. Pleading

1. Describe property in generic terms and omit detailed descriptions. For example: "automobile," not "19CY purple Chevrolet."

2. Never plead in the disjunctive. An allegation that the accused wrongfully appropriated "lawful money and/or property" of a specified value is not sufficient. United States v. Autrey, 12 C.M.A. 252, 30 C.M.R. 252 (1961).

3. Larceny or wrongful appropriation of a value in excess of $100.00 increases the quantum of punishment available, as does larceny of military property.

4. An allegation that the accused attempted to steal "personal property of some value," while it might meet minimum requirements, is subject to a motion for further particularity and the motion will usually be granted. Compare United States v. Williams, 12 C.M.A. 683, 31 C.M.R. 269 (1962) and United States v. Curtiss, 19 C.M.A. 402, 42 C.M.R. 4 (1970) with United States v. Acfalle, 30 C.M.R. 845 (A.B.R. 1960) and United States v. Durham, 21 M.J. 232 (C.M.A. 1986) (pleading the theft of "items" sufficient to protect the accused from former jeopardy where property was identified on the record with specificity).

5. The findings must conform to the specification, or a fatal variance may result. For example, in United States v. Lucero, 1 M.J. 563 (A.F.C.M.R. 1975), the accused was found not guilty of stealing the items alleged in the specification but guilty of stealing some "medical equipment." The court held that, since it could not be determined of what the "medical equipment" consisted, the identity of the offense had been changed and the resulting variance was fatal.

6. Thefts which take place on different occasions are separate crimes and should be alleged separately, not under a single specification. United States v. Paulk, 13 C.M.A. 456, 32 C.M.R. 456 (1963). Thefts occurring at substantially the same time and place, however, or which evidence a single course of conduct, amount to a single larceny and should be alleged as such, even if the property was taken from different persons. United States v. Means, 12 C.M.A. 290, 30 C.M.R. 290 (1961) and cases cited therein. But see United States v. Ventegeat, 20 C.M.A. 32, 42 C.M.R. 224 (1970); United States v. Burney, 21 C.M.A. 71, 44 C.M.R. 125 (1971) and a synopsis of the subject in United States v. Clason, 48 C.M.R. 453 (N.C.M.R. 1974). Caveat: When in doubt, plead multiple thefts under separate specifications to avoid duplicity. Should there be a single course of conduct, the specifications can be treated as multiplicious for sentencing.

7. Although the government must prove that the accused took, obtained, or withheld the property in question, it is only necessary to plead the word "steal." United States v. Paulk, 13 C.M.A. 456, 32 C.M.R. 456 (1963).

8. Sample specification: Part IV, para. 46f, MCM, 1984.

> Specification: In that [Name, etc. and personal jurisdiction data], did, [at/on board (location], on or about [date], steal (wrongfully appropriate) a wristwatch, of a value of about $27.00, the property of Seaman Penurious P. Gullible, U.S. Navy.

P. Multiplicity: As noted above, multiplicity considerations may affect how the offenses are pled. More often than not, however, the question is one which manifests itself only in sentencing. A discussion of the cases illustrate this point:

1. When larceny of several articles is committed at substantially the same time and place it is a single larceny, even though the articles belong

to different persons, but a separate and distinct theft arises with each larcenous taking from a separate locale or structure of different ownership, notwithstanding the fact that multiple takings may occur in the same vicinity and in a single venture under one continuous impulse. United States v. Wenz, 1 M.J. 1030 (N.C.M.R. 1976); United States v. Abendschein, 19 M.J. 619 (A.C.M.R. 1984); Part IV, para. 46c(1)(h)(ii), MCM, 1984.

2. Larcenous taking of tape recorder in one room not multiplicious with charge of larcenous taking of calculator and checks from another office. United States v. Gillingham, 1 M.J. 1193 (N.C.M.R. 1976).

3. The traditional rule was that larceny and forgery were not multiplicious. United States v. Rigsby, 6 M.J. 550 (A.F.C.M.R. 1978); United States v. Hudson, 2 M.J. 958 (A.C.M.R. 1976). Recent cases involving bad check offenses indicate that larceny and forgery will be multiplicious where the theft was simply the result of the forgery. For example, in United States v. Ward, 15 M.J. 377 (C.M.A. 1983), the accused was charged with thirteen specifications of uttering checks without sufficient funds and thirteen specifications of larceny of the items obtained as a result. Held: Multiplicious for findings and the bad check offenses were dismissed. Accord United States v. Allen, 16 M.J. 395 (C.M.A. 1983).

4. Larceny and conspiracy to commit larceny are separately punishable. United States v. Washington, 1 M.J. 473 (C.M.A. 1976).

5. Housebreaking and larceny are properly considered separate offenses for sentencing purposes. United States v. Alvarez, 5 M.J. 762 (A.C.M.R. 1978).

6. Larceny and wrongful disposition of same piece of property are not multiplicious and are separately punishable. United States v. West, 17 M.J. 145 (C.M.A. 1984).

7. Larceny and presenting false claims are not multiplicious for purposes of findings. United States v. McKnight, 19 M.J. 949 (A.F.C.M.R. 1984).

Q. Instructions. See Military Judges' Benchbook, DA Pam 27-9 (1982) insts. 3-90, 3-91.

1. Even though the government need only allege that the accused did "steal," the government must prove that the accused wrongfully took, obtained, or withheld the property in question and the military judge should instruct on the basis of the theory under which the government has proceeded. United States v. Jones, 13 C.M.A. 635, 33 C.M.R. 167 (1963).

2. An instruction in the alternative, however, (e.g., took, obtained, or withheld) will not be objectionable, unless it operates to permit the court to convict on an improper theory. United States v. Smith, 11 C.M.A. 321, 29 C.M.R. 137 (1960); United States v. Nix, 11 C.M.A. 691, 29 C.M.R. 507 (1960). Compare United States v. McFarland, 8 C.M.A. 42, 23 C.M.R. 266 (1957) and United States v. Sicley, 6 C.M.A. 402, 20 C.M.R. 118 (1955). For

example: Accused was tried for larceny of meat. He worked in a mess hall which had received a large delivery of packaged meat. Subsequently, his car was searched off base and the meat was found in his car. Defense introduced evidence that denied the taking by the accused and "explained" his possession of the recently stolen meat, asserting that he got it off base from a civilian, although he did realize it was probably stolen. In short, he defended against the larceny charge by asserting he received stolen goods. The legal officer gave a shotgun instruction, "took, obtained, or withheld." Held: Inclusion of the alternative theory of withholding in the instruction was prejudicial error, because the court might then convict of larceny because the accused had received the stolen goods and thereafter withheld them, which is not larceny. NOTE: The above is J. Ferguson's approach. J. Kilday said that the use of the word "withheld" was not prejudicial, but concurred in the result because of the legal officer's failure to instruct the court on the effect of accused's explanation of possession upon the permissive inference of guilt from possession of stolen property. C. J. Quinn reverted here to the first C.M.A. position of "nonprejudicial" error where the accused's testimony was "patently incredible." But, Judges Ferguson and Kilday rejected that approach and said, in effect, that it's for the court-martial to decide whether the accused's story was credible. Hence, no matter how absurd the tale is, if there is testimony asserting a defense theory, it must be properly instructed upon. United States v. Hicks, 15 C.M.A. 68, 35 C.M.R. 40 (1964) and United States v. Jones, 13 C.M.A. 635, 33 C.M.R. 167 (1963).

R. Related offenses. Larceny may be committed in connection with several other offenses. For example:

1. Robbery (violation of article 122);

2. presenting a false claim (violation of article 132);

3. obtaining services under false pretenses (violation of article 134);

4. receiving stolen property (violation of article 134) (an actual thief is not guilty of receiving stolen property) [United States v. Cook, 7 M.J. 623 (N.C.M.R. 1979)];

5. issuing worthless checks (violation of article 123a);

6. forgery (violation of article 123);

7. theft from the mails (value not an element) (violation of article 134) [e.g., United States v. Gaudet, 11 C.M.A. 672, 29 C.M.R. 488 (1960)];

8. wrongful disposition or destruction of military property of the U.S. (violation of article 108);

9. wrongful destruction of nonmilitary property (violation of article 109);

10. burglary (violation of article 129);

11. housebreaking (violation of article 130) [Finding of not guilty as to larceny charge was not tantamount to finding that accused lacked the essential intent to commit larceny included in related housebreaking specification. United States v. Smith, 4 M.J. 809 (A.F.C.M.R. 1978)]; and

12. conspiracy to commit larceny. United States v. Washington, 1 M.J. 473 (C.M.A. 1976).

0902 ROBBERY (Key Numbers 717-722)

A. Text of Article 122, UCMJ

> 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 robbery, is guilty of robbery and shall be punished as a court-martial may direct.

B. Elements of the offense. Part IV, para. 47b, MCM, 1984.

1. That the accused wrongfully took certain property from the person or from the possession and in the presence of a person named or described;

2. that the taking was against the will of that person;

3. that the taking was by means of force, violence, or force and violence, or putting the person in fear of immediate or future injury to that person, a relative, a member of the person's family, anyone accompanying the person at the time of the robbery, the person's property, or the property of a relative, family member, or anyone accompanying the person at the time of the robbery;

4. that the property belonged to a person named or described;

5. that the property was of a certain or some value; and

6. that the taking of the property was with the intent permanently to deprive the person robbed of the use and benefit of the property.

C. These elements which describe the offense of robbery show that robbery is essentially a combination of a larceny of the taking type and an assault or threat. The following is a discussion of some of the key elements of robbery.

D. The accused committed a taking-type larceny of property of some value from the possession and in the presence of a person.

1. Since robbery includes "taking with intent to steal," a larceny by taking is an integral part of the charge of robbery and must be proved at

trial. Larceny by false pretenses or an obtaining-type larceny is not sufficient to satisfy this element of the offense. Part IV, para. 47c, MCM, 1984. United States v. Brazil, 5 M.J. 509 (A.C.M.R. 1978) (where a withholding of taxicab fare was the essence of what was proven, the accused could properly be found guilty only of larceny, not robbery). Brazil, supra, was overruled in United States v. Abeyta, 12 M.J. 507 (A.C.M.R.), which held that taxi services could not be the subject of a larceny.

2. To constitute the offense of robbery, it is not essential that the subject of the taking-type larceny be of any specific value. However, the court must be satisfied that the property taken was of some value, however small or indefinite as to amount, in order to convict the accused of larceny by taking, hence, robbery.

3. For a detailed discussion of larceny, see section 0901 of this chapter.

4. To be in the victim's presence, it is not necessary that the property taken be located within any certain distance of the victim. If persons enter a house and force the owner by threats to disclose the hiding place of valuables in an adjoining room and, leaving the owner tied, go into that room and steal the valuables, they have committed robbery. Part IV, para. 47c(1), MCM, 1984. "Presence" means possession or control so immediate that violence or intimidation is essential to remove the property. United States v. McCray, 5 M.J. 820 (A.C.M.R. 1978).

a. Example: Victim and her "sleeping companion" drove to a beach area for a picnic. On arriving there, the accused and his friends were occupying the area and the victim started to back up her car to leave. The accused approached the car and snatched the keys from the ignition and dragged the victim from the car and attempted to undress her. The victim evaded the accused, dropped her purse containing $24.00 on the ground next to the car, and went to the aid of her companion. The accused again accosted her and pushed her against the car. The accused and his friends then drove off leaving the victim and her companion, but taking the $24.00 from victim's purse. Held: It is not necessary in robbery that the taking be directly from the person of another, that is, actually severed from the person. It is enough if it is taken from the immediate control of the person, provided the property is taken by or through the use of force or violence. United States v. Hamlin, 33 C.M.R. 707 (A.B.R. 1963).

b. Example: Accused held a knife to the throat of a winner in a pool game and forced him to admit where his friend's IOU was located. The friend (the loser) then went to another barracks, obtained the IOU, returned and destroyed it in the presence of the winner. During the entire episode, the accused held a knife to the winner's throat. Held: The taking of the IOU was "from the person in the presence" of the victim. United States v. Maldonado, 34 C.M.R. 952 (A.B.R. 1964), rev'd on other grounds, 15 C.M.A. 285, 35 C.M.R. 257 (1965).

c. Example: Accused obtained the victim's room key from the victim while they were at the victim's work area. The accused then went to the victim's barracks room, opened the door using the key, and took the victim's stereo. Held: Not taken from the "presence" of the victim despite the government's contention that the room key symbolized ownership. United States v. Cagle, 12 M.J. 736 (A.F.C.M.R. 1981).

d. Example: Accused put a knife to the victim's throat intending to get money "then and there," but then allowed the victim to depart the room. While the victim was gone, the accused opened a suitcase that the victim had left behind and removed a sum of money. The victim returned with the police and the accused was apprehended. Held: Only a case of attempted robbery was made out absent a showing that the taking of money from the victim's suitcase was against his will or in his presence. United States v. Cunningham, 14 M.J. 539 (A.C.M.R. 1982).

E. Second and third elements: The taking was against the will of the victim and was by force or violence, or putting the victim in fear.

1. By force or violence

a. For robbery to be committed by force or violence, there must be actual force or violence to the person, preceding or accompanying the taking against his will. United States v. Chambers, 12 M.J. 443 (C.M.A. 1982). It is immaterial that there is no fear engendered in the victim. Any amount of force is enough to constitute robbery if the force overcomes the actual resistance of the person robbed, or puts him in such a position that he makes no resistance, or is sufficient to overcome the resistance offered by a chain or other fastening by which the article is attached to the person. Part IV, para. 47c(2), MCM, 1984. See United States v. Reynolds, 20 M.J. 118 (C.M.A. 1985), wherein the accused pretended to be a military policeman placing the victim under apprehension. The accused had the victim "patted down" to divert his attention while his wallet was removed. C.M.A. held this jostling constituted sufficient force for robbery.

(1) Where the evidence established that accused struck the victim in the face and took property from victim, who did not resist because he feared further violence, the findings of guilty of robbery by force or violence were supported by the evidence. The assault and battery was sufficient violence to constitute this element of the offense of robbery. United States v. Reynolds, 9 C.M.R. 772 (A.B.R. 1953).

(2) The degree of force required is such as is actually sufficient to overcome the victim's resistance. It is not necessary to show a personal injury, or a blow, or force sufficient to overcome any resistance that the victim was capable of offering. In fact, robbery may exist although the victim makes no resistance. United States v. Hamlin, 33 C.M.R. 707 (A.B.R. 1963).

b. Time of application of force

(1) Actual force or violence to the person of the victim must precede or accompany the taking. If an accused takes possession of the

property without the use of force or violence, but subsequently employs force in order to retain money or to escape, he is guilty only of larceny and not robbery. But see United States v. Chambers, 12 M.J. 443 (C.M.A. 1982), which held that, if the threat or violence happens before asportation is completed, a robbery is committed. See also United States v. Burns, 5 C.M.A. 707, 19 C.M.R. 3 (1955) (the accused beat the victim unconscious with a furnace handle during a psychotic episode and, upon recovering his full mental faculties, he stole the victim's wallet -- robbery was established); United States v. Dixon, 19 M.J. 788 (A.C.M.R. 1985) (assault following initial beating accompanied by a taking is separately punishable).

(2) If the accused, before the effect of the force and violence has been dissipated, steals from the victim, it is robbery; the rationale being that the intent is formed while the effects of the force are still operative and the taking is, for all practical purposes, made possible by the violence employed. United States v. Hamlin, supra, citing United States v. Burns, supra; United States v. Washington, 12 M.J. 1036 (A.C.M.R. 1982).

(3) In United States v. Subia, 12 C.M.A. 23, 30 C.M.R. 23 (1960), the accused came upon an already unconscious victim (drunk) and transported him to another location where he took money from the victim's person without the victim's knowledge. The court indicated that such acts did not constitute robbery but only larceny, because no force was employed. But see United States v. Washington, supra.

2. By putting victim in fear. For robbery to be committed by putting the victim in fear, there need be no actual force or violence, but there must be demonstrations of force or menaces by which the victim is placed in such fear that he is warranted in making no resistance. The fear must be reasonably well-founded apprehension of present or future injury, and the taking must occur while the apprehension exists. The injury feared may be death or bodily injury to the person himself or to the person of a relative or member of his family or to anyone in his company at the time, or it may be the destruction of his habitation or other injury to his property or that of a relative or member of his family or of anyone in his company at the time of sufficient gravity to warrant his giving up the property demanded by the assailant. Part IV, para. 47c(3), MCM, 1984.

F. Sixth element: The taking was with the intent to permanently deprive.

1. A person is not guilty of robbery in forcibly taking property from the person of another if he does so under an honest belief that he is the owner, or is assisting an owner. United States v. Petrie, 1 M.J. 332 (C.M.A. 1976); United States v. Kachougian, 7 C.M.A. 150, 21 C.M.R. 276 (1956); United States v. Mack, 6 M.J. 598 (A.C.M.R. 1978); United States v. Smith, 14 M.J. 68 (C.M.A. 1982).

2. One who forcibly recaptures money lost in a crooked gambling game may not be guilty of robbery because title to money lost in a crooked gambling game does not pass to the winner, and one does not steal when he effects recapture of such money, but he may be guilty of assault and battery.

United States v. Brown, 13 C.M.A. 485, 33 C.M.R. 17 (1963); United States v. Maldonado, supra. It is nc defense to robbery, however, for an accused to take money from a victim to recover the value of hashish which he believed the victim had stolen from him because the accused had no right to reassert possession of contraband hashish. United States v. Petrie, 1 M.J. 332 (C.M.A. 1976).

3. Robbery is a specific intent crime and mental impairment short of legal insanity is relevant in determining the accused's ability to form requisite intent. United States v. Thompson, 3 M.J. 271 (C.M.A. 1977).

G. Possible lesser included offenses of robbery

1. Larceny -- Article 121. United States v. Rios, 4 C.M.A. 203, 15 C.M.R. 203, 205 (1954) (specification failed to allege that property had been taken from person or presence of victim but did allege "...did... steal... property from the victim").

2. Wrongful appropriation -- Article 121

3. Attempted larceny or attempted wrongful appropriation

4. Assault and battery -- Article 128. United States v. Mack, 6 M.J. 598 (A.C.M.R. 1978).

5. Assault with a dangerous weapon -- Article 128. Where, in a trial for robbery, the evidence established that, at a time when the accused may have been too intoxicated to entertain a specific intent, he approached a Korean policeman and, by threatening him with a knife, obtained possession of his carbine, the law officer erred when he failed to instruct with respect to the effect of intoxication on the specific intent. The error was purged by affirmance of the offense of assault with a dangerous weapon. United States v. Craig, 2 C.M.A. 650, 10 C.M.R. 148 (1953), United States v. Douglas, 2 M.J. 470 (A.C.M.R. 1975).

6. Assault intentionally inflicting grievous bodily harm -- Article 128. The robbery specification was in standard form. Held: The allegation of "force and violence" includes both minor and serious physical injuries and the accused must only be aware of the form of violence used to rob the victim. Having directly or inferentially alleged a criminal intent, the government may, in establishing a lesser offense, show the specific type, providing the accused is not misled in his defense. United States v. King, 10 C.M.A. 465, 28 C.M.R. 31 (1959); United States v. Douglas, supra.

7. Assault with intent to rob -- Article 134. United States v. Cooper, 2 C.M.A. 333, 8 C.M.R. 133 (1953).

8. Extortion -- Article 127. United States v. Jackson, 8 M.J. 511 (A.C.M.R. 1979).

H. Pleading

1. A specification that only says "rob," or that fails to aver that the taking was from the person or presence of the victim or was accomplished by force, violence, or fear does not allege robbery. United States v. Ferguson, 2 M.J. 1225 (N.C.M.R. 1976). The same is true for attempted robbery. United States v. Hunt, 7 M.J. 985 (A.C.M.R. 1979).

2. Sample specification -- Part IV, para. 47f, MCM, 1984

> In that [Name, etc. and personal jurisdiction data], did, [at/on board (location], on or about [date], by means of force, steal from the person of Seaman Harry W. Marble, U.S. Navy, against his will, a watch, of a value of about $25.00, the property of Seaman Harry W. Marble, U.S. Navy.

I. Multiplicity considerations

1. Robberies of different victims at the same time and place are separately punishable offenses. United States v. Richardson, 2 M.J. 436 (A.C.M.R. 1975); United States v. Baker, 2 M.J. 773 (A.C.M.R. 1976).

2. Where intent to inflict grievous bodily harm is shown to have been formulated after robbery was perfected, subsequent beating of same victim is separately punishable. United States v. Douglas, 2 M.J. 470 (A.C.M.R. 1975); United States v. Dixon, supra.

3. Separate charges of robbing victim of his car and of German currency were not unreasonably multiplicious when intent to rob money was formulated after intent to take car. United States v. Davis, 18 M.J. 79 (C.M.A. 1984).

0903 RECEIVING, BUYING, CONCEALING STOLEN PROPERTY (Key Numbers 729-734)

A. The UCMJ contains no specific punitive article prohibiting the receiving of stolen property. The offense is charged under article 134 as conduct prejudicial to good order and discipline or service discrediting.

B. Elements. Part IV, para. 106, MCM, 1984.

1. That the accused wrongfully received, bought, or concealed certain property of some value;

2. that the property belonged to another person;

3. that the property had been stolen;

4. that the accused then knew the property had been stolen; and

5. that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces, or was of a nature to bring discredit upon the armed forces.

C. Accused wrongfully received, bought, or concealed property

1. Wrongfully. This means that the property was received, bought, or concealed without the consent of the true owner or without justification or excuse. Part IV, para. 106c(3), MCM, 1984.

2. Received

a. The term "receive" means to acquire possession, care, custody, management, or control of property. Thus, even merely transporting stolen goods may constitute the offense of receipt of stolen goods. United States v. Price, 34 C.M.R. 516 (A.B.R. 1963) (Dicta: accused who transported parts of a car he knew to be stolen was not guilty of larceny because he was not connected in any way with the larceny, and should have been charged with receiving stolen property). United States v. Graves, 20 M.J. 344 (C.M.A. 1985) Accuseds' actions in carrying stolen office machines into pawnshop demonstrated sufficient "possession" for acceptance of guilty plea. Mere constructive possession without knowledge that what is received is stolen cannot constitute "receipt" so as to confer criminal liability. United States v. Rokoski, 30 C.M.R. 433, 436 (A.B.R. 1960). One who comes into constructive possession of property "without knowledge of its character commits no wrong, and there appears to be no sound reason for converting an innocent act into a criminal offense on the basis of after-acquired information which reaches the accused when it is too late for him to act on it by declining to become involved in the transaction."

b. It is not necessary for the receiver to touch the goods with his own hands. If they are delivered into his control, it is sufficient. Thus, possession may be taken for him by his servant or agent acting under his directions; or he may direct the thief to deposit the goods at a certain place and then lead an innocent "purchaser" to that place, or have the goods sent to him, and complete a "sale" without himself touching them.

c. Sale or transfer for consideration is not necessary for receipt. Therefore, this offense encompasses mere concealing or receiving, as well as buying stolen property. Any exercise of control or dominion over property is probably sufficient. Example: Rollo steals a watch from the local base exchange and, after bragging about how he stole it, gives it to his girlfriend as a gift. If she accepts it, she has received stolen property.

d. The receiving must be with the thief's consent. The offense of receiving stolen goods is not committed by one who takes the goods from a thief without consent. This, as we have seen, is larceny. Perhaps more common is the situation where one thief "stiffs" another. For example, A pays for stolen goods he receives from B with a rubber check. A is not guilty of receiving stolen property because there is no valid "consent" by B in relinquishing the goods to A. (But, A is guilty of larceny by trick in addition to a bad check offense.)

3. Concealed. See United States v. Banworth, 24 C.M.R. 795 (A.F.B.R. 1957) for a discussion of concealment.

4. Personalty. As in the crime of larceny, the stolen property must be personal property.

D. That the property had been stolen and belonged to the person alleged as the owner

1. The property must be stolen in fact

Query: Can an accused be found guilty of this offense when he has received wrongfully appropriated property? While Part IV, para. 106, discusses only "stolen property," receiving misappropriated property would in any event seem to be an LIO, an offense under article 134.

2. The property must have been stolen by someone other than the accused

a. The actual thief (perpetrator) cannot be held criminally liable for receiving property which he has stolen, for he cannot logically receive property from himself. See Part IV, para. 106c(1), MCM, 1984; United States v. Ford, 12 C.M.A. 3, 30 C.M.R. 3 (1960); United States v. Cook, 7 M.J. 623 (N.C.M.R. 1979); United States v. Finnie, 18 C.M.R. 700 (A.F.B.R. 1954).

b. In certain cases, however, the same facts may seem to support a charge of larceny or receiving stolen property. This will occur when accused is liable as a statutory principal vice actual thief (i.e., an aider and abettor, or co-conspirator, or accessory before the fact). While earlier cases had held that the accused in such situations could be found guilty of both offenses, C.M.A. recently disavowed such practice and now requires that the accused be found guilty of either larceny or receipt. United States v. Cartwright, 13 M.J. 174 (C.M.A. 1982). Accord United States v. Lampini, 14 M.J. 22 (C.M.A. 1982). See also Part IV, para. 106c(1), MCM, 1984.

c. Further, receipt of stolen property has been held not to be an LIO of larceny. United States v. Cook, 7 M.J. 623 (N.C.M.R. 1979); United States v. Thompson, 37 C.M.R. 705 (A.B.R. 1967); United States v. Price, 48 C.M.R. 645 (A.F.C.M.R. 1974). Thus, whenever there is doubt about whether the accused was the thief, or merely a receiver of stolen property, the savvy prosecutor should charge both offenses to allow for the contingencies of proof.

3. Proving that the property was stolen in fact

a. The government cannot introduce the conviction of the thief as evidence against the receiver. See Part IV, para. 3c(5), MCM, 1984 (prohibits the use of evidence of principal's conviction against an accessory after the fact to establish the fact that the offense was committed).

b. Therefore, the government must in effect prove two crimes at the trial of the receiver: the larceny and the receiving.

c. Query: Suppose the thief is acquitted: Can the receiver be convicted? Yes. See Chapter I of this study guide and Part IV, para. 3c(5), MCM, 1984.

E. That accused then knew the property had been stolen

1. Actual knowledge that the property was stolen is required. Part IV, para. 106c(2), MCM, 1984.

a. There is some conflict in the case law as to just what sort and amount of evidence is required to find the requisite knowledge and whether any inferences are permissible. In United States v. Gluch, 30 C.M.R. 534 (A.B.R. 1961), the board stated:

> In the absence of a specific proscription in the Code and Manual or by COMA, and applying the principle adopted in the U.S. courts, we hold that as to the offense of knowingly receiving stolen property where it reasonably appears from the evidence that the stolen property was not stolen by the accused, a justifiable inference may be drawn from his recent, unexplained and exclusive possession that he had some knowledge that the property was stolen.

Id. at 541.

b. In United States v. Petty, 3 C.M.A. 87, 11 C.M.R. 87 (1953) and United States v. Fairless, 18 C.M.R. 904 (A.F.B.R. 1955), an inference of knowledge was permitted from the attendant facts and circumstances. In United States v. Rokoski, 30 C.M.R. 433 (A.B.R. 1960), however, the board distinguished both Petty and Fairless on the basis that, in those cases, knowledge was inferred from evidence corroborating confessions. The board stated that a greater quantum of proof is required where no confession is extant: "Here, inference of knowledge from facts and circumstances won't suffice." Id. at 435. But cf. United States v. Tucker, 1 M.J. 492 (A.F.C.M.R. 1975) (court found sufficient facts and circumstances to give rise to an inference that the accused knew the items received were stolen); United States v. Morton, 15 M.J. 850 (A.F.C.M.R. 1983) (permissive inference regarding accused's possession of recently stolen bicycle is simply a description of a general type of logical, relevant, factual deduction that a juror may draw from the evidence admitted at trial). In summation, whether an inference of knowledge will be permitted will depend upon the totality of the facts and circumstances brought out at trial.

c. Mere negligence in not realizing that the property is stolen will not be sufficient for conviction. United States v. Rokoski, supra; United States v. Werner, 160 F.2d 438 (2d Cir. 1947).

2. Such knowledge must exist at the time the accused received, bought, or concealed the property. See United States v. Rokoski, supra.

3. Note that an Article 121, UCMJ, wrongful withholding type larceny does not preempt the buying, receiving, or concealing offenses. United States v. Bonavita, 21 C.M.A. 407, 45 C.M.R. 181 (1972). Where the

accused receives, buys, or conceals the property knowing it to be stolen and with no intent to return the property to the true owner, the subsequent withholding of the property from the true owner cannot amount to larceny. Part IV, para. 46c(1)(b), MCM, 1984. Because there has been no taking or obtaining by the accused, his offense is simply receiving stolen property, unless, of course, the accused is a principal but not the perpetrator in the initial taking. United States v. Henderson, supra. United States v. McFarland, 8 C.M.A. 42, 23 C.M.R. 266 (1957) (the essential elements of proof as to larceny are incompatible with those of receiving stolen property); United States v. Jones, 13 C.M.A. 635, 33 C.M.R. 167 (1963); United States v. Welker, 8 C.M.A. 647, 25 C.M.R. 151 (1958).

F. Value

-- The same rules apply here as for larceny (i.e., the government must allege and prove some value). Specific value is a matter in aggravation. Part IV, para. 106e, MCM, 1984.

G. Pleading. Part IV, para. 106f, MCM, 1984.

-- Sample specification

> In that Seaman Ima A. Fence, U.S. Navy, USS Sting, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 15 March 1982, unlawfully buy a wristwatch of a value of about $130.00, the property of Yeoman Third Class Ibe N. Robbed, U.S. Navy, which property as he, the said Seaman Fence, then knew had been stolen.

0904 BAD CHECK LAW (Key Numbers 50, 58)

A. Text of Article 123a (enacted in 1961)

> 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 'credit' means an arrangement or understanding, express or implied, with the bank or other depository for the payment of that check, draft or order.

B. Elements. Part IV, para. 49b, MCM, 1984.

1. That the accused made, drew, uttered or delivered a check, draft or order for the payment of money;

2. that at the time of the making, etc., the accused knew that the maker or drawer did not or would not have sufficient funds or credit to pay the instrument in full upon presentment; and

3. that the making, etc., was for the procurement of an article or thing of value with intent to defraud, or for the payment of a past due obligation or for any purpose with intent to deceive.

C. First element. That the accused made, drew, uttered or delivered a check, draft, or order for the payment of money.

1. Making and drawing are synonymous and refer to the acts of writing and signing or simply signing the instrument. Part IV, para. 49c(3), MCM, 1984.

a. Preparing a worthless check but not signing it apparently may not make one a "maker or drawer." United States v. Teal, 34 C.M.R. 890 (A.F.B.R. 1964) (Making a check and then placing it in one's pocket (i.e., without any attempt to negotiate it) is not a criminal act prohibited by Article 123a, UCMJ).

b. Part IV, para. 49c(3), MCM, 1984, is misleading when it says "writing and signing." If both were required, then a maker or drawer who merely signs an otherwise completed instrument prepared by another would be excluded from liability.

2. Delivering and uttering both mean transferring the instrument to another. Uttering also means offering to transfer (i.e., uttering includes an attempted delivery). Part IV, para. 49c(4), MCM, 1984.

3. Frequently, an accused will have made, uttered, and delivered the same check, in which case he/she should be alleged as the maker. The accused need not do all three; any one of them will suffice. Consideration, however, should be given to the contingencies of proof (e.g., by pleading in the alternative where there is doubt about the facts or the law).

4. Check, draft, or order for the payment of money upon any bank or other depository.

a. This is intended to include all negotiable instruments ordering the payments of money by any business regularly, but not necessarily exclusively, engaged in public banking activities. Part IV, para. 49c(1) and (2), MCM, 1984.

b. The bank may be real or nonexistent. Checks have been drawn on such fictitious institutions as "The East Bank of the Mississippi."

c. A post-dated check is a "check" within the meaning of article 123a. United States v. Hodges, 35 C.M.R. 867 (A.F.B.R. 1965) (If the requisite intent existed at the time of the making of the check, it is immaterial that legal presentment and dishonor might necessarily be impossible before the date upon which the instrument purports to become due and payable).

d. A specification that the accused did "wrongfully make a certain savings withdrawal slip for payment of money" with the intent to defraud, in violation of article 123a, did not state an offense because "the instrument is clearly not a 'check' or 'draft' ... and operated only as a receipt and not as an order to pay." United States v. Greene, 43 C.M.R. 737, 739 (A.C.M.R. 1971).

D. Second element. Knowing at the time he makes, draws, utters, or delivers the check (etc.) that the maker or drawer does not or will not have sufficient funds (etc.) for payment ... in full upon presentment.

1. "Will not have" covers the situation where the accused at the time he/she makes, etc. knows that sufficient funds currently are on deposit but also knows because of outstanding checks there will not be sufficient funds at the time of presentment.

2. Actual knowledge is required

a. This may be established by circumstantial evidence that the check was drawn on a nonexistent bank, or on a bank at which the accused did not have an account, or the accused signed a fictitious name.

b. Knowledge also may be established by utilizing the statutory rule of evidence provided in article 123a, that knowledge and intent are established prima facie if payment was refused and the maker did not make good on the check. Part IV, para. 49c(17), MCM, 1984.

(1) However, the statutory rule of evidence establishing knowledge and intent applies only to makers and drawers. It does not cover the knowledge and intent element in case of an utterer and deliverer. United States v. Rosario, 34 C.M.R. 865 (A.F.B.R. 1964).

(2) If the accused makes good six days after notice, the prima facie evidence of knowledge and intent would not be nullified; however, reasonable doubt might exist. The statutory inference is discussed in detail in section 0905.E.4, below.

E. Third element: intent. There are two mutually exclusive intents covered in article 123a: to defraud and to deceive. Which intent is applicable depends on what the accused received or attempted to procure.

1. If the check is made, etc. for the procurement of an article or thing of value, it is with the intent to defraud.

a. Intent to defraud is an intent to obtain a thing of value by misrepresentation for one's own use or for use of another, either permanently or temporarily. Part IV, para. 49c(14), MCM, 1984.

b. Article or thing of value. Part IV, para. 49c(8), MCM, 1984, interprets this to include every kind of right or interest in property or derived from contract, including intangible rights, contingent rights, or those which mature in the future.

(1) The government must allege at a minimum "for procurement of currency or other thing of value." An allegation of intent to defraud for the procurement of money was held insufficient because money could have been a past due obligation, and hence intent to deceive, not an intent to do fraud. United States v. Burke, 39 C.M.R. 718 (A.B.R. 1968).

(2) Automobile insurance and payment for rental of quarters were held to be things of value within the meaning of article 123a(1). United States v. Ward, 35 C.M.R. 834 (A.F.B.R. 1965).

(3) Value of the article is an essential element. A specification that the accused fraudulently made checks to the PX for procurement of an article fairly implies that the article at least had some value. United States v. Cordy, 41 C.M.R. 670 (A.C.M.R. 1969).

c. Procurement. The government need not establish what the accused received; in fact, it need not establish that he received anything at all, so long as it proves the requisite intent or purpose to procure. United States v. Martin, 38 C.M.R. 877 (A.F.B.R. 1968) (article 123a does not make the receipt of something of value a necessary element of this offense). "For the procurement of" some article or thing of value must be alleged, however, and proved. United States v. Henry, 41 C.M.R. 946 (A.F.C.M.R. 1969).

2. If the check is made, etc. for payment of a past due obligation or for any other purpose, it is with the intent to deceive.

a. Past due obligation is an obligation to pay money which has legally matured prior to the making, uttering, etc. Part IV, para. 49c(9), MCM, 1984.

b. For any other purpose is intended as a catch-all for anything that does not fulfill the requirement of "article or thing of value" or "past due obligation." For example: A bad check in payment for laundry services was held to be properly pleaded under article 123a(2), in that, if past due, then it is expressly covered by article 123a(2), and if not yet due, then it is covered by "for any other purpose." United States v. Green, 36 C.M.R. 882 (A.F.B.R. 1966), petition denied, 36 C.M.R. 541 (1966).

(1) In United States v. Wallace, 15 C.M.A. 650, 36 C.M.R. 148 (1966), the court said that the issuance of a worthless check in a gambling game or as a means of facilitating a gaming transaction cannot be made the basis of a criminal prosecution for allegedly "dishonorable" conduct. Although Wallace involved bad check offenses charged under articles 133 and 134, the reasoning appears applicable to article 123a. Thus, it is questionable, notwithstanding the above provision in the Manual, that article 123a covers the issuance of bad checks in apparent satisfaction of gambling debts. See United States v. Williams, 17 C.M.A. 321, 38 C.M.R. 119, 120 (1967) (forging a check under article 123 is a valid offense though).

(2) Query: Are services to be pleaded under article 123a(1) or (2)? See United States v. Green, supra; United States v. Ward, supra. While most of these cases probably fall under the intent to deceive provision of article 123a(2), they are difficult to categorize with complete assurance and pleading in the alternative is strongly recommended if there is any doubt.

c. Intent to deceive is an intent to gain an advantage for one's self or a third person by a misrepresentation; or an intent to bring about a disadvantage, by misrepresentation, to the one to whom the misrepresentation is made. Part IV, para. 49c(15), MCM, 1984.

3. Distinction between articles 123a(1) (defraud) and 123a(2) (deceive). Defraud connotes obtaining a thing and, hence, is used in the procurement offense. Deceive does not connote obtaining a thing but more aptly describes the state of mind present when one seeks to gain any advantage by a misrepresentation. Deceive is an interest of a lesser degree of seriousness than an intent to defraud. United States v. Jarrett, 34 C.M.R. 652 (A.B.R. 1964). The different degrees of seriousness are reflected in the maximum permissible punishments available. Part IV, para. 49e, MCM, 1984.

a. Article 123a(1) covers those situations where the use of a worthless check is:

(1) With the intent to defraud; and

(2) in order to obtain something of value.

b. Article 123a(2) covers those situations where a worthless check is used with the intent to deceive to:

(1) Satisfy a past due indebtedness; or

(2) for any purpose other than obtaining something of value.

c. Hence, these two intents are separate and distinct and neither is included in the other. For example, a specification which alleges the use of a worthless check with the intent to deceive in order to obtain a thing of value does not allege an offense. United States v. Wade, 14 C.M.A. 507, 34 C.M.R. 287 (1964).

4. Proof of intent

a. In most instances, the intent to deceive or defraud will have to be established by circumstantial evidence.

b. Article 123a specifically includes a statutory rule of evidence. It provides that prima facie evidence of (1) the maker's or drawer's intent to defraud or deceive and (2) knowledge of insufficient funds or credit, is established by the drawee's refusal of payment for insufficient funds unless the maker or drawer pays the holder the amount due within five days after notice of nonpayment. United States v. Crosby, 22 M.J. 854 (A.C.M.R. 1986).

c. The Military Rules of Evidence contain certain evidentiary procedures to facilitate the prosecution of bad check cases (e.g., exceptions to the best evidence rule (Mil.R.Evid. 1003), hearsay exceptions for records of regularly conducted activity and the absence of entries therein (Mil.R.Evid. 803(6) and (7)), and self-authentication for commercial paper (Mil.R.Evid. 902(9)). See NJS Evidence Study Guide for further discussion.

d. Note that, as in the question of knowledge of insufficient funds, a failure to make a check good within 5 days after notice of nonpayment is prima facie evidence of the maker's or drawer's intent to deceive or defraud. It is not evidence of the deliverer's or utterer's knowledge or intent, however. See United States v. Rosario, 34 C.M.R. 865 (A.F.B.R. 1964).

e. Note also, however, that this inference may be rebutted. For example, an accused cashed worthless checks. On 18 June 19CY, the accused was notified of nonpayment. On that same day he drew $22.00 in pay, but was ordered to pay a mess bill and consequently didn't make good the checks within 5 days. Held: Reasonable doubt as to intent, since the accused could have paid the checks if he hadn't been ordered to pay the mess bill. United States v. Gerberg, N.M.C.M. 62-01561 (27 November 1962); United States v. Crosby, supra (stipulation as to expiration of five-day period).

f. Remember that, in order to utilize the five-day presumption, it is necessary to show that the accused received notice of the drawer's refusal to honor the instrument. Since such notices are commonly mailed, the government may often utilize the general presumption that proof of mailing a properly stamped letter raises the presumption of receipt by the addressee. In United States v. Cauley, 9 M.J. 791 (A.C.M.R. 1980), the article 123a statutory presumption was disallowed where the government presented no evidence as to the precise practice of the mailing bank with respect to letters of notification of bad checks. On further appeal, C.M.A. held that the military judge had erred in instructing the members that they could infer receipt of the notice by the accused when the only evidence presented was that the accused's commanding officer had received the notice of dishonor. United States v. Cauley, 12 M.J. 484 (C.M.A. 1982).

F. Lesser included offenses

1. Neither article 123a(1) nor article 123a(2) are LIO's of each other. United States v. Wade, 14 C.M.A. 507, 34 C.M.R. 287 (1964).

2. Both article 123a(1) and (2), do include as an LIO the offense of "Dishonorable failure to maintain funds for payment of checks," in violation of article 134. United States v. Margelony, 14 C.M.A. 55, 33 C.M.R. 267 (1963); Part IV, para. 49d, MCM, 1984.

3. "Dishonorable failure" differs from article 123a in that no intent to deceive or defraud is required at the time of the making, drawing, uttering, or delivery of the check. Also, it is limited to a failure to place or maintain funds, whereas article 123a punishes knowledge at the time of the making, etc., that there is not or will not be funds available. See Part IV, para. 68, MCM, 1984.

a. Note: The word "dishonorably" in the lesser offense under article 134 does not appear in the greater article 123a offenses. However, the 123a offenses have been held to include a deliberate design or purpose which is equated to "dishonor." See United States v. Margelony, supra.

b. An article 123a(1) specification alleging "knew he did not have sufficient funds" was held not to include the LIO of dishonorable failure to maintain because there was no direct or clearly implied allegation that the accused knew he would not have sufficient funds at the time of presentment. United States v. Graham, 36 C.M.R. 945 (A.F.B.R. 1966).

c. In United States v. Crosby, 41 C.M.R. 927 (A.F.C.M.R. 1969), the evidence was insufficient to sustain a conviction either under article 123a or the LIO of article 134 in light of evidence that the bank previously had honored checks on the accused's overdrawn account, and cashed the checks in question without hesitation, even though accused's name was on an overdrawn list. See also United States v. Kess, 48 C.M.R. 106 (A.F.C.M.R. 1973) (where an accused's overdrafts have customarily been honored, absent circumstances establishing that the accused's conduct was nonetheless dishonorable, it must be shown that accused knowingly exceeded the limits of a credit arrangement with the bank, or that he knew or should have known that further overdrafts would not be honored).

d. Though intent is not required to prove the LIO under article 134, more than simple negligence in failing to maintain sufficient funds in one's account is necessary. Part IV, para. 68c, MCM, 1984. The offense requires proof that the accused's nonfeasance was characterized by deceit, evasion, or false promises indicating that he acted in bad faith or gross indifference to the state of his account. United States v. Kess, supra; United States v. Harville, 7 M.J. 895 (A.F.C.M.R. 1979). Evidence which showed only that accused was totally baffled by the mysteries of checking account management was insufficient to show guilt of making and uttering worthless checks or the lesser included offense of dishonorably failing to maintain sufficient funds. United States v. Elizondo, 29 M.J. 798 (A.C.M.R. 1989).

G. Affirmative defense

1. An honest mistake is an affirmative defense to all article 123a offenses and, when raised by the evidence, it must be instructed upon. Part IV, para. 49c(18), MCM, 1984. United States v. Callaghan, 14 C.M.A. 231, 34 C.M.R. 11 (1963). For example, where an accused maintained a joint checking account with his wife, a statement of mitigation and extenuation that he made

and uttered checks in the honest belief that he had sufficient funds to cover them, and was only aware of a deficiency when the checks returned, was inconsistent with a plea of guilty to dishonorable failure to maintain sufficient funds. United States v. Harrell, 14 C.M.A. 517, 34 C.M.R. 297 (1964).

2. An intent to redeem, at a future time, checks written on an insufficient account is not a defense to a bad check charge. In United States v. Jarrett, 34 C.M.R. 652 (A.B.R. 1964), the accused admitted that he knew when he wrote the checks in issue that his account was insufficient, but he said he intended to redeem the checks "in a five-day period." He was convicted under both articles 123a(1) and 123a(2) (different checks). Accord United States v. Zajac, 15 M.J. 845 (A.F.C.M.R. 1983) (intent to redeem worthless checks with anticipated winnings from gambling not a defense).

H. Sample specification

1. Worthless check with intent to defraud. Article 123a(1); Part IV, para. 49f(1), MCM, 1984.

> In that Corporal Claude D. Paperhanger, U.S. Marine Corps, Headquarters and Service Battalion, Marine Corps Base, Camp Pendleton, California, on active duty, did, at Marine Corps Base, Camp Pendleton, California, on or about 30 March 19CY, with intent to defraud and for the procurement of lawful currency, wrongfully and unlawfully make a certain check for the payment of money upon the Bank of America in words and figures as follows, to wit:
>
> Bank of America — No. 67 **
> San Diego, California — 30 March 19CY
>
> Pay to the
> Order of John Jones — $25.00
>
> Twenty-five Dollars----------Dollars
>
> /s/ Claude d. Paperhanger,
>
> then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with such bank for the payment of the said check in full upon its presentment.
>
> ** Note that the words and figures on the check should be set forth verbatim in the specification. The best method to do this is simply to insert a photographic copy of the check. Further note that this sample specification is drawn to cover a case where a worthless check has been given to procure an article or thing of value (i.e., currency).

2. Worthless check with intent to deceive. Article 123a(2); Part IV, para. 49f(2), MCM, 1984. The same language as in paragraph 1 above would be used, except the words "deceive and for the payment of a past due obligation" would replace the words "defraud and for the procurement of lawful currency," unless, of course, the check was to pay for any "other purpose."

3. Dishonorable failure to maintain funds. Article 134, UCMJ; See Part IV, para. 68f, MCM, 1984.

0905 MILITARY PROPERTY OF THE UNITED STATES (Wrongful Sale, Disposition, Damage, Destruction, and Loss) (Key Numbers 789-794)

A. Text of Article 108, UCMJ

Any person subject to this chapter, who without proper authority

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

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

B. General discussion. Part IV, para. 32, MCM, 1984.

1. Article 108 attaches criminal liability to conduct which may amount to only simple negligence. Moreover, the penalties which may be imposed are quite severe. This article reflects an essential military requirement: that equipment be available and in working order.

2. Article 108 is divided into three subsections

a. Selling or otherwise disposing of military property of the U.S.;

b. damaging, destroying, or losing such military property; and

c. suffering such military property to be lost, damaged, destroyed, sold, or wrongfully disposed of.

3. Concepts common to all three offenses

a. Military property

(1) The Army and Air Force Courts of Military Review have generally adopted the narrower definition limiting "military property" to property having some unique military nature or function. See, e.g., United States v. Underwood, 41 C.M.R. 410 (A.C.M.R. 1969); United States v. Waddell, 23 C.M.R. 903 (A.F.B.R. 1957).

(2) The Navy Court of Military Review had adopted a broader definition, interpreting this term to refer to any property belonging to or under the control of the military, including the exchange. See, e.g., United States v. Harvey, 6 M.J. 545 (N.C.M.R. 1978); United States v. Mullins, 34 C.M.R. 694 (N.B.R. 1964).

(3) United States v. Schelin, 15 M.J. 218 (C.M.A. 1983) resolved much of this controversy in ruling that exchange retail merchandise was not "military property of the United States." The court noted that "it is either the uniquely military nature of the property itself, or the function to which it is put, that determines whether it is 'military property' within the meaning of Article 108." Id. at 220. Absent this nexus to national defense, the special protection of article 108 in criminalizing merely negligent conduct is unwarranted.

(4) However, the fact that the property is held for resale is not determinative. In United States v. Simonds, 20 M.J. 279 (C.M.A. 1985), the court held that resale merchandise in a ship's store was military property within the meaning of article 108. The store is an appropriated fund activity, and both funds and stock remain functional Navy accounts.

b. Without proper authority is an essential element to all article 108 offenses.

(1) This simply means that it must be alleged and proved that the accused was not authorized to damage, sell, or otherwise dispose of the property.

(2) Although the phrase "without proper authority" should be alleged, a failure to do so will not result in a fatal defect if the specification fairly implies a lack of authority. Thus, in United States v. Reid, 12 C.M.A. 497, 31 C.M.R. 83 (1961), C.M.A. held that an allegation which stated that the accused sold service examinations for advancement to chief to certain first class boatswain's mates prior to the testing date sufficiently implied that the sale was without authority.

(3) From the Reid, case it can be seen that the element "without proper authority" may be alleged by clear implication in the specification and, furthermore, that the proof that the property was damaged, lost, or disposed of without authority may be established by evidence that the conduct of the accused is generally recognized as not permissible. The better practice, of course, is to allege "without proper authority" in the specification.

c. Value

(1) As in larceny and receiving stolen property, the military property which is lost, damaged, or destroyed must be alleged and proven to be of some value. Part IV, para. 32c(3), MCM, 1984; United States v. Thornton, 8 C.M.A. 57, 23 C.M.R. 281 (1957). But see United States v. Bowen, NCM 79-1254 (N.C.M.R. 18 Apr. 1980) (Unpublished) [the value of a .45 pistol, not stated in the specification, may be inferred from its nature and description, citing United States v. Johnson, 12 C.M.R. 328 (A.F.B.R. 1953), aff'd, 3 C.M.A. 706, 14 C.M.R. 124 (1954)].

(2) The amount of value is a matter in aggravation. See Part IV, para. 32e, MCM, 1984.

(3) Value may be established in the same manner as in the case of larceny. See Part IV, para. 32c(3), MCM, 1984.

C. The offense of wrongfully selling or otherwise disposing

1. How the accused came into possession of the property is immaterial. It is only of interest what he did with it. In this connection, the limits of the offense are found in the phrase "otherwise dispose of."

2. "Otherwise dispose of" is not limited, by association, to "sell." It includes the unauthorized surrender of the use or control over, or the ostensible title to, military property. United States v. Holland, 27 M.J. 127 (C.M.A. 1987). It covers a surrender which is permanent or temporary. In United States v. Faylor, 8 C.M.A. 208, 24 C.M.R. 18 (1957), it was held that abandonment is a form of disposition. In United States v. Brown, 8 C.M.A. 18, 23 C.M.R. 242 (1957), C.M.A. held that the pawning of a government parka to cover the costs of a "lady of pleasure" constituted "disposition."

3. The manner of disposition should be alleged. United States v. Emerson, 16 C.M.R. 690 (A.F.B.R. 1954) (specification that did not allege the manner of disposition was minimally sufficient in the absence of a defense motion for appropriate relief).

4. Effect of lack of knowledge. If the accused lacked knowledge that the property in issue was "military property of the United States" he has an affirmative defense, provided such lack of knowledge was based on an honest and reasonable mistake (i.e., this is a general intent offense). United States v. Germak, 31 C.M.R. 708 (A.F.B.R. 1962); United States v. Woodfork, 22 C.M.R. 531 (A.B.R. 1956) (lack of knowledge, both honest and reasonable, was raised by the evidence and should have been instructed upon).

D. The offenses of damaging, destroying, losing, and suffering to be lost, damaged, destroyed, sold, or otherwise disposed of

1. Mental element. Willfully or through neglect.

a. Willfully means with specific intent. United States v. Groves, 2 C.M.A. 541, 10 C.M.R. 39 (1953) (voluntary intoxication can be a defense to willful destruction of military property, since it is a specific intent offense).

b. Through neglect means simple negligence (i.e., that the actions of the accused were of such a character that a reasonably prudent person endowed with any special knowledge which the accused might possess would have foreseen that damage or destruction or loss might well result from such action). This element is distinctive when compared to the willful destruction required when nonmilitary personal property is the subject under article 109.

(1) Example: Operating a vehicle at a high rate of speed on the wrong side of the road at night is negligence. United States v. Hirt, 13 C.M.A. 420, 32 C.M.R. 420 (1962) (C.M.A. held, however, that the government had not established that accused was the operator of the vehicle).

(2) Example: Accused driving struck gatepost. Held: No evidence of negligence. United States v. Stuck, 12 C.M.A. 562, 31 C.M.R. 148 (1961).

(3) Example: Guilty plea to negligent destruction of military property by entrusting a military truck to an unlicensed 16-year-old military dependent who subsequently rolled it was held to be provident. The negligence was the proximate cause of the damage. United States v. Miller, 12 M.J. 559 (A.F.C.M.R. 1981).

(4) Under certain limited situations, a justifiable inference of negligence arises (i.e., if the property damaged, destroyed, or lost was an item of individual issue to the accused, and there is no explanation for the loss, damage, or destruction that creates a reasonable doubt as to the accused's negligence, an inference of negligence exists). See Part IV, para. 32c(1), MCM, 1984, and United States v. Ryan, 3 C.M.A. 735, 14 C.M.R. 153 (1954), where C.M.A. stated that a jeep was held not to be an item of individual issue and res ipsa loquitur is not applicable as such in article 108 offenses.

2. Loss, damage

a. Lost property is that which has been unintentionally parted with and cannot be found.

b. Damaged property is that made less valuable, useful, or desirable.

3. "Suffering" means permitting or allowing. Part IV, para. 32c(2), MCM, 1984.

a. Before permitting becomes criminal, however, it must be shown:

(1) That the accused had a duty to protect the property;

(2) that there was a failure to perform the duty; and

(3) that the failure to perform the duty was the proximate cause of the loss, destruction, etc.

b. Example: If the accused, a member of the crew, had inspected the mooring lines as he was required to do, the admiral's barge would not have floated away. The accused suffered the loss of the admiral's barge.

4. Value

a. In the case of loss, destruction, sale, or disposition, the value of the property so lost etc., controls the limit of punishment. See Part IV, para. 32e, MCM, 1984.

b. In the case of damage, however, the amount of damage sets the limit. Id.

E. LIO's -- Part IV, para. 32d, MCM, 1984. For all the article 108 offenses, the negligence offense is an LIO of the willful offense.

F. Pleading

1. Article 108(1) - selling or disposing. Part IV, para. 32f(1), MCM, 1984.

> Specification: In that Private Randy R. Parts, U.S. Marine Corps, Weapons Company, 2d Battalion, 3d Marines, 1st Marine Brigade, Fleet Marine Force, Pacific, on active duty, did, at Honolulu, Hawaii, on or about 20 April 19CY, without proper authority, sell to Wilbur R. Weakeyes one pair of binoculars, of a value of about $45.00, military property of the United States.
>
> NOTE: "Disposing of, etc., should be substituted where appropriate.

2. Article 108(2) - damaging, destroying, or losing. Part IV, para. 32f(2), MCM, 1984.

a. Damaged property

> Specification: In that Seaman Clumse E. Jerk, U.S. Navy, USS Butterfingers, on active duty, did, on board USS Butterfingers, located at San Diego, California, on or about 5 June 19CY, without proper authority, through neglect, damage by dropping on the deck one electric typewriter of a value of about $300.00, military property of the United States, the amount of said damage being in the sum of about $75.00.

(1) Both the specific property damaged and the manner in which it was damaged should be alleged.

(2) Both the value of the property and the amount of the damage are alleged. The amount of the damage fixes the authorized punishment. See Part IV, para. 32e, MCM, 1984.

b. Destroyed property

Specification: In that ..., did, ... without proper authority, willfully destroy by burning, one mattress, of a value of about $63.00, military property of the United States.

(1) The sample specification requires that the manner in which the property was destroyed be alleged.

(2) "Through neglect" should be substituted, when appropriate.

c. Lost property

Specification: In that . . . did, . . . without proper authority, through neglect, lose one compass, of a value of about $25.00, military property of the United States.

3. Article 108(3) -- suffering. Part IV, para. 32f(3), MCM, 1984.

Specification: In that Quartermaster Third Class Bone E. Elbows, U.S. Navy, USS Oops, on active duty, did, on board USS Oops, at sea, on or about 10 March 19CY, without proper authority, through neglect, suffer one sextant, of a value of about $75.00, military property of the United States, to be destroyed by being knocked over the side of the ship.

NOTE: If only damaged, the amount of damage determined by cost of repair or cost of replacement, whichever is lesser, should be alleged.

G. Multiplicity

-- Accused can be separately found guilty of both wrongful sale and wrongful concealment (article 134) of the same military property. United States v. Wolfe, 19 M.J. 174 (C.M.A. 1985).

H. Recent changes

-- The most recent changes to the Manual for Courts-Martial created a number of new lesser included offenses to article 108. Part IV, para. 32d(1)(b) reflects an LIO of sale or disposition of nonmilitary government property under article 134. United States v. Rivers, 3 C.M.R. 564 (A.F.B.R. 1952) and 18 U.S.C. § 641. Part IV, paras. 32d(2) and (4) are modified to reflect that willful damage or destruction of nonmilitary property may be a violation of article 109. United States v. Suthers, 22 C.M.R. 787 (A.F.B.R. 1956).

0906 WASTING, SPOILING, DAMAGING AND DESTROYING NONMILITARY PROPERTY (Key Numbers 550, 789)

A. Text of Article 109, UCMJ

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

B. Distinction between article 108 and article 109

1. Article 109 is concerned with all real and personal property other than military property of the U.S., including nonmilitary government property (e.g., a U.S. mail truck) and private property. Article 108 deals solely with military property of the U.S.

2. Whereas article 108 provides that loss, sale, damage, destruction, or disposition of military property may be accomplished either willfully or through neglect, under Article 109 wasting or spoiling (i.e., destroying or damaging) real property must be either willful or reckless (a disregard for the probable destructive results of a voluntary act) and damage or destruction of personal property must be willful before a criminal liability will attach. Put another way, in order to be criminally liable for destruction of or damage to nonmilitary property, the accused must be more than merely negligent.

a. As to nonmilitary personal property, the accused's state of mind must be willful and wrongful. United States v. Bernacki, 13 C.M.A. 641, 33 C.M.R. 173 (1963); United States v. Priest, 7 M.J. 790 (N.C.M.R. 1979). Part IV, para. 33c(2), MCM, 1984.

b. As to nonmilitary real property, it must be willful or reckless. Part IV, para. 33c(1), MCM, 1984.

c. But, as to military property of the U.S., mere negligence will suffice. Part IV, para. 32c, MCM, 1984.

3. Finally, unlike article 108, article 109 does not provide any criminal liability for sale, loss, or other disposition (other than damage or destruction) of the nonmilitary property.

C. Multiplicity. Article 108 and 109 offenses may be deemed to be separate for punishment purposes even if they occur as part of the same transaction. United States v. Clason, 48 C.M.R. 453 (N.C.M.R. 1974) (accused could be separately punished for vandalizing private and military vehicles after a drinking spree).

D. Pleading. Part IV, para. 33f, MCM, 1984.

1. Sample specification

Specification: In that Seaman Recruit Juvenile D. Lenquint, U.S. Navy, USS Hood, on active duty, did, at Naval Base, Norfolk, Virginia, on or about 20 February 19CY, willfully and wrongfully damage an automobile, of a value of about $4,200.00, the property of Yeoman Second Class Ima A. Victim, U.S. Navy, by smashing the windshield, the amount of said damage being in the sum of about $145.00.

2. In United States v. Collins, 16 C.M.A. 167, 37 C.M.R. 323 (1966), C.M.A. held that the language of article 109 can reasonably be construed to express a purpose to permit all damage inflicted in a single transaction to be combined into a single offense and, as a result, a difference in the ownership of the several articles damaged would make no difference to the prosecution. Therefore, all articles of property damaged in violation of article 109, under circumstances indicating only a single incident or transaction, should be alleged as a single offense -- regardless of the ownership of the articles.

If an accused damages or destroys		and the damage or destruction was done	then the accused is
Military Property		Willfully	Guilty of Violating Art. 108
		Recklessly	
		Negligently	
Non-Military Property	and the Property is Realty	Willfully	Guilty of Violating Art. 109
		Recklessly	
		Negligently	Not Guilty
	and the Property is Personalty	Willfully	Guilty of Violating Art. 109
		Recklessly	Not Guilty
		Negligently	

PERTINENT DEFINITIONS

1. "Military property" is all property owned, held, or used by one of the armed forces of the United States.

2. "Nonmilitary property" means any property not embraced in definition 1 above.

3. "Realty" means land, buildings, and any fixtures attached thereto such as piers, fences, trees.

4. "Personalty" means any property not embraced in definition 3 above.

5. "Willfully" means intentionally, i.e., the accused actually intended to cause the damage or destruction which resulted.

6. "Recklessly" means that the accused damaged or destroyed the property through a culpable disregard for the foreseeable consequences of his acts.

7. "Negligently" means that the accused failed to exercise the due care which a reasonably prudent man would have exercised under the circumstances.

0907 UNLAWFUL ENTRY - Article 134, UCMJ
HOUSEBREAKING - Article 130, UCMJ
BURGLARY - Article 129, UCMJ
(Key Numbers 723-728, 753-754)

A. General comments. These three offenses are related in that each is designed to protect the same basic societal norm; that is, each offense is designed to punish persons who enter places where they are not supposed to be. The offenses of housebreaking and burglary are increasingly more severe and have additional elements, as will be discussed below in detail, that reflect the specific intent to commit criminal offenses once inside the restricted place. Accordingly, both housebreaking and unlawful entry are LIO's of burglary, and unlawful entry is an LIO of housebreaking.

B. Unlawful entry

1. Unlawful entry is an "established offense" under article 134 and is specifically discussed in Part IV, para. 111, MCM, 1984.

2. Elements of the offense

a. That the accused entered the real property of another or certain personal property of another which amounts to a structure usually used for habitation or storage;

b. that such entry was unlawful; and

c. "C to P" or "SD."

C. Housebreaking

1. Text of article 130

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

2. Elements of the offense. Part IV, para. 56b, MCM, 1984.

a. That the accused unlawfully entered a certain building or structure of a certain other person; and

b. that the unlawful entry was made with the intent to commit a criminal offense therein.

D. Burglary

1. Text of article 129

> Any person subject to this chapter who, with intent to commit an offense punishable under sections 918-928 (articles 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.

2. Elements of the offense. Part IV, para. 55b, MCM, 1984.

a. That the accused unlawfully broke and entered the dwelling house of another;

b. that both the breaking and entering were done in the nighttime; and

c. that the breaking and entering were done with the intent to commit therein the offense of (one of the offenses punishable under articles 118-128, except article 123a).

E. Comments on the offense of housebreaking and the distinction between it and the offense of unlawful entry. These two offenses are closely related to each other, but there are distinctions, including the types of structures or enclosures that are protected by each. These distinctions will be discussed below in detail in the section defining "building or structure." Other comments below apply to both offenses, except where specifically noted.

1. "Unlawfully" enter

a. The legality of the entry in housebreaking must be determined solely from the accused's authorization, express or implied. For the purpose of determining the authority to enter, buildings or structures may be classified into three principal groups:

(1) Those which are wholly private in character, such as ones' home; every penetration must be regarded as unlawful in the absence of invitation, express or implied.

(2) Those which are public; all unobstructed incursions must be regarded as authorized in the absence of a clear direction to the contrary.

(3) Those which are semiprivate; the following factors, none of which will necessarily control, may be considered:

(a) The nature and function of the building involved;

(b) the character, status, and duties of the entrant;

(c) the conditions of the entry, including time, method, and ostensible purpose;

(d) the presence or absence of a directive of whatever nature seeking to limit or regulate free ingress;

(e) the presence or absence of an explicit invitation to the visitor;

(f) the invitational authority of any purported host; and

(g) the presence or absence of a prior course of dealing, if any, by the entrant with the structure, or its inmates, and its nature.

b. It is not the criminal intent (i.e., the intent to commit a crime once inside the structure) that makes the entry unlawful, but absence of authorization. United States v. Williams, 4 C.M.A. 241, 15 C.M.R. 241 (1954) (a lawful entry, even if with a contemporaneous criminal intent, is not sufficient to make out the offense of housebreaking). But see United States v. Toland, 19 C.M.R. 570 (N.B.R. 1955) (accused, who was in charge of the ship's store, could unlawfully enter the store when his purpose for unlocking the door and entering was not to conduct his lawful duties, but was merely to gain entrance to steal some items).

c. When the authority to enter is gained by trick or false pretense, such as falsely representing oneself as a policeman or tendering a bogus identification, the entry is nonetheless unlawful. United States v. Vance, 10 C.M.R. 747 (A.F.B.R. 1953).

d. Examples where the lawfulness of the entry was questioned:

(1) In United States v. Pendleton, 21 C.M.R. 432 (A.B.R. 1956), the board held that, where an accused entered a store open for business and without provocation assailed the occupant, the evidence did not support housebreaking because the accused's entry was lawful.

(2) When an armed forces policeman entered a room which he was authorized to check, and while therein committed a larceny, housebreaking cannot be made out because there was no unlawful entry. United States v. Blair, 18 C.M.R. 581 (A.F.B.R. 1954).

(3) In United States v. Williams, 4 C.M.A. 241, 15 C.M.R. 241 (1954), the evidence established that shortly after midnight the accused entered a barracks building assigned to another company. Although the lights had been extinguished at the time, visibility was reasonably good and the accused was seen inspecting the pockets of various fatigue uniforms. One of the occupants of the barracks awoke and yelled. Accused was apprehended by a guard. In affirming a finding of guilty of housebreaking, C.M.A. held that the evidence sufficiently established an illegal entry of the barracks inasmuch

as the accused was under no official duty to enter the building, he was not invited therein, and no authority could be implied to enter late at night a barracks other than his own and in which the lighting had been dimmed for sleeping.

(4) In United States v. Browder, 15 C.M.A. 466, 35 C.M.R. 438 (1965), the facts were sufficient to show an unlawful entry where the accused entered the barracks in the company of another who was assigned to the unit quartered therein. It also appeared that both the accused and his companion were absent without authority at the time they returned in the night and, by force, broke into the barracks that had been locked and secured while the unit was away on a field problem. Under these circumstances, the accused's companion had no right to enter and the accused could therefore acquire no rights through him.

2. "Entered"

a. The entry of any part of the body, even a finger, is sufficient. Thus, if a wrongdoer puts his hand inside a window that he is raising, this will constitute an entry. Part IV, para. 55c(3), MCM, 1984.

b. An insertion into the structure of an instrument or object may be sufficient to constitute an entry, if the insertion is for the purpose of completing the intended offense. For example, there is an entry where a hook is inserted through a window to commit larceny or a pistol to commit murder, even though the hand never enters the window. If the only entry is by an instrument that is merely being used to gain admittance (e.g., if, while jimmying open a window, the crowbar extends through the window opening into the structure), then there has not been sufficient entry to constitute the offense. Id.

3. A certain "building or structure"

a. The word "building" includes a room, shop, store, or apartment in a building. Part IV, para. 56c(4), MCM, 1984.

b. The word "structure," for the offense of housebreaking, refers only to those structures that are in the nature of a building or dwelling. Id.

(1) Examples of things held to be a building or structure: A stateroom, hold, or other compartment of a vessel, an inhabitable trailer, a tent, and a houseboat. United States v. Love, 4 C.M.A. 260, 15 C.M.R. 260 (1954) (A tent). In United States v. Vernetti, 29 C.M.R. 875 (A.F.B.R. 1960), it was held that a vending machine enclosure consisting of a permanent 40-by-16 foot concrete patio with a corrugated aluminum room attached by steel poles and beams imbedded in concrete, and enclosed by strong plywood and plastic panels which are attached to the concrete base by metal beams, and which can be locked, is a building or structure which can be the subject of housebreaking. In United States v. Scimeca, 12 M.J. 937 (N.C.M.R. 1982), a meat freezer outside an SNCO club was held to be a "building or structure" for housebreaking purposes. In United States v. Demmer, 24 M.J. 410 (C.M.A. 1987), an exchange snack truck was held to be a "structure" in a housebreaking prosecution.

(2) Examples of things held NOT to be a building or structure:

(a) A movable footlocker - United States v. Harris, 23 C.M.R. 586 (A.B.R. 1957);

(b) an aircraft - United States v. Taylor, 12 C.M.A. 44, 30 C.M.R. 44 (1960);

(c) a private automobile - United States v. Gillin, 8 C.M.A. 669, 25 C.M.R. 73 (1958); United States v. Reece, 12 M.J. 770 (A.C.M.R. 1981);

(d) a military "track" vehicle - United States v. Sutton, 21 C.M.A. 344, 45 C.M.R. 118 (1972); and

(e) a locker used for storage of personal items and clothing - United States v. Bradchulis, N.M.C.M. 81-0720 (13 Aug. 1981).

(3) It is not necessary to the offense of housebreaking that the building or structure be in use at the time of the entry. Part IV, para. 56c(4), MCM, 1984; United States v. Love, 4 C.M.A. 260, 15 C.M.R. 260 (1954) (accused was discovered in an unoccupied troop tent attempting to steal some clothes); United States v. Crunk, 4 C.M.A. 290, 15 C.M.R. 290 (1954).

c. For the offense of unlawful entry, much less of a building or structure is necessary than for the offense of housebreaking. While the restrictions that objects such as aircraft [United States v. Taylor, 12 C.M.A. 44, 30 C.M.R. 44 (1960)] and automobiles [United States v. Wright, 5 M.J. 106 (C.M.A. 1978)] are not buildings or structures for purposes of unlawful entry, as they are not for purposes of housebreaking, some question remains as to the status of certain types of restricted enclosures. As will be seen below, these fixed enclosures are definitely not buildings or structures as discussed above regarding housebreaking, but yet have been held to be the proper subject of an unlawful entry offense.

(1) The broader scope of areas protected by the offense of unlawful entry was first suggested in the case of United States v. Taylor, supra. There the court said:

> It is clear that the offense of housebreaking and unlawful entry are closely related and may, under certain circumstances, stand in the position of greater and lesser .... and, although this Court has never specifically delineated the scope of the crimes one to the other, it is beyond cavil that property not protected against unlawful entry may not properly be the subject of housebreaking.

Id. at 46, 30 C.M.R. at 146. The clear implication of such language is that the converse is not necessarily true (i.e., there may be areas protected against unlawful entry that are not protected against housebreaking).

(2) The Court of Military Appeals resolved this matter by upholding the conviction of an accused for unlawful entry into a government storage area that was simply an open area surrounded by a chain-link fence. United States v. Wickersham, 14 M.J. 404 (C.M.A. 1983). Now it appears that the "building or structure of another" is clearly not the required object of the unlawful entry prohibited by article 134, it remains for further case law to decide whether the presence of a fence is the litmus test for unlawful entry. See Everett, C. J., dissenting, Id. at 408. The drafters of the 1984 Manual for Courts-Martial purport to expand the unlawful entry protection to all real property and any personal property which amounts to a structure used for habitation or storage. Part IV, para. 56c, MCM, 1984.

4. "Of a certain other person"

a. When a specification does not allege the element of ownership in another directly or by implication, the offense of housebreaking is not made out. United States v. McCourt et al, 5 C.M.R. 513 (A.F.B.R. 1952), petition denied, 5 C.M.R. 130 (C.M.A. 1952).

b. In United States v. Wheat, 5 C.M.R. 494 (A.F.B.R. 1952), the specification alleged that the accused, did, "at Holding and Reconsignment Point, Montgomery, Alabama, on or about 21 November 1951, unlawfully enter Warehouse Number 2, with the intent to commit a criminal offense, to wit: larceny, therein." Held: The specification is fatally defective since it contains no averment that the warehouse was the property of another.

c. A specification charging the offense of housebreaking and alleging that the structure entered was the "Unit Supply Room of the 1268th Air Transport Squadron" sufficiently alleges ownership of the supply room in another. The phrase "Unit Supply Room 1268th Air Transport Squadron" is a sufficient averment of fact to allege by implication that the supply room is the property of the named squadron. Compare United States v. Mills, 5 C.M.R. 757 (A.F.B.R. 1952) with United States v. Jones, 23 C.M.R. 818 (A.F.B.R. 1956), where a specification alleging "building number 228" at Brooks Air Force Base was held to be fatally defective since ownership was not averred directly or by clear implication.

5. "...the intent to commit a criminal offense therein"

a. The intent to commit some criminal offense therein is an essential element of housebreaking and must be alleged and proved in order to support a conviction. Housebreaking, therefore, is a specific intent offense.

b. The elements "unlawful entry" and "concurrent intent to commit a criminal offense therein" are distinctly separate and proof of one does not also constitute proof of the other. United States v. Cox, 14 C.M.R. 706 (A.F.B.R. 1954).

c. Any act or omission which is punishable by court-martial, except an act or omission constituting a purely military offense, is a "criminal offense." Part IV, para. 56c(3), MCM, 1984. Therefore, if an accused unlawfully enters a building with the intent to be disrespectful to one of his superiors or with the intent to go UA or with the intent to disobey a lawful order, he has not committed a housebreaking. Has he committed any offense? Yes, unlawful entry under article 134.

d. The intent to commit such criminal offense "therein" may be inferred from the accused's conduct once inside the building as for example, where the accused does commit a larceny inside the building.

F. Comments on the offense of burglary

1. Burglary is more limited than housebreaking in that:

a. The place entered must be a dwelling house;

b. it must be a place that is occupied;

c. it is essential that there be a breaking;

d. the entry must be in the nighttime; and

e. the intent must be to commit one of the offenses made punishable under articles 118 through 128, except article 123a.

2. "Dwelling house"

a. The term "dwelling house" implies a place of habitation for human beings (i.e., the place burglarized must be lived in). The dwelling house must be occupied at the time of the offense, though it is not necessary that anyone actually be in the dwelling. The fact that the occupant of the dwelling is temporarily absent on leave, vacation, TAD, etc., or even that the dwelling is closed up for the summer, does not deprive the dwelling of its status of being occupied. The dwelling house includes outstructures attached to or within the common enclosure used as a residence (e.g., a garage). Part IV, para. 55c(5), MCM, 1984. While it is not fatally defective for the word "dwelling" not to appear in the specification, it must, at least affirmatively, appear in the specification that the building entered was in fact a dwelling. United States v. Schwarz, 20 C.M.R. 497 (N.B.R. 1955) (specification alleging merely "squadron armory" was defective).

b. An individual room in a barracks can be the subject of a burglary, as can individual apartments in a building, etc. United States v. Green, 7 M.J. 966 (A.C.M.R. 1979); United States v. Holder, N.M.C.M. 76-0145 (12 May 1976); United States v. Norman, 16 M.J. 937 (A.C.M.R. 1983) (a hotel room may be a "dwelling" within the meaning of the military offense of burglary). Even entry into the barracks building itself, without entry into a particular room, may be sufficient to complete the offense. United States v. Bailey, 23 C.M.R. 862 (A.F.B.R. 1957).

3. "Breaking"

a. The term "breaking" is a term of art, meaning that the accused must use some degree of force, however slight, to gain entry. It is not required that there be any damage to or destruction of property, yet there must be more than crossing of some imaginary line. Part IV, para. 55c(2), MCM, 1984. For example, if the accused merely walks into the dwelling through an open door, there has been no breaking; but, if he must turn the door knob and open a shut door to gain admittance, a breaking has occurred. Merely opening further a partly open door is sufficient force to constitute breaking. Id.

b. Examples:

(1) In United States v. Bailey, 23 C.M.R. 862 (A.F.B.R. 1957), it was held that, although merely opening a closed door was sufficient to constitute the breaking in burglary, the evidence did not establish that the door to the room was closed.

(2) In United States v. Handzlik, 32 C.M.R. 573 (A.B.R. 1962), it was held that the forceful overcoming of pressure by the occupant to close an already open door constituted a breaking.

c. Even where no force is used, an entry gained by fraud, duress, threats, or trick will constitute a constructive breaking. Part IV, para. 55c(2), MCM, 1984, contains some examples of constructive breaking.

4. "In the nighttime." Both the breaking and the entering must be in the nighttime. Nighttime is defined by Part IV, para. 55c(4), MCM, 1984, following the common law rule, as that period between sunset and sunrise when there is not sufficient light to discern a person's face. The presence or absence of any artificial lighting is not relevant.

5. Intent

a. The breaking and entering must be with the intent to commit one of the following offenses: murder, manslaughter, rape and carnal knowledge, larceny and wrongful appropriation, robbery, forgery, maiming, sodomy, arson, extortion, and assault. To make out the offense, it is essential that the specific intent alleged exist at the time of the breaking and entering. United States v. Kluttz, 9 C.M.A. 20, 25 C.M.R. 282 (1958). An accused's intent may be proved by circumstantial evidence. United States v. Garcia, 15 M.J. 685 (A.F.C.M.R. 1983) (breaking and entering with intent to commit rape).

b. It is not necessary that the offense actually be committed. If, after the breaking and entering, the accused does commit one of these offenses though, it may be inferred that he intended to commit it at the time of the breaking and entering. Part IV, para. 55c(6), MCM, 1984.

G. Multiplicity. Even though they are likely to be a single or integrated transaction or chain of events, housebreaking and burglary are probably not multiplicious for sentencing purposes with the commission of their intended crime. The rationale made for this lack of multiplicity is that the offenses deal with different societal norms.

1. In United States v. Rose, 6 M.J. 754 (N.C.M.R. 1978), petition denied, 7 M.J. 56 (C.M.A. 1979), burglary with intent to commit rape and sodomy was held not to be multiplicious with the subsequent rape and sodomy. The court stated:

> Burglary is an offense against habitation, rape is an offense against the person, and sodomy is an "offense against morals" or a "crime against nature."

> ... The essence of burglary is the violation of the sanctity of the dwelling. Three more divergent societal norms would be difficult to find.

Id. at 757.

2. In United States v. Alvarez, 5 M.J. 762 (A.C.M.R. 1978), petition denied, 5 M.J. 369 (C.M.A. 1978), housebreaking and larceny were considered as separate offenses for sentencing purposes.

H. Pleading

1. Unlawful entry. Part IV, para. 111f, MCM, 1984.

> Specification: In that Seaman Sneak E. Thief, U.S. Navy, USS Slinky, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, unlawfully enter Warehouse Building 503, the property of the U. S. Government.

2. Housebreaking. Part IV, para. 56f, MCM, 1984.

> Specification: (same as above, with the addition of the words:), with the intent to commit a criminal offense, to wit: larceny, therein.

3. Burglary. Part IV, para. 55f, MCM, 1984.

> Specification: In that Seaman Sneak E. Thief, U.S. Navy, on active duty, did, at Naval Education and Training Center, Newport, Rhode Island, on or about 1 April 19CY, in the nighttime, unlawfully break and enter the dwelling house of Yeoman Second Class Ima A. Victim, U.S. Navy, with intent to commit larceny therein.

4. Omission of the words "break and enter" is fatal to a specification alleging the offense of burglary. United States v. Knight, 15 M.J. 202 (C.M.A. 1983).

0908 SPECIFIC POINTS OF SIMILARITY AND DISTINCTION BETWEEN OFFENSES AGAINST PROPERTY

A. Larceny and wrongful appropriation

1. Similarity. Both offenses require a wrongful taking, obtaining, or withholding of personal property of some value from the possession of one with a superior right to possession.

2. Distinction. Larceny requires a specific intent to deprive permanently. Wrongful appropriation requires only a specific intent to deprive temporarily.

B. Larceny and bad checks

1. Similarity. Article 123a (bad checks) prohibits fraud by worthless checks (i.e., the obtaining of a thing of value by a check which cannot successfully be presented for payment). See Article 123a(1), UCMJ. This offense can still be charged as a violation of article 121. See United States v. Barnes, 14 C.M.A. 567, 34 C.M.R. 347 (1964).

2. Distinctions

a. Article 123a, however, can also punish the payment of past due obligations by worthless check. This offense is not cognizable as larceny since no tangible property is received when the check is given. See Article 123a(2), UCMJ.

b. Larceny requires an intent to deprive permanently, whereas the bad check offense requires merely an intent to defraud [article 123a(1)] which may involve permanent or temporary deprivation, or an intent to deceive [article 123a(2)] which may involve no deprivation at all.

c. Larceny requires a purpose of the accused to possess tangible personal property. The bad check offense (article 123a) makes punishable the issuance of a worthless check for any purpose.

(1) If the purpose was to obtain a thing of value, article 123a(1) is applicable.

(2) If the purpose was anything except a purpose to obtain a thing of value, article 123a(2) is applicable. See United States v. Wade, 14 C.M.A. 507, 34 C.M.R. 287 (1964).

(3) Thus, a theft of services, which cannot constitute larceny, can be punished under article 123a if the theft was by means of a worthless check. Whether the violation is laid under article 123a(1) or article 123a(2) depends on whether the services qualify as a thing of value.

d. In the larceny offense, a failure to acquire the property would simply be an attempt; but, under the bad check offense, the crime is complete even though nothing was gained.

3. Gravamen of article 121. It is apparent, therefore, that the gravamen of article 121 is deprivation of property. However, "deprivation of property" may or may not be involved in article 123a.

4. Gravamen of article 123a. The gravamen of the bad check offense is the making or uttering of a worthless check with the intent to defraud (obtain something) or deceive (gain an advantage) whether or not anything is in fact obtained or gained thereby.

C. Larceny and receiving, buying, stealing, stolen property

1. Similarity. In both larceny and receiving, buying, or concealing stolen property, the accused comes into possession of property of some value which is not his.

2. Distinctions

a. In the latter offenses, the accused may or may not come into possession unlawfully.

b. In the withholding type larceny, original possession of the property is lawful.

c. Further, in larceny, there must be a wrongful taking or obtaining or withholding from the person in possession.

d. In receiving, buying, or concealing stolen property, the receiver, purchaser, or concealer must acquire possession without the consent of the owner. These distinctions have been pointedly demonstrated in United States v. McFarland, 8 C.M.A. 42, 23 C.M.R. 266 (1957) and United States v. Welker, 8 C.M.A. 647, 25 C.M.R. 151 (1958).

(1) In McFarland, the accused was convicted of larceny of $2.00. A close friend of the accused had taken $12.00 from the victim and the following day had given $2.00 to the accused, telling him that the money had belonged to the victim. Held: The accused did not commit larceny. C.M.A. stated that, although the accused might have been charged as a receiver of stolen property, there was no wrongful taking, obtaining, or withholding so as to warrant the larceny charge. There was no evidence of taking or obtaining, and a withholding type larceny required a conversion by a person having lawful possession in the first instance.

(2) In Welker, the accused pleaded guilty to larceny of an M-1 rifle. A stipulation of facts constituting the offense was admitted in evidence. The stipulation stated that the accused was advised by a friend that he (the friend) had found an M-1 rifle leaning against a tree while on maneuvers and had hidden it in a lake, then told the accused that he wanted nothing to do with the rifle and that the accused could have it. The accused got the rifle and took it home with the intent to keep it. Held: His plea of guilty was inconsistent with the stipulation of facts, which indicated that he had merely received stolen property, an offense not charged, and C.M.A. reversed his conviction of larceny because the plea of guilty was improvident. The distinguishing principle revealed in the case is between withholding type larceny and receiving. A larceny by withholding requires initial lawful possession, whereas receiving involves an unlawful possession acquired with consent of the thief.

e. Quite obviously, in receiving, buying, or concealing stolen property, the property must have, in fact, first been stolen. This is not necessary for larceny, although it is possible to steal stolen property (thief #2 takes from thief #1).

f. Receiving, buying, or concealing stolen property has a requirement that the accused know the property to have been stolen. Quite obviously, this is not a requirement in larceny.

D. Larceny and misuse of property

1. Similarity. In both types of offenses, the accused takes some improper action with respect to another's property. In the case of a wrongful sale or disposition of military property under article 108, the same act may also constitute a larceny.

2. Distinctions

a. Articles 108 and 109 deal with offenses against real and personal property. Article 121 is concerned only with personal property.

b. Larceny deals essentially with wrongful deprivation, while articles 108 and 109 also prohibit wrongful damage, waste, etc.

c. Larceny requires a specific intent to deprive. Articles 108 and 109 require no intent to deprive and the accused's state of mind can be negligent (article 108) or reckless (article 109 - real property).

E. Illustrative fact situation

1. Seaman A has always wanted to "own" a .45 automatic pistol. One night, while on liberty, he decides to steal one. He drives to the base, takes a pair of bolt cutters from his car, and snaps off the lock of the door to the small arms cabinet. He places his hand on a .45 automatic U.S. Army pistol.

a. Question: What offense, if any, has A committed?

b. Answer: Attempted larceny; willful destruction of military property (lock on small arms cabinet).

2. The accused takes a .45, goes to his barracks and conceals it in his locker. The next day he becomes anxious that he might be caught and decides to get rid of the pistol. He takes it out to the woods in back of the barracks and throws it under a bush.

a. Question: Considering all the facts given, what offenses has A committed in this hypothetical problem?

b. Answer: Larceny of pistol; willful destruction of military property (lock on arms cabinet); wrongful disposition of military property (abandoned pistol).

3. The following day, Seaman B is out in the woods looking for a practice golf ball which he has lost and, in thrashing about, he discovers the pistol. He picks it up. He doesn't want anything to do with weapons and puts it back where he found it. Later Seaman C comes along, sees the pistol and takes it to his barracks, intending to take it home as a trophy if no one claims it.

a. Question: What offense, if any, has B committed?

b. Answer: Not larceny -- no taking with intent to deprive. But, how about wrongful disposition of military property? Was it in his possession? Yes. Was it military property? Yes. Did he abandon it? Yes. Could it be argued in defense that he had no duty with respect to the property? No, not if it's obviously military property. All military personnel have a duty to safeguard military property which comes into their possession.

c. Question: What offense, if any, has C committed?

d. Answer: Larceny, if, under the circumstances, there was a clue as to ownership, he should have taken steps to return the property.

4. But, suppose A told C about stealing the pistol, where he hid it, and that C could have it. C goes and gets it with the intent to keep it.

a. Question: Is C guilty of larceny now?

b. Answer: No, only of receiving stolen property. There has been no wrongful taking, obtaining, or withholding from the person last in possession.

5. Suppose A tells C simply that he stole it and decided to get rid of it and where he put it. C goes and gets it with the intent to keep it.

a. Question: Has C committed larceny or been guilty of merely receiving stolen property?

b. Answer: Query: Has A in effect given it to C or merely announced his abandonment of it? If the former -- C receives stolen property. If the latter -- C commits larceny. It would be well to charge both to provide for contingencies of proof. NOTE: This hypothesis is based on United States v. Welker, 8 C.M.A. 647, 25 C.M.R. 151 (1958).

c. Question: Is C an A.A.F.?

d. Answer: No. There is no showing that he assisted the thief in order to prevent his apprehension, trial, or punishment.

6. Suppose C now decides to sell the pistol. He takes it to Seaman D, tells him it is stolen military property, and D gives C a check for $30.00 in payment for the pistol. The check is drawn on a nonexistent bank.

a. Question: What new offense or offenses are involved?

b. Answer:

(1) Wrongful sale of military property by C.

(2) Making a bad check to defraud in violation of article 123a(1) by D.

(3) Is D guilty of receiving or buying stolen property? No, his possession was a result of a false pretense and, hence, was not with the consent of C.

(4) D would also be guilty of larceny by trick (false pretense). United States v. Barnes, 14 C.M.A. 567, 34 C.M.R. 347 (1964).

F. Summary

1. From the foregoing, one should be impressed with the fact that all factual situations must be analyzed carefully, particularly those involving property offenses.

2. Keep in mind the elements of the offenses and their basic differences.

CHAPTER X

DEFENSES

1001 OVERVIEW OF CRIMINAL DEFENSES (Key Numbers 801, 832-853)

For purposes of analysis, criminal defenses may be divided into two categories: (1) defenses in bar of trial, and (2) defenses on the merits. Defenses on the merits can be further subdivided into general and affirmative (sometimes called special) categories. Some defenses belong exclusively in one category, while others may be properly placed in either. For example, the defense of insanity may be raised as a bar to trial if it is alleged that the accused lacks the requisite mental capacity to stand trial; or it may be raised as a defense on the merits if it is alleged that the accused was not mentally responsible at the time of the offense. This chapter will discuss separately and in greater detail most of the major defenses in each category.

1002 DEFENSES IN BAR OF TRIAL (Key Numbers 849-853)

Defenses in bar of trial include those that do not directly relate to the accused's guilt or innocence. They are usually raised prior to the entry of pleas by the accused and, if established, bar further proceedings. Defenses in bar of trial are usually framed as motions to dismiss and litigated as interlocutory issues before the military judge alone. The military judge rules finally on all such issues. His rulings are not subject to reversal although either side may request reconsideration of his ruling. The ability of the government to request reconsideration is limited by Article 62(a) of the UCMJ. This article states in pertinent part, "... if a specification before a court-martial has been dismissed on motion and the ruling does not amount to a finding of not guilty, the convening authority may return the record to the court for reconsideration of the ruling and any appropriate action." The case of United States v. Ware, 1 M.J. 282 (C.M.A. 1976) held that the military judge must exercise independent discretion when deciding issues submitted for reconsideration, and that error is committed if the military judge merely accedes to the position of the convening authority. Paragraph 67f, MCM, 1969 (Rev.) stated that the military judge shall accede to the position of the convening authority. The Ware case held specifically that such a procedure was "inherently inconsistent with the actions of Congress in creating an independent judicial structure." Id. at 287. R.C.M. 905f, MCM, 1984, incorporates the Ware holding into the new MCM by indicating that the military judge may reconsider any ruling not amounting to a finding of not guilty. A successful defense in bar of trial will usually result in a dismissal of the charges or the granting of other appropriate relief which terminates the proceedings, at least temporarily.

A. Defenses in bar of trial are not defenses in the strict sense of the word, but may be considered as such because their effect on the outcome of the trial is the same when successfully argued. Some examples of the more common defenses in bar of trial include the following:

1. Former jeopardy (commonly known as double jeopardy);

2. former punishment;

3. res judicata;

4. lack of mental capacity to stand trial;

5. lack of jurisdiction over the person or over the offense;

6. statute of limitations expiration;

7. lack of speedy trial;

8. pardon;

9. immunity;

10. constructive condonation of desertion; and

11. failure to allege an offense.

B. Defenses in bar of trial and their equivalents are usually raised either prior to trial (addressed to the convening authority) or by motion to dismiss or for appropriate relief (addressed to the military judge) prior to the entry of pleas. Failure to assert them prior to pleas, however, does <u>not</u> constitute waiver. Failure to assert them prior to the conclusion of trial will generally constitute a waiver except with regard to the defenses of lack of jurisdiction over the person or over the offense, failure to state an offense, insanity (lack of mental capacity to stand trial), and speedy trial where there is a delay equivalent to a denial of due process. For a more thorough discussion of the waiver stand, see R.C.M. 905(e) and 907(b), MCM, 1984, and NJS Procedure Study Guide, Chapter 12.

1003 DEFENSES ON THE MERITS (Key Numbers 834, 836-848)

Defenses on the merits are those that relate directly to the accused's guilt or innocence of the offenses with which he/she is charged. They are presented during the trial on the merits and are decided by the finder of fact. A successful defense on the merits will usually result in a finding of not guilty to the charges and specifications to which the defense relates. As previously mentioned, defenses on the merits may be divided into two subcategories for purposes of analysis: (1) general and (2) affirmative (or special).

A. General defenses: A general defense denies that the accused committed any or all of the acts that constitute the elements of the offense(s) charged, or it may claim that the accused did not possess the requisite intent or other required state of mind. Such a defense may arise through the inability of the prosecution to prove the accused's guilt beyond a reasonable doubt. It may also be raised by defense evidence which raises reasonable doubt about one or more of the elements of the offense charged. Throughout this study guide, issues which may give rise to general defenses have been discussed during the analysis of each separate offense. The following is a discussion of additional examples of general defenses:

1. Lack of requisite criminal intent: This defense is raised by evidence (or the lack of it) that the accused did not possess a required specific intent or other necessary state of mind. For example, the prosecution may fail to prove that the accused had a premeditated design to kill in a murder case or the defense may show that the accused did not have the intent to deprive permanently the true owner of the use and possession of his property in a larceny case. In both instances, the defense rests upon the lack of required intent, an element in each offense which the government is required to prove beyond a reasonable doubt.

2. Alibi: Proof of alibi is not a defense in the sense that it absolves one of criminal liability for committing certain acts; rather, it is rebuttal evidence which challenges the prosecution's evidence identifying the accused as the person who committed the crime alleged. United States v. Wright, 48 C.M.R. 295 (A.F.C.M.R. 1974). The essence of the alibi defense is a showing that it would have been physically impossible for the accused to have committed the crime because he was elsewhere at the time the offense was committed. United States v. Brooks, 25 M.J. 175 (C.M.A. 1987). Once an alibi defense is presented, it becomes incumbent upon the prosecution to rebut the defense and prove the accused's presence at the scene of the offense beyond a reasonable doubt if the accused is to be convicted. United States v. Wright, supra. R.C.M. 701(b)(1) requires the defense to put the government on notice of this defense in advance of trial.

3. Character: Under previous military law, evidence of the accused's good character was admissible and sufficient by itself or in connection with other evidence to raise reasonable doubt about the accused's guilt. The law recognized that a person of good character was less likely to commit a crime than a person of bad character. Rule 404a of the Military Rules of Evidence significantly changes this practice. Now, evidence of a person's character or a trait of his character is not admissible for the purpose of proving that that person acted in conformity therewith on a particular occasion, with three exceptions: (1) Evidence of a pertinent trait of the character of the accused offered by the accused or by the prosecution to rebut the same (e.g., evidence of accused's reputation for honesty to rebut larceny charge); (2) evidence of a pertinent trait of character of the victim offered by the accused (or by the prosecution to rebut the same) (e.g., evidence of the trait of peacefulness offered by the prosecution to rebut the defense's portrayal of the victim in a homicide or assault case as the aggressor); and (3) impeaching evidence. Mil.R.Evid. 404a. It would appear then that evidence of the accused's general good character will not be accepted into evidence in order to raise a general defense. The Analysis to the rules of evidence

suggests that evidence of the accused's general good military character may still be introduced, particularly if the accused is charged with a uniquely military offense. The admissibility of evidence suggesting the good military character of the accused is currently one of the more frequently litigated appellate issues. It can be argued that C.M.A. is taking a more expansive approach toward allowing the use of such evidence and, at least in drug cases, has said firmly that good military character is admissible despite the wording of the rule. See, e.g., United States v. Piatt, 17 M.J. 442 (C.M.A. 1984); and United States v. McNeill, 17 M.J. 451 (C.M.A. 1984); United States v. Weeks, 20 M.J. 22 (C.M.A. 1985); United States v. Vandelinder, 20 M.J. 41 (C.M.A. 1985). For a more exhaustive discussion of the character evidence issue, see NJS Evidence Study Guide, Chapter 5.

4. Affirmative defenses: Affirmative defenses, sometimes called special defenses, are in the nature of the traditional "confession and avoidance." Generally, the accused admits all of the elements of the offense charged, but contends that the conduct was not criminal under the circumstances because of the presence of one or more of these affirmative defenses. See sections 1007-1016 of this chapter.

a. Inconsistent defenses: There is no proscription in military law against asserting inconsistent defenses. United States v. Snyder, 6 C.M.A. 692, 21 C.M.R. 14 (1956); United States v. Walker, 21 C.M.A. 376, 45 C.M.R. 150 (1972); and United States v. Garcia, 1 M.J. 26 (C.M.A. 1975). For example, the accused may claim alibi and self-defense in the same trial. Although the wisdom of doing so may be questioned from a tactical viewpoint, there does not appear to be any legal reason forbidding it.

b. Examples: Some examples of affirmative defenses include:

(1) Impossibility. The inability of an accused, through no fault of his own, to comply with the terms of an order to perform a military duty constitutes a defense. Most often seen in connection with unauthorized absence and orders violation cases, this defense is usually divided into two subcategories (see section 1009 of this chapter):

(a) Physical inability; and

(b) financial inability.

(2) ignorance or mistake of fact (see section 1010 of this chapter);

(3) entrapment (see section 1008 of this chapter);

(4) self-defense;

(5) coercion or duress;

(6) accident or misadventure;

(7) justification and obedience to lawful orders; and

(8) lack of mental responsibility.

c. Procedure. By their very nature, affirmative defenses are usually raised during the presentation of the defense case, or, if possible, during cross-examination of the prosecution's witnesses. The burden is generally on the defense to present evidence which raises the defense. Once presented, the burden shifts to the prosecution to prove, beyond a reasonable doubt, that the defense asserted does not exculpate the accused. Of course, the prosecution's own evidence may raise the defense in some cases.

d. Instructions. When the evidence -- whether it be the prosecution's, the defense's, or the court's -- reasonably raises an affirmative defense, the military judge must sua sponte instruct the members as to the defense and that they may not find the accused guilty of the offense affected thereby unless they are convinced beyond a reasonable doubt that the basis of the special defense does not exist. R.C.M. 920(e), MCM, 1984; United States v. Sawyer, 4 M.J. 64 (C.M.A. 1977); United States v. Ferguson, 15 M.J. 12 (C.M.A. 1983); United States v. Richey, 20 M.J. 251 (C.M.A. 1985); see chapter XI, infra.

1004 FORMER JEOPARDY (Key Number 853)

A. Basis. The fifth amendment states, in pertinent part, "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...." Article 44(a), UCMJ, similarly provides: "No person shall, without his consent, be tried for a second time for the same offense." The double jeopardy provisions of the fifth amendment apply to the military. Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949).

B. Waiver/consent: There is substantial authority for the proposition that the defense of former jeopardy is waived if it is not raised before pleas or before the conclusion of trial. There are two principal cases on point; they were, however, decided by the Court of Military Appeals in the 1950's, and are therefore relatively aged. In both United States v. Kreitzer, 2 C.M.A. 284, 8 C.M.R. 84 (1953) and United States v. Schilling, 7 C.M.A. 482, 22 C.M.R. 272 (1957), the court held that the defense of former jeopardy was waived if not asserted at trial. A more recent case is the unpublished decision of United States v. Hallett, NCM 78-0498 (N.C.M.R. 26 March 1979). It held the same way, and cited the Schilling decision as its basis for doing so. In a published decision, however, the Army Court of Military Review decided to depart from the strictures laid down by the Kreitzer and Schilling cases and held that jeopardy is not subject to such waiver but could be raised for the first time on appeal. United States v. Johnson, 2 M.J. 541 (A.C.M.R. 1976). The Johnson court relied upon the Supreme Court case of Henry v. Mississippi, 379 U.S. 443 (1965), which refused to find a waiver of fourth amendment objections from counsel's inaction at the trial level. The Court of Military Appeals has indicated that the "passive waiver doctrine has been restricted to actions of trial defense counsel which leave appellate tribunals with insufficient factual development of an issue necessary to resolve a question of law raised on appeal." United States v. Graves, 1 M.J. 50 (C.M.A. 1975). On the other hand, R.C.M. 907(b)(2)(C), MCM, 1984, indicates that former jeopardy is among those defenses which may be waived by failure to assert it at the trial level.

C. Analysis. Former jeopardy issues can best be analyzed in terms of two questions: First, was the former proceeding a "trial" for purposes of the rule against former jeopardy; and, second, if it was a "trial," did jeopardy attach?

1. Was the former (first) proceeding a trial? There are two requirements which must be met in order for this question to be answered properly. First, it must be a criminal judicial proceeding. Second, it must be a proceeding involving the same sovereign.

a. Criminal proceeding. The former proceeding must have been a criminal or penal proceeding. Yates v. United States, 355 U.S. 66 (1957).

(1) In the case of United States v. Sinigar, 6 C.M.A. 330, 20 C.M.R. 46 (1955), it was held that a criminal contempt proceeding was not a trial for former jeopardy purposes because of the contempt proceeding's inherently summary and sui generis nature. As noted by the Supreme Court in the case of Mayberry v. Pennsylvania, 400 U.S. 455 (1971), however, not every contempt proceeding is summary. In that case, the Court held that the accused was entitled to a trial on his contempt charges. The trial judge had not acted individually on the many instances of contempt during the course of the proceedings, but chose to sentence the accused to between 11 and 22 years confinement for all of the "contempts" at the conclusion of the trial. The Court held that, under these circumstances, a trial was required, although it did note that the judge could have punished each "contempt" as it arose. Id. at 464. Consequently, in some instances, contempt proceedings may amount to a trial for former jeopardy purposes.

(2) In the case of United States v. Cadenhead, 14 C.M.A. 271, 34 C.M.R. 51 (1963), the court held that a Japanese family court proceeding, which is similar to a U.S. juvenile court proceeding, was not a trial within the meaning of the double jeopardy provision of the relevant Status of Forces Agreement.

(3) Consideration of allegations of misconduct by an administrative discharge board proceeding does not allow jeopardy to attach in bar of a subsequent court-martial. United States v. Williams, 12 M.J. 1038 (A.C.M.R. 1982). See also United States v. Lynch, NCM 75-1401 (N.C.M.R. 16 Aug 1976) and United States v. Erb, 12 C.M.A. 524, 31 C.M.R. 110 (1961) (dealing with medical boards).

(4) Prior punishment of an accused under Article 15, UCMJ (nonjudicial punishment), does not raise an issue of former jeopardy since article 15 punishment does not involve judicial proceedings. United States v. Fretwell, 11 C.M.A. 377, 29 C.M.R. 193 (1960); United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

(5) The Army Court of Military Review has held that a trial in a U.S. Magistrate Court will foreclose a trial by court-martial for the same offenses. United States v. Chavez, 6 M.J. 615 (A.C.M.R. 1978).

b. Sovereignty. In order to constitute a defense, former jeopardy must involve the same sovereign (i.e., the first trial must have been conducted by the same sovereign if it is to be a bar to the second proceeding). This rule may be expanded by agreement or treaty, as we shall see in the discussion of foreign court proceedings below.

(1) State Court proceedings. The Supreme Court, in Bartkus v. Illinois, 359 U.S. 121 (1959), held that every citizen of the United States is also a citizen of a state or territory and may therefore be said to owe allegiance to two sovereigns and is liable for an infraction of the laws of either or both. The Court concluded that, if both the state and Federal governments punish the offender for the same act, he cannot claim that he has been doubly punished for the same offense, since he has committed the offenses by his single act, both of which are punishable. See also Abbate v. United States, 359 U.S. 187 (1959), which upheld a federal criminal trial of the accused following his state court prosecution. See generally, King, The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution," 31 Stan. L. Rev. 477 (1979).

(2) Foreign court proceedings. In the absence of a treaty to the contrary, an accused can be tried by a foreign country and the United States if his offense violates the laws of both. United States v. Cadenhead, 14 C.M.A. 271, 34 C.M.R. 51 (1963). In most situations involving military offenders, however, there will be a treaty to the contrary since most U.S. military personnel stationed in foreign countries are covered by a Status of Forces Agreement (SOFA). Most U.S. SOFA's contain a provision prohibiting dual trials within the country concerned if the accused was acquitted or is serving or has served his sentence from the first trial, although they do permit the U.S. to try the military offender for disciplinary violations arising from the event. There is, however, no prohibition for a second trial by the other sovereign if the accused received only a suspended sentence (but see discussion below) if the foreign appellate court dismissed the charges voiding the entire proceeding [United States v. Miller, 16 M.J. 169 (C.M.A. 1983)] or if the foreign jurisdiction "merely took into consideration" the facts of offenses which were later brought to court-martial. United States v. Green, 14 M.J. 461, 473 (C.M.A. 1983). In any event, careful perusal of the pertinent SOFA is required in all such cases. See, e.g., Cadenhead, supra (Japan); United States v. Reed, 33 C.M.R. 932 (A.F.C.M.R. 1963) and United States v. Stokes, 12 M.J. 229 (C.M.A. 1982) (Spain).

(3) Limitations. Regardless of the "dual sovereignty" concepts discussed above, it is the policy of the Navy, as expressed in JAGMAN, § 0116d(1), that:

> A person in the naval service who has been tried in a domestic or foreign court, whether convicted or acquitted, or whose case has been "diverted" out of the regular criminal process for a probationary period, or whose case has been adjudicated by juvenile court authorities, shall not be tried by court-martial or be awarded nonjudicial punishment for the same act or acts, except in those unusual cases where trial by court-martial or the imposition of nonjudicial punishment is considered essential in the interest of justice, discipline, and the proper administration within the naval service.

Those "unusual cases" require the prior approval by the general court-martial convening authority for trial by summary court-martial or nonjudicial punishment or by the Judge Advocate General for special or general courts-martial. JAGMAN, § 0116d(3).

2. Has jeopardy attached? Even if the former proceeding was a trial for purposes of former jeopardy, jeopardy may or may not have attached.

a. The former jeopardy defense precludes trial of an accused by the same sovereign only if the trial is for the same offense for which he/she has been previously tried. It is sometimes difficult to determine whether the second trial involves the same offense, since different offenses may arise from one transaction. For example, a servicemember may be prosecuted in a Federal court for interstate transportation of a stolen car, given a suspended sentence, and then returned to military control. The military may then choose to prosecute the servicemember at a court-martial for an unauthorized absence incurred while he was in jail awaiting trial by civilian Federal authorities. The same sovereign may thus prosecute twice if the offenses tried are different. In Brown v. Ohio, 432 U.S. 161 (1977), the Supreme Court set forth the test to be applied in determining how many offenses are involved for double jeopardy purposes. The Court said that there are two offenses "if the underlying statute requires proof of a fact which the other does not." Id. at 166. Using this test, the Court held in Brown that the accused's prior conviction for the lesser included offense of joyriding prohibited his subsequent prosecution for the offense of auto theft. See United States v. Chavez, 6 M.J. 615 (A.C.M.R. 1978).

(1) Acquittal of the greater offense will bar a subsequent trial for a lesser offense; and, as demonstrated by the Brown opinion, supra, conviction of the lesser offense may bar trial of a greater offense. It may also be concluded that acquittal of an LIO bars a subsequent trial for the greater offense if the greater offense differs from the former in degree only. For example, if the accused is acquitted of manslaughter, he may not be retried for murder of the same victim. Finally, it is apparent that, if the accused is charged with the greater offense but found guilty only of an LIO, he may not be retried for the greater offense since the finding of guilt of the LIO results in a finding of not guilty of the greater offense. (See the comments on mistrial below).

(2) Sometimes careful analysis is needed to determine whether the same offense is involved. For example, in the case of United States v. Chavez, 6 M.J. 615 (A.C.M.R. 1978), the accused was tried in Federal magistrate court for negligent driving, and then court-martialed for assaulting a military policeman. The Army Court of Military Review held the "two" offenses to be the same since the essence of both the negligent driving offense and the assault offense was that the car had lightly touched the military policeman as it was being driven away. On the other hand, there appears to be authority for trying conspiracy and obstruction of justice charges at a second trial even though the accused had already been tried for the underlying offenses at an earlier trial. United States v. Rex, 3 M.J. 604 (N.C.M.R. 1977). And, in Snell v. United States, 550 F.2d 515 (9th Cir. 1977), on remand, 592 F.2d 1083 (9th Cir. 1979), cert. denied, 450 U.S. 957 (1981), the

Supreme Court denied certiorari in a case in which the accused had been first tried for extortion, convicted and then had the conviction overturned on appeal, only to find himself in court again a second time on charges of attempted bank robbery, even though both offenses arose out of the same transaction. His claim of double jeopardy was to no avail.

b. When does jeopardy attach? The Manual for Courts-Martial indicates that jeopardy attaches when presentation of evidence on the issue of the guilt or innocence has begun. R.C.M. 907(b)(2)(C)(i), MCM, 1984. This section of the MCM is founded upon the case of United States v. Wells, 9 C.M.A. 509, 26 C.M.R. 289 (1958). The Wells case noted that there were two "general" rules then in use to determine at what stage of a trial jeopardy attached. After considering the matter, the court concluded: "Apparently Congress intended that jeopardy in the courts-martial system would attach upon the hearing of evidence and thus conform to one of the alternatives of the general rule." Id. at 512, 26 C.M.R. at 292. In United States v. Jackson, 20 M.J. 83 (C.M.A. 1985), the court held jeopardy did not attach and the first case was not a "trial" where the judge had dismissed the case during motions because the charge sheet was improper. The MCM provision and the Wells case, supra, upon which it is based, may be questionable in light of the Supreme Court case of Crist v. Bretz, 437 U.S. 28 (1978). The Court, in that case, held that the Federal rule that jeopardy attaches in a jury trial when the jury is empaneled and sworn is an integral part of the fifth amendment and is applicable to the states through the fourteenth amendment. Application of the Crist decision to the military justice system would indicate that jeopardy attaches in a court-martial composed of members when the court is assembled, since the members are sworn prior to this time. In trials conducted before military judge alone, the court is assembled when the military judge announces that it is, which generally occurs after the military judge has approved the written request for trial before military judge alone. The Crist decision, however, appears to reaffirm that in nonjury trials (i.e., courts without members or trials before military judge alone), jeopardy does not attach until the first witness is sworn. Crist v. Bretz, supra, at n.15; Serfass v. United States, 420 U.S. 377 (1975). It should be noted that the drafters of the MCM, 1984, considered the Crist decision and decided that it was inapplicable to courts-martial since, in the military, there is no jury trial. A court-martial composed of members is not a trial by jury. R.C.M. 907 drafters' analysis, MCM, 1984, app. 21-50. There are several factors to be determined before a conclusion can be reached as to whether jeopardy has attached: (1) The jurisdictional status of the court (i.e., did it, or did it not have jurisdiction to try the case?) (2) The status of the findings (i.e., was there an acquittal, conviction, no trial, or mistrial?).

c. Acquittal with jurisdiction. In the military justice system, an acquittal is final as soon as the findings are announced. The automatic review of courts-martial required by the UCMJ is limited to a determination of whether the court-martial possessed jurisdiction if the accused is acquitted. Articles 61, 64-69, UCMJ. If a rehearing is ordered, the accused "... shall not be tried for any offense of which he was found not guilty by the first court-martial...." Article 63b, UCMJ. This is true even if the legal rulings underlying the acquittal were erroneous. Sanabria v. United States, 437 U.S. 54 (1978). In the case of United States v. Hitchcock, 6 M.J. 188 (C.M.A.

1979), the military judge granted a defense motion for a finding of not guilty to some of the offenses charged; however, he "reversed" himself when the trial counsel called to his attention during a subsequent recess three cases contrary to the defense's position. The Court of Military Appeals ruled that "[h]owever mistaken or wrong it may be, an acquittal cannot be withdrawn or disapproved," and reversed the case. Id at 189. If a finding of not guilty is made, reprosecution will be barred whether or not evidence has been presented. Thus, in United States v. Johnson, 2 M.J. 541 (A.C.M.R. 1976), jeopardy attached during an article 39a session which resulted in a "not guilty" determination even though no evidence had been produced at the session. Note, however, the case of Lee v. United States, 432 U.S. 23 (1977), in which the Court said that double jeopardy did not occur where the trial court had "expressed its opinion" of the accused's guilt but had granted a motion made before trial to dismiss for failure of the indictment to allege a requisite intent, and the government subsequently reinstituted prosecution with a new and corrected indictment.

d. Acquittal without jurisdiction. At one time it was assumed that, if an accused was acquitted by a court-martial that did not have jurisdiction over the case, the proceedings were a total nullity and, hence, jeopardy had never attached. United States v. Padilla, 1 C.M.A. 603, 5 C.M.R. 31 (1952). However, in the case of United States v. Culver, 22 C.M.A. 141, 46 C.M.R. 141 (1973), the court held that, despite a jurisdictional defect in the first court (which had acquitted the accused), the accused could not be required to stand trial a second time. The court had previously reversed Culver's conviction [United States v. Culver, 20 C.M.A. 217, 43 C.M.R. 57 (1970)] because the trial had been before a military judge alone, without benefit of a written request for trial before military judge alone, which was an indispensable jurisdictional prerequisite. It was therefore felt that the Culver decision would preclude retrial of an acquitted accused even when it was determined that the acquitting court lacked jurisdiction. The MCM, 1984, appears to disagree by stating that a court-martial proceeding which lacks jurisdiction is not a trial within the meaning of the former jeopardy rule. R.C.M. 907(b)(2)(C)(iv), MCM, 1984. The drafters distinguish the Culver decision by noting that only one of the judges deciding the case did so on jeopardy grounds. See R.C.M. 907 drafters' analysis, MCM, 1984, app. 21-50.

e. Conviction. Military courts operate under a system of "continuing jeopardy," whereby the accused is considered to have been placed in jeopardy only once throughout the course of the entire review and appellate process. Article 44(b), UCMJ, states: "No proceeding in which an accused has been found guilty by 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." See, e.g., United States v. O'Quin, 16 M.J. 650 (A.F.C.M.R. 1983) (second court-martial following intermediate review determination that accuser problem made proceedings a nullity not barred by double jeopardy).

(1) Rehearings. If the findings or sentence are set aside on review, a rehearing may be ordered pursuant to articles 63, 66, and 67 of the code. See United States v. Miller, 10 C.M.A. 296, 27 C.M.R. 370 (1959), in which the Court of Military Appeals decided that rehearings limited to reconsideration of the sentence were proper proceedings. If a rehearing is

ordered, the trial is not considered complete for jeopardy purposes until the rehearing has been completed and reviewed. The accused is protected during this period of "continuing jeopardy" by provisions prohibiting a rehearing if the conviction is set aside for lack of evidence. Articles 63, 66, and 67, UCMJ; United States v. Ivory, 9 C.M.A. 516, 26 C.M.R. 296 (1958); United States v. Perry, 34 C.M.R. 761 (A.F.B.R. 1963). Any punishment that may be imposed as a result of the rehearing is limited to that awarded at the original proceeding, as reduced by reviewing authorities. Article 63(b), UCMJ. As noted above, a rehearing may not consider any offense of which the accused was previously acquitted. If the reviewing authorities have reversed the conviction for legal insufficiency of the evidence, the accused may not be retried. That rule was laid down by the Supreme Court in Burks v. United States, 437 U.S. 1 (1978). The Court said, "... we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient...." Id. at 18. The usual rule that the accused "waives" his double jeopardy protection by appealing a decision was held inapplicable to the situation where the reviewing courts overturned the lower decision because of legally insufficient evidence. The Court held that it mattered not who originated the appeal. This principle would seem to have equal force if the charges were withdrawn after the trial had begun because of insufficient evidence. See the discussion on withdrawal of charges, below.

(2) Sentence deadlock. If the first court-martial cannot agree upon the sentence to be awarded, the case can be referred to a second court-martial for a rehearing on the sentence, and former jeopardy will not be available as a defense at that rehearing. United States v. Goffe, 15 C.M.A. 112, 35 C.M.R. 84 (1964). However, do not confuse this deadlock situation with the situation in which a court-martial imposes "no punishment" as the sentence; former jeopardy considerations would preclude a rehearing in the latter instance since "no punishment" is not a deadlock but a valid sentence.

f. Withdrawal of charges. As noted above, the Supreme Court case of Burks v. United States, 437 U.S. 1 (1978) probably prevents the retrial of an accused whose case was interrupted by the withdrawal of his charges due to insufficient evidence. In the much earlier case of Wade v. Hunter, supra, the U.S. Supreme Court held that it was proper for a convening authority to withdraw charges from a general court-martial and transmit them to another convening authority in the rear. The double jeopardy clause was held not to bar a retrial where the record showed that the tactical situation caused by the Army's rapid advance had placed the unit a "considerable distance" from the German town where a couple of civilian witnesses requested by the members resided. The fact that the trial had proceeded to such a point that the members had actually closed for deliberations, deliberated for some period of time, and then reopened the court to request the testimony of the two civilian witnesses was held not to bar a retrial.

(1) Article 44 (c), UCMJ, provides that "[a] proceeding which, after the introduction of evidence, but before a finding, is dismissed or terminated by the convening authority upon motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial ... for purposes of former jeopardy." The MCM, 1984, gives more guidance. Charges which are withdrawn after the introduction of evidence on

the merits may not be reinstituted unless the withdrawal was "... necessitated by urgent and unforeseen military necessity." R.C.M. 604(b), MCM, 1984. Charges withdrawn prior to the introduction of evidence may be reinstituted" ... unless the withdrawal was for an improper reason." Id.

(2) Case law is to the same effect (i.e., if the charges are withdrawn because of lack of evidence or poor trial preparation on the part of the government, the accused may not be retried for the same offense). United States v. Ivory, 9 C.M.A. 516, 26 C.M.R. 296 (1958); United States v. Stringer, 5 C.M.A. 122, 17 C.M.R. 122 (1954). In the Stringer case, the trial counsel had done a poor job of preparing his witnesses. Midway in the trial, the senior member remarked as follows: ".. apparently this case is not ready for trial ... I don't think that justice can be done ... if this is a sample of what we are going to have to hear, I think the case will have to be better prepared. Otherwise, we will hang the man innocently." Id. at 127. The same result was reached in the unpublished case of United States v. Fernandez, NCM 79-0019 (N.C.M.R. 13 Aug 79). The unpublished decision of United States v. Shuniak, NCM 79-1188 (N.C.M.R. 11 Oct 79) held that the accused is protected from double jeopardy as to the specifications that had been "withdrawn with prejudice" pursuant to a pretrial agreement even though the military judge had, correctly, not entered findings as to those specifications.

(3) Note that, where the charges have been ordered dismissed by the military judge due to their failure to state an offense, neither Article 44, UCMJ, nor the Constitution bars a second trial upon properly drafted specifications. United States v. Sparks, 15 M.J. 895 (A.C.M.R. 1983).

g. Mistrials: The general rule is that the declaration of a mistrial will not bar further proceedings unless the declaration was an abuse of discretion and not consented to by the defense, or unless the declaration was the direct result of intentional prosecutorial misconduct. R.C.M. 915(c)(2), MCM, 1984.

(1) Requested by the defense. If a mistrial is requested by the defense, and granted by the military judge, jeopardy does not attach or is waived, and the accused may be retried for the same offense. United States v. Ivory, 9 C.M.A. 516, 26 C.M.R. 296 (1958). This will not hold true for the defense-requested mistrial which is caused by prosecutorial misconduct.

(2) If the military judge properly declares a mistrial "in the interest of justice" or due to "manifest necessity," jeopardy does not attach. United States v. Waldron, 15 C.M.A. 628, 36 C.M.R. 126 (1966) (5 of the 6 court members had a preformed opinion as to the credibility of a key government witness); United States v. Keenan, 18 C.M.A. 108, 39 C.M.R. 108 (1969) (law officer concluded instructions to disregard testimony regarding an uncharged murder would be insufficient); United States v. Schilling, 7 C.M.A. 482, 22 C.M.R. 272 (1957) (trial recording device failed); United States v. Richardson, 21 C.M.A. 54, 44 C.M.R. 108 (1971) (military judge sitting alone withdrew findings of guilty and declared mistrial as to whole proceedings when he became convinced during presentencing stage that accused was receiving inadequate assistance from counsel); and United States v. Tubbs, 2 M.J. 840 (A.C.M.R. 1976) (accused sought to plead guilty but made statements indicating that he was not, military judge refused to accept pleas and entered mistrial--

held former jeopardy did not bar subsequent trial); see also United States v. Watt, 32 C.M.R. 504 (A.B.R. 1962), petition denied, 32 C.M.R. 472 (C.M.A. 1962); United States v. Stafford, 30 C.M.R. 704 (N.B.R. 1961) (defective recording device resulted in declaration of mistrial -- held no double jeopardy upon retrial). Of similar import is United States v. Pitcher, NCM 77-1485 (N.C.M.R. 31 Jan 78), which held that the declaration of a mistrial due to a "mix up" in the detail of the military judge did not result in former jeopardy.

(3) Abuse of discretion. If the military judge abuses his discretion in declaring the mistrial, jeopardy will attach and prevent retrial of the accused. United States v. Stringer, 5 C.M.A. 122, 17 C.M.R. 122 (1954); United States v. Walter, 14 C.M.A. 142, 33 C.M.R. 354 (1963); United States v. Rex, 3 M.J. 604 (N.C.M.R. 1977). The Rex case, supra, was based at least in part upon the decision of United States v. Jorn, 400 U.S. 470 (1971), in which the Supreme Court had held that a retrial was prohibited where a trial judge had abused his discretion by declaring a mistrial so that government witnesses could consult with their attorneys. The Rex court, after concluding that the Jorn court had not mentioned the burden of proof in its analysis of the law of double jeopardy, also discusses who has the burden of proving that the discretion was abused. The Rex court said: "Although older cases seem to place the burden of proof upon the accused, it may be that when the issue may be resolved on legal, as opposed to factual grounds, that the burden should rest upon the government to show that "manifest necessity" demanded that a mistrial be declared." United States v. Rex, supra, at 609. Where the defense counsel improperly cross-examined a rape victim on her prior sexual experiences in contravention of Mil.R.Evid. 412, there was no "manifest necessity" for the military judge to grant the government's motion for a mistrial over the defense's objection, and retrial was therefore barred by the double jeopardy clause. United States v. Ghent, 21 M.J. 546 (A.F.C.M.R. 1985).

(4) Action by the prosecution. Where the trial counsel's action is held to constitute intentional action designed to provoke the accused's mistrial, reprosecution is barred by the double jeopardy clause. See United States v. Goodyear, 14 M.J. 567 (N.M.C.M.R. 1982) (Court declined to extend intentional misconduct standard to include gross negligence or bad faith). See also Oregon v. Kennedy, 456 U.S. 667 (1982).

(5) Functional mistrial. A defense motion for relief, which, if granted, terminates the proceedings without a finding with regard to guilt, can be considered the functional equivalent of a mistrial and will have the same effect with respect to former jeopardy. That is, a subsequent trial will not be barred since the termination of the proceedings was at the request of the defense. This is true even though the trial court may somehow indicate its belief in the guilt or innocence of the accused. Lee v. United States, 432 U.S. 23 (1977), wherein the Supreme Court held that where the trial court had merely "expressed its opinion" of the accused's guilt after hearing the evidence of the prosecution and did not make findings, but granted a motion to dismiss for failure of the indictment to allege the requisite intent, reprosecution did not violate the double jeopardy clause of the Constitution. Such a result was said to be "functionally indistinguishable from a mistrial." This same result would occur in the military setting when the defense moves to dismiss a specification for failure to state an offense (i.e., reprosecution is not barred). See United States v. Sparks, 15 M.J. 895 (A.C.M.R. 1983).

-- But, dismissal is not always the functional equivalent of mistrial. In the case of United States v. Kinneer, 7 M.J. 974 (N.C.M.R. 1979), a defense motion to dismiss was grounded on the unlawfulness of the order which the accused had allegedly disobeyed. The trial military judge deferred ruling on the motion until after he heard the government's case, and then granted it. Even though styled as a motion to dismiss, the court held that the military judge had actually determined the merits of the matter; thus, jeopardy did attach and, hence, subsequent prosecution was barred.

h. Multiplicity. In addition to protecting an accused against multiple prosecutions for the same offense by the same sovereign, the fifth amendment also shields an accused from multiple punishment for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969). This protection is embodied in R.C.M. 307(c)(4) and 907(b)(3)(B), MCM, 1984, and is discussed in different chapters of this study guide (e.g., Pleadings, chapter II). For additional discussion, see NJS Procedure Study Guide, chapter XIV.

1005 FORMER PUNISHMENT (Key Number 525)

A. R.C.M. 907(b)(2)(D)(iv), MCM, 1984, indicates that punishment imposed under article 15 (nonjudicial punishment) or article 13 (punishment for disciplinary infractions arising while the accused is in pretrial confinement), UCMJ, for minor offenses will bar a subsequent court-martial for those offenses. This concept is known as the "former punishment" bar to trial. A serious offense can be the subject of a subsequent court-martial even if punishment has been previously awarded to the accused under either article. United States v. Joseph, 11 M.J. 333 (C.M.A. 1981). See also United States v. Pierce, 27 M.J. 367 (C.M.A. 1989) (absent some sinister design, evil motive, or bad faith on the part of military authorities, it is not a violation of military due process to court-martial a servicemember for a serious offense even though he has been punished nonjudicially.

B. Former punishment is a defense altogether separate and apart from that of former jeopardy. Punishment imposed under the authority of articles 13 or 15 has not been awarded as the result of a trial; consequently, former jeopardy will not bar a subsequent court-martial in these cases. However, the accused who has already been punished for a minor offense may, nonetheless, have a valid defense under the "former punishment" provisions of the Manual.

1. Minor offenses. The defense of former punishment is limited to minor offenses. A minor offense usually does not involve moral turpitude and carries a maximum permissible punishment of less than a dishonorable discharge and/or confinement for one year at a general court-martial. Part V, para. 1e, MCM, 1984. There is, however, no universal standard by which to determine whether an offense is minor. Each case must be evaluated on its own facts; for example, in determining the issue, the courts have considered such things as the nature of the offense committed, the age and rank of the accused, the time and place of its commission, whether a victim was involved, and the potential for harm to the maintenance of good order and discipline. Id.

a. The following cases provide illustrations of situations that the courts have held to involve more than "minor" offenses:

(1) United States v. Fretwell, 11 C.M.A. 377, 29 C.M.R. 193 (1960). Navy lieutenant tried for being drunk on duty while he was OOD of USS Hancock, then in drydock.

(2) United States v. Harding, 11 C.M.A. 674, 29 C.M.R. 490 (1960). Assault which resulted in broken jaw and chipped teeth.

(3) United States v. Vaughan, 3 C.M.A. 121, 11 C.M.R. 121 (1953) and United States v. Rosencrons, 34 C.M.R. 512 (A.B.R. 1963). Escape from confinement.

(4) United States v. Wharton, 33 C.M.R. 729 (A.F.B.R. 1963). Involuntary manslaughter and resisting apprehension arising out of an automobile chase and accident.

(5) United States v. Fisher, 22 C.M.R. 676 (N.B.R. 1956). Larceny of $36.00. (Caveat: this case was decided under the punishment provisions of the MCM, 1951, and it is not known whether larceny of $36.00 would still be considered a nonminor offense for this purpose.)

(6) United States v. Cross, 2 M.J. 1057 (A.C.M.R. 1976). Possession of approximately one pound of marijuana.

(7) United States v. Pierce, 27 M.J. 367 (C.M.A. 1989). Theft of an aviator kit bag containing a parachute and personal items belonging to post personnel.

b. The same factors that caused the courts to determine that they were not dealing with a minor offense in the cases cited above convinced the courts of the opposite in the following decisions:

(1) United States v. Mahoney, 27 C.M.R. 898 (N.B.R. 1959). Marine captain was drunk in public and walked through civilian hotel clad only in undershorts.

(2) United States v. Yray, 10 C.M.R. 618 (A.F.B.R. 1953). Unauthorized absence for five days.

(3) United States v. Williams, 10 C.M.A. 615, 28 C.M.R. 181 (1959). Disrespect to superior noncommissioned officer.

2. Punishment imposed during pretrial restraint of the accused. As noted above, R.C.M. 907(b)(2)(D)(iv), MCM, 1984, prohibits a subsequent court-martial for minor offenses previously punished under articles 13 or 15 of the code. Article 13, UCMJ, permits an accused to be punished "for infractions of discipline" while he is being held in pretrial or post-trial restraint. If the accused is punished for such misconduct, he may not be court-martialed for the same offense if the offense in question was minor, as defined above. Cases dealing with this aspect of the former punishment defense may be divided into two categories for purposes of analysis: (1) Those cases in which the punishment was imposed lawfully; and (2) those cases in which the punishment was imposed unlawfully.

a. Lawful punishment. If the accused is subjected to disciplinary punishment for minor infractions of discipline during a period of pretrial restraint, he may not be subsequently prosecuted at a court-martial for the same offense. For example, in the case of United States v. Williams, 10 C.M.A. 615, 28 C.M.R. 181 (1959), the accused was placed in disciplinary segregation on a reduced diet after being disrespectful to his superior non-commissioned officer. He was later brought to trial on the disrespect charge, among other charges. The court ruled that the disrespect offense had been the subject of a previous punishment and, hence, the accused could not be subjected to court-martial for that violation. Of similar import is the case of United States v. Rosencrons, 34 C.M.R. 512 (A.B.R. 1963).

b. Illegal pretrial punishment. Cases involving illegal pretrial punishment require somewhat more analysis than those noted above. The first issue usually to be resolved is whether the accused has been punished. This is so because at times the "punishment" will be imposed unintentionally by confinement facility officials or command authorities, and because it may or may not be imposed as a result of a disciplinary infraction committed after the accused has been placed in pretrial restraint. Chapter XII of the Procedure Study Guide should be carefully reviewed in this area. Remember that the former punishment defense prevents a court-martial only for the same, minor offense. Hence, if the accused has been punished for some offense other than that for which he is being tried by court-martial, or if the offense for which he is being tried and was previously punished is not minor, then the accused cannot rely on the former punishment defense. United States v. Vaughan, 3 C.M.A. 121, 11 C.M.R. 121 (1953). The accused, however, may be entitled to other relief. United States v. Larner, 1 M.J. 371 (C.M.A. 1976). United States v. Bayhand, 6 C.M.A. 762, 21 C.M.R. 84 (1965); United States v. O'Such, 16 C.M.A. 537, 37 C.M.R. 157 (1967); and United States v. West, 12 C.M.A. 670, 31 C.M.A. 256 (1962). In all of these cases, the illegal nature of the pretrial confinement caused the courts to dismiss the charges or to grant other relief because of the peculiar nature of the charges, the severity of the confinement, or its effect upon the accused's ability to defend himself; however, none were decided on the basis of, or even involved, the former punishment defense.

1006 RES JUDICATA (Key Numbers 832, 1266)

A. Defined. "Any matter put in issue and finally determined by a court-martial, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other court-martial of the same accused, except that, when the offenses charged at one court-martial did not arise out of the same transaction as those charged at the court-martial at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a federal government unit were parties." R.C.M. 905(g), MCM, 1984.

B. Who may assert it? Res judicata may be asserted only by the defense.

1. Same parties. In order for the defense to assert res judicata, it must be shown that the same parties were involved in both proceedings. United States v. Chavez, 6 M.J. 615 (A.C.M.R. 1978). In Chavez, the appellant, charged with assaulting a military policeman by assaulting him with an automobile, claimed that he was entitled to the defense of res judicata because the matter of whom the driver of the automobile was at the time of the assault had been previously decided in proceedings held by a United States magistrate. The magistrate had decided beyond a reasonable doubt that the driver was an individual other than the appellant. The Army Court of Military Review, however, rejected the appellant's claim by finding that the appellant was not a party to the magistrate proceeding.

2. Privity of necessary parties. When a crime is one that, by definition, cannot be committed by only one person, but requires a concert of action or intent by two or more, a determination of an issue in a trial of one of the parties may be pleaded in defense by another person who, although not a party to the former proceeding, was nonetheless a necessary party to the alleged crime. See, e.g., United States v. Doughty, 14 C.M.A. 540, 34 C.M.R. 320 (1964).

3. Principals and accessories. Except when they are necessary parties (United States v. Doughty, supra), perpetrators, aiders and abettors, and accessories before and after the fact lack privity for res judicata purposes. This is so because the code permits conviction of all principals and accessories, regardless of the conviction or acquittal of the actual perpetrator. United States v. Marsh, 13 C.M.A. 252, 32 C.M.R. 252 (1962); United States v. Hollis, 16 M.J. 954 (A.F.C.M.R. 1983) (determination of lack of service-connectedness not res judicata in trial of accomplice).

C. What are previously determined matters? See R.C.M. 905(g) discussion, MCM, 1984, for an excellent compilation of examples. Note that previously determined matters of law may be contested by the government at a second trial on unrelated charges.

D. Prior acquittal as res judicata. A finding of not guilty raises the possibility that the accused was acquitted because of a failure of proof of any one or all of the elements of the charged offense. Thus, it is often difficult to determine what factual matters were determined when the accused was acquitted. Military courts will not presume, for purposes of res judicata, that all necessary elements of the offense were decided in favor of the accused by a prior acquittal. Instead, the record of the prior proceeding will be scrutinized, with particular attention paid to the pleadings, the evidence, and argument of counsel. Parol evidence outside the record of the prior proceedings, such as the testimony of court members at the first trial, will not generally be permitted to establish the factual determinations inherent in the acquittal. United States v. Underwood, 15 C.M.R. 487 (A.B.R. 1953). Instead, the court will examine the evidence and the logical conclusions to be drawn from it, including matters such as which witnesses were apparently believed and which ones apparently were found untrustworthy. United States v. Martin, 8 C.M.A. 346, 24 C.M.R. 156 (1957). The test, ultimately, is whether, after examining all available evidence, a rational jury could have grounded its verdict upon an issue other than that which the accused seeks to foreclose from relitigation. Ashe v. Swenson, 397 U.S. 436 (1970); see also United States v. Marks, 21 C.M.A. 281, 45 C.M.R. 55 (1972); and R.C.M. 905(g) discussion, MCM, 1984.

E. Finally determined. For res judicata to prevent relitigation of an issue, that issue must have been finally determined at the prior proceeding. Except for a ruling which is, or amounts to, a finding of not guilty, a ruling ordinarily is not final until action on the court-martial is completed. R.C.M. 905(g) discussion, MCM, 1984. Note the case of United States v. Saulter, 5 M.J. 281 (C.M.A. 1978), in which the court noted that a summary dismissal of appellant's petition for writ of habeas corpus by a U.S. District Court was not a final determination since the dismissal had been appealed by the accused to the appropriate Court of Appeals. Also note the case of United States v. Guzman, 4 M.J. 115 (C.M.A. 1977). In that case, the convening authority had determined that appellant's enlistment was void because of misconduct by his recruiter and, therefore, the court-martial that had tried him was without jurisdiction over the appellant's person. Apparently, the accused was subsequently convicted at another court-martial for offenses separate from those tried at the first court-martial. That conviction was appealed to C.M.A., who, in a summary disposition, dismissed the charges, holding that the convening authority's determination in the first case was res judicata as to the second.

F. Parties and courts. As noted above, in order for the defense of res judicata to be successfully asserted, a court of competent jurisdiction must have finally determined the matter in issue between the same parties. R.C.M. 905(g), MCM, 1984, indicates that any court may have determined the issue in question, including a previous court-martial. As a practical matter, only Federal courts may be looked to since the United States seldom appears in any other type of court as a party. And there is some indication that state court proceedings may not be sufficient to meet the requirements of res judicata. United States v. Borys, 39 C.M.R. 608 (A.C.M.R. 1968). Also recall that, if the convening authority in a given case makes a factual determination, that factual determination may be res judicata if the same matter is put into issue at a subsequent trial involving the same parties (not necessarily the same convening authority). United States v. Guzman, 4 M.J. 115 (C.M.A. 1977). As we have already seen, the accused is usually one party, although in certain instances, a coactor will do just as well. The United States must be the other party. This requirement is satisfied if the United States or any governmental unit deriving its authority therefrom was a party to the previous proceeding. R.C.M. 905(g), MCM, 1984. If a state was the party in the first proceeding, res judicata will not bar the subsequent prosecution. United States v. Borys, supra, at 612; see also Serio v. United States, 203 F.2d. 576 (5th Cir. 1953), cert. denied, 346 U.S. 887 (1953) and Smith v. United States, 243 F.2d. 877 (6th Cir. 1957).

G. Inconsistent findings within the same trial. The doctrine of factual res judicata "through" inconsistent findings at the same trial was rejected by the Supreme Court in the case of Dunn v. United States, 284 U.S. 390 (1932). The Court there said quite plainly, "[c]onsistency in the verdict is not necessary." Another case decided the same term further illustrates the point. Borum et al. v. United States, 284 U.S. 596 (1932). Thus, within one trial, an acquittal of all or part of a specification has no effect on the remainder of the specification or other specification unless, of course, the remainder of the specification fails to state an offense. United States v. Spivey, 23 C.M.R. 518 (A.B.R. 1957).

H. Relationship between res judicata and former jeopardy. Res judicata is "an integral part of the protection against former jeopardy." United States v. Chavez, 6 M.J. 615, 621 (A.C.M.R. 1978). Because of the important distinctions between the concepts of res judicata and former jeopardy, however, the doctrine of res judicata may be applied when the former jeopardy defense cannot. The two most salient distinctions are discussed below. It should be noted that, in the Supreme Court case of Ashe v. Swenson, 397 U.S. 436 (1970), the Supreme Court held that the Federal rule of "collateral estoppel" in criminal cases, which is analogous to res judicata for the military justice system [United States v. Saulter, 5 M.J. 281 (C.M.A. 1978)], is embodied in the fifth amendment guarantee against double jeopardy. Thus, res judicata may have constitutional underpinnings just as former jeopardy does. United States v. Chavez, supra.

1. Same offense/same matter. Former jeopardy may be claimed as a defense only when the accused was formerly tried on the same offense. Res judicata may be claimed in a second trial for a different offense, so long as the "matter" previously determined was the same and the other necessary requirements are met.

2. Assembly/final determination. Jeopardy attaches upon introduction of evidence. R.C.M. 907(b)(2)(C)(i). There need be no final determination of guilt or innocence at the first trial in order for the accused to claim former jeopardy. Res judicata requires final determination of the particular matter as to which it is invoked. It applies whether the previous trial resulted in conviction, acquittal, or something in between. Note that, where it relates to an evidentiary matter or some other collateral issue, a final determination is possible even though jeopardy has not attached. For example, before assembly of the court, if the military judge dismisses the charges against the accused because of a lack of personal jurisdiction over him due to a void enlistment, that determination will be res judicata at a subsequent court-martial of the same accused. Jeopardy would not attach to the dismissed charges, however, because the motion was granted before the assembly of the court. United States v. Jackson, 20 M.J. 83 (C.M.A. 1985).

1007 INSANITY (Key Numbers 843-846, 984, 1246)

A. Historical background. Prior to 1977, the insanity standard in military law was the standard set forth in M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 781 (H.L. 1843); namely, whether the accused at the time of the act charged was "able concerning the particular act charged both to distinguish right from wrong and to adhere to the right." Para. 120b, MCM, 1969 (Rev.). In the benchmark case of United States v. Frederick, 3 M.J. 230 (C.M.A. 1977), on retrial, 7 M.J. 791 (N.C.M.R.), petition denied, 8 M.J. 42 (C.M.A. 1979), the Court of Military Appeals rejected the M'Naghten and irresistible impulse standard of mental responsibility previously promulgated in paragraph 120b of the Manual for Courts-Martial, 1969 (Rev.). The court held that the promulgation of such a standard was beyond the scope of the President's rulemaking authority under Article 36, UCMJ, because the standard was a question of substantive, not procedural, law. The court went on to hold that the correct standard was that found in section 4.01 of the American Law Institute's Model Penal Code, which had been adopted with some modifications by ten of the eleven Federal circuits. The standard laid down in Frederick is:

A person is not responsible for criminal conduct if, at the time of such conduct as a result of mental disease or defect, the person lacks substantial capacity to appreciate the criminality of that person's conduct or to conform the person's conduct to the requirements of law. As used in this rule, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

B. The present standard. In 1986, Congress enacted Art. 50a of the UCMJ, which provides the insanity standard under military law and applies to all offenses committed on or after 14 November 1986. As enacted by Congress, Art. 50a provides as follows:

Art. 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, or the president of a court-martial without a military judge, shall instruct the members of the court as to the defense of lack of responsibility under this section 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, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge 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 section 852 of this title (article 52), 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, the military judge determines that the defense of lack of mental responsibility has been established.

C. Legislative background. Art. 50a was patterned virtually word-for-word after the insanity standard set forth in the Insanity Defense Reform Act, Pub. L. No. 98-473, found at 18 U.S.C. § 17, which became effective 12 October 1984. This rather plainly reflects a congressional intent that the standard for insanity in the military be the same as that set forth in 18 U.S.C. § 17. Accordingly, Federal cases applying and interpreting that statute should be highly persuasive in any dispute over the construction of art. 50a.

D. Analysis. As will be seen below, art. 50a marks a radical departure from the Frederick standard in several significant respects. But, at least one key term from the Frederick standard has been left intact (i.e., the term "mental disease or defect"). Thus, the pre-art. 50a case law discussing this term arguably retains its validity. In virtually all other respects, however, art. 50a marks a radical departure from Frederick.

1. Definition of "mental disease or defect." Because the Frederick decision did not include an interpretation of the ALI standard, several lower counts have attempted to define its terminology for application to the military justice system. See, e.g., United States v. Martin, 7 M.J. 613 (N.C.M.R. 1979). Although given the opportunity to rectify this situation, the Court of Military Appeals instead noted that "...we can no better define the terms 'mental disease or defect' than by the use of the terms themselves.... and ... that attempts at further definition will be confusing rather than clarifying." United States v. Cortes-Crespo, 13 M.J. 420, 422 (C.M.A. 1982). Accordingly, the procedure that trial judges must continue to follow involves the receipt of testimony on the particular disorder of the accused with submission to the trier of fact of the issue of whether such a disorder falls within the parameters of the standard. See, e.g., United States v. Bush, 14 M.J. 900 (N.M.C.M.R. 1982); United States v. Wattenbarger, 15 M.J. 1069 (N.M.C.M.R. 1983).

a. Alcoholism and voluntary intoxication. Voluntary intoxication by alcohol or drug, even when combined with an existing mental condition, does not raise the issue of insanity if the mental condition alone is insufficient to raise such an issue; however, this is subject to the proviso that consistent use of an intoxicant may itself cause a mental disease. United States v. Thomson, 3 M.J. 271 (C.M.A. 1977). Voluntary intoxication, which does not in itself constitute a mental disease, can negate a requisite specific

intent and thereby preclude convictions for specific intent offenses, but it will not absolve one of criminal responsibility where the crime requires no specific intent or other specific state of mind. Nor is alcoholic-induced amnesia a defense to a crime. United States v. Riege, 5 M.J. 938 (N.C.M.R. 1978); United States v. Sexton, 1 M.J. 679 (N.C.M.R. 1975); United States v. Martin, 7 M.J. 613 (N.C.M.R. 1979); United States v. Triplett, 44 C.M.R. 466 (A.C.M.R. 1971). Section 2.08(5)(c) of the Model Penal Code recognized "pathological intoxication" as a defense when the intoxication is "grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." The Court of Military Appeals has not ruled whether this "pathological intoxication" defense is applicable to military law. United States v. Santiago-Vargas, 5 M.J. 41 (C.M.A. 1978). The court "assumed" in Santiago-Vargas that the defense did apply but noted that the accused therein failed to come within its scope since he knew that, "when intoxicated, he behaved in a violent manner." Id. at 43. The Navy-Marine Corps Court of Military Review, however, has specifically refused to recognize a defense of "pathological intoxication." United States v. Gertson, 15 M.J. 990 (N.M.C.M.R.), petition denied, 16 M.J. 309 (C.M.A. 1983).

b. Drug use. Drugs are treated the same as alcohol for purposes of mental responsibility. Intoxication, which is the result of voluntary drug ingestion, is not a defense to offenses which are general intent crimes; however, the intoxication may negate the formulation of such an intent and, hence, constitute a defense to offenses requiring a specific state of mind. See cases cited above; United States v. Reitz, 47 C.M.R. 608 (N.C.M.R. 1973), rev'd on other grounds, 22 C.M.A. 584, 48 C.M.R. 178 (1974); United States v. Brown, 50 C.M.R. 374 (N.C.M.R. 1975); United States v. Foley, 12 M.J. 826 (N.M.C.M.R. 1981) (mental defect resulting from voluntary ingestion of drugs not a defense to general intent offenses).

c. Substance within a substance. The fact that a substance, itself legally consumable -- such as coffee or beer -- was adulterated with a dangerous drug may be a defense to criminal liability even for a general intent offense. Where the substance consumed is itself a contraband drug, however, the mental disease or defect will not be held to be "nonculpably incurred" and the accused can be found guilty. See United States v. Ward, 14 M.J. 950 (A.C.M.R. 1982) (accused ingested marijuana adulterated with PCP).

d. Caveat: Note that art. 50a says specifically that the "mental disease or defect" must be a severe mental disease or defect. R.C.M. 706(c)(2)(A) indicates that the term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.

2. The cognitive test. Whereas the Frederick test focused its inquiry on whether the accused lacked substantial capacity to appreciate the criminality of his conduct, art. 50a focuses the inquiry on whether the accused was "unable to appreciate the nature and quality or the wrongfulness of the acts." This change appears to be nothing less than an attempt to abolish the ALI standard in Frederick altogether and return the insanity standard to the old M'Naghten test. The legislative history to 18 U.S.C. § 17, makes it quite clear that this was precisely the intent of Congress in enacting that statute.

See 1984 U.S. Code Cong. & Ad. News 3404-3413. Note also that art. 50a substitutes the word "unable" for the more flexible term "lacks substantial capacity." Arguably, this term means the accused must be completely unable to appreciate the criminality of his conduct.

3. The volitional test. The Frederick standard contained not only a cognitive test (i.e., "lacks substantial capacity to appreciate the criminality of his conduct") but also a volitional test (i.e., "lacks substantial capacity to conform his conduct to the requirements of law"). Satisfying either test provided the accused with a viable insanity defense. Article 50a abolishes the volitional test and leaves only a cognitive test. It therefore no longer matters whether the accused had the capacity to conform his conduct to the requirements of law.

4. Partial mental responsibility. The concept of "partial mental responsibility" (sometimes called "diminished capacity") has been abolished by art. 50a, which explicitly provides that "[m]ental disease or defect does not otherwise constitute a defense." An identical provision exists in 18 U.S.C. § 17, and the legislative history to that provision makes it quite clear that Congress intended to eliminate any such concept as "diminished capacity." See 1984 U.S. Code Cong. & Ad. News 3404-3413. However, an accused can, without raising the affirmative defense of lack of mental responsibility under art. 50a, present evidence that a mental disease or defect rendered him unable to entertain a required specific intent or possess a required actual knowledge. Both military and civilian courts have held that such evidence does not raise an affirmative defense, but merely goes to the issue of reasonable doubt on an essential element. See United States v. Pohlot, 827 F.2d 889 (3rd Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 710, 98 L.Ed.2d 660 (1988); Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988). Cf. R.C.M. 916(k)(2).

5. Burden of proof. The most radical aspect of art. 50a is its reversal of the burden of proof. No longer is the government required to prove beyond a reasonable doubt that the accused was sane. Art. 50a places the burden of proving the defense of lack of mental responsibility on the accused. The standard is clear and convincing evidence.

E. Lack of mental capacity to stand trial

1. Basis. Lack of mental capacity is a defense in bar of trial. By asserting it, the defense seeks to postpone trial until the accused is mentally competent to stand trial, if ever. The law recognizes lack of mental capacity as a bar to trial because it would be fundamentally unfair to try an accused who could not understand the nature of the proceedings or who was incapable of cooperating intelligently in his/her own defense.

2. Standard. The lead case of United States v. Frederick, supra, which promulgated a new standard for mental responsibility determinations, did not affect the mental capacity standard. The standard is enunciated in R.C.M. 909, MCM, 1984:

> No person may be brought to trial by court-martial unless that person possesses sufficient mental capacity to understand the nature of the proceedings against that person and to conduct or cooperate intelligently in the defense of that case.

a. The most explicit amplification of this standard is found in the case of United States v. Williams, 5 C.M.A. 197, 17 C.M.R. 197 (1954). The court in that case held that the accused must:

> be able to comprehend rightly his own status and condition in reference to such proceedings; that he must have such coherency of ideas, such control of his mental faculties, and such power of memory as will enable him to identify witnesses, testify in his own behalf, if he so desires, and otherwise properly and intelligently aid his counsel in making a rational defense....

Id. at 204, 17 C.M.R. at 204.

The Supreme Court, in the case of Dusky v. United States, 362 U.S. 402 (1960), held that a trial court must not base its determination that the accused is mentally competent to stand trial upon a mere finding that he is oriented to time and place and has some recollection of events. The test must be "whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Id. at 402. For a more recent discussion of the issue, see United States v. Martinez, 12 M.J. 801 (N.M.C.M.R. 1981); United States v. Bruce, 18 M.J. 829 (A.C.M.R. 1984).

(1) The question of amnesia as it affects the mental capacity to stand trial is an interesting one. As noted above with regard to mental responsibility, amnesia alone, usually of an alcoholic origin, is not a defense on the merits. Similarly, the contention that loss of memory alone constitutes lack of mental capacity has generally been rejected by the courts. United States v. Olvera, 4 C.M.A. 134, 15 C.M.R. 134 (1954); United States v. Lopez-Malave, 4 C.M.A. 341, 15 C.M.R. 341 (1954). In Olvera, supra, at 142, the court said, "The accused may well be characterized by a genuine amnesia as to certain events, yet be able to deal rationally with them, to cooperate with his counsel, and to remember the events taking place at the trial." See also Wilson v. United States, 391 F.2d 460, 462 (D.C. Cir. 1968). This general rule may vary, however, if it is shown that the amnesia is accompanied by, or is caused by, a mental defect or disease. Wilson, supra, and United States v. Jones, 147 F. Supp. 265, 267 (C.D. Md. 1956). It should be noted that amnesia does not prevent the accused from testifying in his own behalf, even if he can't recall the events surrounding the alleged crime. This is because, other things being equal, the accused still has the ability to testify that he just "doesn't remember." This is not as unusual as it may sound, for many witnesses often cannot remember specific events and testify accordingly. If the accused possesses the ability to deal rationally with his inability to remember, his inability to recall may be a tactical handicap, but it is not a bar to trial. See, e.g., United States v. Dunaway, 39 C.M.R. 908 (A.F.B.R. 1968), petition denied, 39 C.M.R. 293 (1968).

(2) It is significant to note that the second part of the test is posed in the disjunctive: "to conduct or cooperate intelligently in his own defense." Thus, if an accused has such a disorder that he is unable to get along with or accept the advice of any lawyer -- that is, to cooperate--

he is not immune from trial if he does have the substantial ability to intelligently conduct his own defense and understand the nature of the proceedings. United States v. Koch, 37 C.M.R. 843, 851 (A.F.B.R.), rev'd., 17 C.M.A. 79, 37 C.M.R. 343 (1966); United States v. Jones, 147 F. Supp. 265 (D.C. Md. 1956).

b. The defense of lack of capacity is raised as a motion for a continuance and not as a motion to dismiss. United States v. Lopez-Malave, supra; United States v. Dunaway, supra; United States v. Schlomann, 36 C.M.R. 622 (A.B.R. 1966). In addition, it is an interlocutory question upon which the military judge rules finally. R.C.M. 909(c), MCM, 1984; United States v. Lopez-Malave, supra; United States v. Wisener, 46 C.M.R. 1100 (C.G.C.M.R. 1973).

c. It is important to note that, unlike mental responsibility issues, to assert a mental defense successfully, the accused need not be suffering from a mental defect or disease. Lack of mental capacity may be based on character disorders and other maladies not generally thought to qualify as mental diseases. United States v. Wisener, supra, and United States v. Bruce, supra. Mental capacity is an interlocutory question of fact to be determined by the military judge, and trial may not proceed unless it is established by a preponderance of the evidence that the accused possesses the requisite capacity to understand the proceedings and cooperate in the defense of the case. R.C.M. 909(c)(2), MCM, 1984.

F. Procedural aspects of insanity issues

1. Inquiry

a. Before referral of charges. If any commanding officer, investigating officer, trial counsel, or defense counsel has reason to believe that an accused may be insane, or may have been insane at the time of the offense, such fact and support for the belief or observations should be reported to the convening authority. R.C.M. 706(a) and (b), MCM, 1984. If the convening authority determines that a reasonable basis for inquiry exists, a board of one or more persons will be convened to examine the accused and evaluate the accused's present mental capacity to stand trial and his or her mental responsibility at the time of the offense. Each member of the board shall be either a physician or a clinical psychologist. At least one member should be a psychiatrist or a clinical psychologist. R.C.M. 706(c), MCM, 1984. This examination of the accused has been held not to be a critical phase requiring the assistance of counsel. United States v. Olah, 12 M.J. 773 (A.C.M.R. 1981).

b. After referral of charges. Whether or not the accused has petitioned the convening authority to inquire into the sanity of the accused, once the case has been referred to trial, the defense (or any other party) may request the court to do so. The military judge rules finally as to whether further inquiry should be made. The request for inquiry may be made by trial or defense counsel, any court member, or the military judge on his own motion. R.C.M. 706(b)(2), MCM, 1984.

c. Sanity board requirements. Regardless of whether the inquiry was ordered before, during, or after trial, R.C.M. 706(c)(2), MCM, 1984, requires the sanity board to answer each of the following questions, together with any others that the authority ordering the inquiry may pose:

(1) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect?

(2) What is the clinical psychiatric diagnosis?

(3) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of the accused's conduct?

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

2. Litigation of the issues

a. Litigation of mental capacity to stand trial. Once the issue is raised at trial as to the present mental capacity of the accused, a ruling must be made. Whether the issue is raised as a result of formal inquiry, by motion for continuance [see United States v. Williams, 5 C.M.A. 197, 17 C.M.R. 197 (1954)], or through introduction of evidence at trial, the issue is always an interlocutory question to be ruled upon finally by the military judge. If it is not established by a preponderance of the evidence that the accused is mentally competent to stand trial, the proceedings shall be suspended. Depending on the severity and/or duration of the problem, the case may be continued or the charges withdrawn or dismissed. R.C.M. 909(c)(2) discussion, MCM, 1984.

b. Litigation of mental responsibility. The issue of mental responsibility is purely an issue on the merits and cannot be litigated as an interlocutory question. R.C.M. 916(k)(3)(C), MCM, 1984.

3. Deliberation and voting

-- R.C.M. 921 implements a special voting procedure for members deliberations when mental responsibility is in issue. The members first vote on whether the government has proved the elements of the offense beyond a reasonable doubt. If at least two-thirds of the members vote for a finding of guilty (or if all members vote for a finding of guilty where the death penalty is mandatory), then the members will proceed to a vote to determine whether the accused has met his burden of proving lack of mental responsibility by clear and convincing evidence. If a majority determine that the accused has met his burden, then a finding of not guilty only by reason of lack of mental responsibility results. But, if an acquittal does not result from this vote, then the defense of lack of mental responsibility has been rejected and the finding of guilty stands.

4. Action by convening authority

a. A finding by a court, that the accused is not guilty only by reason of lack of mental responsibility at the time of the offense, is a finding of not guilty which, like all acquittals, may not be disturbed by the convening authority.

b. When the trial has been suspended due to a finding of lack of mental capacity to stand trial, the convening authority may request reconsideration of the ruling based either on a belief that the ruling was erroneous or that the accused's condition has changed. The convening authority may decide to withdraw the charges and reinstate them at a later date. Lozinski v. Wetherill, 21 C.M.A. 52, 44 C.M.R. 106 (1971). If it appears that the incapacity is permanent, the charges may be permanently withdrawn or dismissed. R.C.M. 909(c)(2) discussion, MCM, 1984.

5. Guilty plea cases. If there is any indication that the accused is or was insane at the time of the offense, the military judge must inquire into the matter to determine the providency of the plea, even though the defense does not wish to raise insanity as a defense. See United States v. Leggs, 18 C.M.A. 245, 39 C.M.R. 245 (1969).

6. Mental evaluations of an accused under the Military Rules of Evidence

a. Procedure after adoption of the Military Rules of Evidence. Mil.R.Evid. 302, Privilege Concerning Mental Examination of an Accused.

(1) The Text of the Rule

(a) General rule. The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under R.C.M. 706 and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during the sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Mil.R.Evid. 305 at the examination.

(b) Exceptions.

(1) There is no privilege under this rule when the accused first introduces into evidence such statements or derivative evidence.

(2) An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence, but such testimony may not extend to statements of the accused except as provided in (1).

(c) Release of evidence. If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.C.M. 706. If the defense offers statements made by the accused at such examination, the military judge may upon motion order the disclosure of such statements made by the accused and contained in the report as may be necessary in the interests of justice.

(d) Noncompliance by the accused. The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under R.C.M. 706 from presenting any any expert medical testimony as to any issue that would have been the subject of the mental examination.

(e) Procedure. The privilege in this rule may be claimed by the accused only under the procedure set forth in Mil.R.Evid. 304 for an objection or a motion to suppress.

(2) Limitations on the application of Mil.R.Evid. 302

(a) The protections of Mil.R.Evid. 302 do not apply to mental examinations not ordered under R.C.M. 706. Hence, independently requested examinations are outside the protection of the rule. United States v. Matthews, 14 M.J. 656 (A.C.M.R. 1982) (Mil.R.Evid. 302 did not apply to psychiatric examination to determine fitness for administrative separation held prior to commission of the offenses).

(b) Failure to move for suppression, or failure to object, constitutes waiver.

b. Operation of Mil.R.Evid. 302

(1) It creates a limited testimonial immunity which prohibits the use of any statement made by the accused during any mental examination ordered under R.C.M. 706 of the Manual. This immunity is effective even if appropriate warnings have been given to the accused.

(2) It purports to extend to any statement made by the accused and any derivative evidence obtained through the use of such a statement.

(3) It applies during trial on the merits and during sentencing proceedings.

(4) In conjunction with R.C.M. 706, it creates three different levels of disclosure:

(a) The results of the examination;

(b) the full report of the board less any statements of the accused; and

(c) the specific statements of the accused.

(5) The results of the sanity board (i.e., the ultimate conclusions as to the accused's sanity of the board members -- number 1, above) are furnished to all interested parties in R.C.M. 706(c)(3)(A), MCM, 1984. The full investigative report (numbers 2 and 3, which usually appear in one document) is provided immediately to the defense but to no one else outside medical channels. R.C.M. 706(c)(3)(B), MCM, 1984. Disclosure (release) of the entire sanity board report to the commanding officer of the accused will be made upon request. Id.

(6) If the defense raises the insanity defense by offering expert testimony concerning the accused's mental condition, then the military judge, upon request (motion), shall order the disclosure (release) of the full report to the prosecution less any specific statements of the accused. Mil.R.Evid. 302(c).

(7) If the defense offers specific statements of the accused, the military judge may upon motion of the prosecution order the disclosure of the statements "as may be necessary in the interests of justice." Id.

c. Nonmilitary experts used by the defense

(1) If the defense uses civilian experts, the prosecution could seek a continuance and an order from the military judge that the accused submit to an R.C.M. 706 sanity board. See Mil.R.Evid. 302(d). The full report, less any specific statements of the accused, would then be releasable to the prosecution. See United States v. Frederick, 7 M.J. 791 (N.C.M.R.), petition denied, 8 M.J. 42 (C.M.A. 1979).

(2) If the accused is examined by a sanity board, but the defense does not present any expert witnesses, then the prosecution would not get the full report and is barred from even interviewing the members of the board.

7. Potential problem areas

a. Neutral statements: Mil.R.Evid. 302 protects any statement of the accused, but United States v. Babbidge, 18 C.M.A. 327, 40 C.M.R. 39 (1969), sought to protect only incriminating statements as do its progeny. Consequently, the Rule's breadth is overbroad. Most psychiatric opinions are based upon what the accused tells the psychiatrist as well as how he tells it. So, if the accused lies, the possibility of an inaccurate assessment is great, yet the prosecution may be prohibited from finding out what the accused told the psychiatrists to gauge the validity of their opinions. See United States v. Thomson, 3 M.J. 271, 273-74 (C.M.A. 1977), where the Court of Military Appeals said: "... psychiatrists cannot reach their conclusion to answer the question of criminal responsibility at a time certain in a vacuum, but must rely upon the history supplied both by the person examined and others; if that history is faulty, then the credibility of the conclusion of the psychiatrists may be faulty and must be tested."

b. Time of disclosure. Mil.R.Evid. 302(c) states that the defense offer of expert testimony triggers disclosure to the prosecution of the full report. Does this mean that the prosecution must wait until the defense expert is on the stand, mentions the accused's mental condition, or finishes his direct testimony before it is entitled to disclosure? Or, does it mean that the prosecution is entitled to disclosure as soon as the defense puts in a witness request which is granted?

c. Civilian experts. Can the prosecution discover reports written by the defense's civilian experts, including the statements of the accused? See United States v. Frederick, 7 M.J. 791, 805-806 (N.C.M.R. 1979), where the Navy Court of Military Review said: "Discovery in a criminal trial is not a one-way street. Appellant sought to turn the proceedings into a jurisprudential game of hide-and-seek instead of a search for the truth. To this he was not entitled."

d. Defense use of lay testimony. The plain language of Mil.R.Evid. 302 indicates that the government is entitled to call expert witnesses in rebuttal only if the defense utilizes the testimony of psychiatric experts in presenting the insanity issue to the court. This could occasion the successful assertion of such a defense, even though all experts concur that the accused was sane. That judicial application of this provision may rectify this legislative oversight is evident from United States v. Matthews, 14 M.J. 656, 659 (A.C.M.R. 1982).

For a further discussion of the impact of the new Military Rules of Evidence on mental evaluations, see Yustas, "Mental Evaluation of an Accused under the Military Rules of Evidence - An Excellent Balance," The Army Lawyer (May 1980); Ross, "Rule 302 - An Unfair Balance," The Army Lawyer (March 1981).

8. Post-trial incarceration of the criminally insane. The secretaries of several armed forces have been empowered to commit insane service persons and to retain them in medical custody so long as mental disorders persist. See 24 U.S.C. § 191; White v. Treibly, 19 F.2d 712 (D.C. Cir. 1927); Overholser v. Treibly, 147 F.2d. 705 (D.C. Cir.), cert. denied, 326 U.S. 730 (1945). There are no mandatory requirements regarding the criminally insane, however, and an accused who is found not guilty because of insanity may be treated, administratively discharged, or simply sent back to duty. In fact, the military has no medical facilities designed for the long-term treatment of the insane, although the Veterans' Administration does. See United States v. Schlomann, 16 C.M.A. 414, 37 C.M.R. 34 1966). For this reason, the Schlomann court rejected a requested instruction that, "if the accused is acquitted by reason of insanity, he will be presumed to be insane and may be confined in a hospital as long as necessary." Id. at 37-38. This instruction, espoused by the District of Columbia courts in Lyles v. United States, 254 F.2d 725 (D.C. Cir.), cert. denied, 356 U.S. 961 (1957), was based on the mandatory commitment requirement of the District of Columbia. See United States v. Gray, 9 C.M.A. 208, 25 C.M.R. 470 (1958).

9. Post-trial execution of the criminally insane. The U.S. Supreme Court has held that it is unconstitutionally cruel and unusual punishment to execute someone who is insane, regardless of his sanity at the time of trial or

at the time of the offense. Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). Whether the standard for insanity under the eighth amendment is necessarily the same as that set forth in art. 50a seems unlikely. Justice Powell indicates, in his concurring opinion, that the type of mental deficiency envisioned by the eighth amendment's bar against execution of the insane is a degree of insanity such that the accused is not aware of the punishment he is about to suffer and why he is about to suffer it. It is clear from Wainwright that some type of due process hearing is required for the accused who makes some colorable claim of insanity for eighth amendment purposes. What procedures would be required at such a hearing is not at all clear from Wainwright, since the majority in that case was split into three separate camps, none of which commanded a majority. It should be noted that the accused's insanity does not mean that the adjudged death sentence may never be executed. It only means that the execution is postponed until such time as the accused recovers sufficiently that he may be deemed competent for execution.

1008 ENTRAPMENT (Key Numbers 847-848)

A. General concept. The defense of entrapment exists when a person acting for, or on behalf of, the government deliberately instills in the mind of the accused a disposition to commit a criminal offense which the accused had no predisposition to commit. United States v. Russell, 411 U.S. 423 (1973); United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982); United States v. Hebert, 1 M.J. 84 (C.M.A. 1975); United States v. Garcia, 1 M.J. 26 (C.M.A. 1975).

B. Subjective analysis. Originally, the sole purpose of the entrapment defense was to prohibit unlawful or otherwise objectionable conduct by law enforcement officials. This objective test has given way to a subjective approach that examines the accused's predisposition to commit the charged offense. United States v. Russell, supra; United States v. Hebert, supra. The defense is "rooted in the concept that Government officers cannot instigate the commission of a crime by one who would otherwise remain law abiding." United States v. Garcia, supra, at 29; United States v. Sermons, 14 M.J. 350 (C.M.A. 1982). But see "The due process defense," infra.

C. Conduct not constituting entrapment. Entrapment is more than merely setting the stage to discover the guilt of one who has conceived his or her own wrongful plan. United States v. Jewson, 1 C.M.A. 652, 5 C.M.R. 80 (1952). Nor is it merely setting out marked money, planting decoys, and engaging in other stratagems and trickery. United States v. Suter, 21 C.M.A. 510, 45 C.M.R. 284 (1972); United States v. Hawkins, 6 C.M.A. 135, 19 C.M.R. 261 (1955). Merely affording the opportunity or facilities for the commission of a crime conceived by another is not entrapment. United States v. Choate, 7 C.M.A. 187, 21 C.M.R. 313 (1956). Proof of a profit motive does not by itself negate entrapment. It is merely one factor to consider in deciding whether the accused was predisposed to commit the offense. United States v. Eckhoff, 27 M.J. 142 (C.M.A. 1988).

D. Inducement by an individual acting in a purely private voluntary capacity. Inducement by one acting in a purely private capacity is not entrapment. For example, after an enlisted men's club had been burglarized,

Sergeant H, the mess treasurer and member of the board of governors of the club, became suspicious of the accused. He befriended the accused, who then admitted the crime. Sergeant H later proposed a second burglary to the accused, who then agreed to participate. Sergeant H notified his superiors of the planned crime. The accused subsequently was apprehended, tried, and convicted of the second burglary. C.M.A. held this was not entrapment. "Not every person in uniform is an agent of the Government." The evidence showed that Sergeant H was acting in an entirely private capacity as a volunteer when he and the accused planned the burglary. United States v. Wolf, 9 C.M.A. 137, 139, 25 C.M.R. 399, 401 (1958); but cf. United States v. Dohle, 1 M.J. 223 (C.M.A. 1975) as it may apply to the question of "private capacity." Whether the Court of Military Appeals would rule the same way today if presented with the Wolf case is an unsettled question. Recent cases have indicated that, if an accused is questioned out of purely "personal motivation," and the accused perceives it as a purely casual conversation, even with a superior, the answers he gives may be used against him. United States v. Duga, 10 M.J. 206 (C.M.A. 1981); United States v. Kirby, 8 M.J. 8 (C.M.A. 1979). Whether the sergeant in Wolf acted in a purely personal capacity is doubtful, although the court found that he did. On the other hand, the analyses of Rules 304 and 305 of the Military Rules of Evidence indicate that decisions such as United States v. French, 25 C.M.R. 851 (A.F.B.R. 1958), aff'd in relevant part, 10 C.M.A. 171, 27 C.M.R. 245 (1959), are still valid. The French case held that statements made to informers are admissible, even if the accused had not been warned of his rights under Article 31, UCMJ.

E. Litigation of entrapment

1. Burden of proof. Once the issue of entrapment is reasonably raised by the evidence, the prosecution assumes the burden of proving beyond reasonable doubt that the accused was not entrapped. United States v. Black, 8 M.J. 843 (A.C.M.R. 1980); United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982); United States v. Johnson, 18 M.J. 76 (C.M.A. 1984). In meeting this burden, the government may utilize any competent, admissible evidence--whether acquired prior to or subsequent to the commission of the offense charged -- to rebut the defense. United States v. Henry, 23 C.M.A. 70, 48 C.M.R. 541 (1974).

2. Evidence of predisposition. The defense of entrapment will not prevail when there is evidence that the accused was predisposed to commit the crime in the absence of inducement by law-enforcement agents. Thus, the prosecution will generally have wide latitude to show other acts of misconduct by the accused which manifest a predisposition to commit the offense charged and are "reasonably contemporaneous" therewith. Sorrells v. United States, 287 U.S. 435 (1932); United States v. Henry, 23 C.M.A. 70, 48 C.M.R. 541 (1974); United States v. Howard, 23 C.M.A. 187, 48 C.M.R. 939 (1974); United States v. Bryant, 3 M.J. 9 (C.M.A. 1977). See also United States v. Dayton, 29 M.J. 6 (C.M.A. 1989) (military judge properly advised members that possession or use of controlled substance does not establish predisposition to distribute it). Such evidence may still be admissible under Rules 105, 404, and 405 of the Military Rules of Evidence. If its probative value is substantially outweighed by the danger of "unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence," it will be excluded under Mil.R.Evid. 403. For example, in the case of Hansford v. United States, 303 F.2d. 213, 226 (D.C. Cir.

1962), it was held that evidence of prior misconduct must be excluded because of such considerations, even though it was offered to rebut an entrapment defense. A pre-rules case involving the same consideration, but allowing the accused to be cross-examined on other criminal acts to rebut his claim of entrapment, is United States v. Farrell, 50 C.M.R. 555 (A.C.M.R. 1975). Such evidence of misconduct, however, will, upon request, require a limiting instruction concerning the limited purpose for which it is offered. Mil.R.Evid. 105.

3. There is a presumption that, once an accused is entrapped, all related criminal acts are tainted. The government must prove that any particular subsequent criminal act is not the result of the entrapment if it is to secure a conviction of that subsequent offense. "The question of whether the Government has met its burden in overcoming the presumptive taint of the first transaction is one of fact for determination by the factfinder...." United States v. Shanks, 12 C.M.A. 586, 31 C.M.R. 172 (1961); United States v. Skrzek, 47 C.M.R. 314, 318 (A.C.M.R. 1973). Cf. United States v. Jursnick, 24 M.J. 504 (A.F.C.M.R. 1987). But, if the "one offense would not necessarily follow from another offense, inducement of the second ... is not inducement of the first...." United States v. Black, 8 M.J. 843, 845 (A.C.M.R. 1980).

4. Entrapment as an inconsistent defense. It appears that one who denies commission of the offense may also claim entrapment (i.e., "I didn't do it; but if I did, I was entrapped"). Until recently, military law followed the common law rule that entrapment may not be claimed by one who denied commission of the offense charged. United States v. Bouie, 9 C.M.A. 228, 26 C.M.R. 8 (1958). In United States v. Garcia, 1 M.J. 26 (C.M.A. 1975), however, the Court of Military Appeals held that the accused may claim entrapment even though the accused has also presented an alibi defense. Thus, it appears that when two or more inconsistent defenses are reasonably raised by the evidence, and that disbelief of one of the defenses does not necessarily disprove the inconsistent defense, even inconsistent defenses must be considered by the triers of fact.

5. The due process defense. A rebirth of the objective approach to the entrapment defense has recently occurred, based upon the position that government conduct may be so outrageous as to violate fundamental fairness. For example, in one case, even though the accused was predisposed to committing the offense (thus making the defense of entrapment unavailable), he contended that the conduct of the government agent in supplying him with contraband (marijuana) was so egregious as to violate due process. United States v. Harms, 14 M.J. 677 (A.F.C.M.R. 1982). While he was unsuccessful, the appellate decision left open the possibility that certain government misconduct could indeed require an accused's acquittal separate from subjective entrapment considerations. Id. See also United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982); United States v. Simmons, 14 M.J. 624 (A.F.C.M.R. 1982).

6. Instructions on entrapment. Following United States v. Vanzandt, supra, it is clear that the existence of reasonable suspicion of criminal activity is immaterial. Therefore, there is never a need to offer or receive evidence establishing whether or why any suspicion existed. Id. at 344.

This decision made the instruction in the Military Judges' Benchbook (1982) incorrect. Change 1 to DA Pam 27-9 (MJB) of 15 February 1985, paras. 5-6, incorporates this decision and appears to be correct. United States v. Johnson, 18 M.J. 76 (C.M.A. 1984) also discusses the appropriate entrapment instruction in detail.

1009 IMPOSSIBILITY (INABILITY) (Key Numbers 832, 838, 1266)

A. Defined. When it is impossible for the accused to perform a legally required act, the accused will not be criminally liable for a failure to perform. The impossibility may be either physical or financial. R.C.M. 916(i). It may be caused by natural phenomena, the accused's own physical disability, or acts of third parties. The inability must not arise through any fault of the accused. R.C.M. 916(i), MCM, 1984. Impossibility of performance is an affirmative defense in disobedience of orders cases -- see, e.g., United States v. Pinkston, 6 C.M.A. 700, 21 C.M.R. 22 (1956); United States v. Borell, 46 C.M.R. 1108 (A.F.C.M.R. 1973) -- as well as unauthorized absence cases -- see, e.g., United States v. Lee, 14 M.J. 633 (A.C.M.R. 1982); United States v. Irving, 2 M.J. 967 (A.C.M.R. 1976).

B. Litigation. When the evidence reasonably raises a defense of impossibility/inability, the burden is on the prosecution to prove, beyond a reasonable doubt, that it was not impossible for the accused to perform as required. Whether that burden is met by the government depends upon the test to be used. The test is one of reasonableness, but a reasonableness with three prongs. First, was the defense reasonably raised? Second, was the order given reasonable? Third, was the accused reasonably justified in doing what he did? However, it is important to note that the question of impossibility of performance, unlike the giving of the order itself, is not one of reasonableness: "When one's physical condition is such as actually to prevent his compliance with the orders or ... to cause the commission of the offense ... the question is not one of reasonableness ... but whether the accused's illness was the proximate cause of his crime." United States v. Cooley, 16 C.M.A. 24, 27, 36 C.M.R. 180, 183 (1966); United States v. Liggon, 42 C.M.R. 614 (A.C.M.R. 1970). The first prong of the reasonableness test arises in determining whether the defense has been raised by the facts presented. For instance, in the case of United States v. Franklin, 4 M.J. 635, 638 (A.F.C.M.R. 1977), the accused claimed that he had been kidnapped and drugged during his absence. The court held that this tale of woe was so "inherently improbable and uncertain" as not to raise reasonably the defense, and that the military judge did not err in failing to instruct the court on the affirmative defense of physical inability to return. The second prong of the reasonableness test has been previously discussed. Chapters III and IV. The third prong of the test, however, cannot be answered until a distinction is made between physical impossibility and physical inability, because reasonableness is not an issue in the former but is in the latter. United States v. Cooley, 16 C.M.A. 24, 36 C.M.R. 180 (1966); United States v. Liggon, 42 C.M.R. 614 (A.C.M.R. 1970). The Court of Military Appeals in United States v. Cooley, supra, at 27, 36 C.M.R. at 183, made the following comments on the differences between physical impossibility and physical inability:

> The question to be determined [is] simply one of reasonable justification for the refusal [to obey], which

> would augur against the existence of the necessary element of willfulness.... The case, however, is different when one's physical condition is such as actually to prevent compliance with the orders or, as here, to cause the commission of the offense. Upon such a showing, the question is not one of reasonableness vis a vis willfulness, but whether the accused's illness was the proximate cause of his crime.
>
> That is the situation here. The case is not one of balancing refusal and reason, but one of physical impossibility to maintain the strict standards required under military law. In such a situation, the accused is excused from the offense if its commission was directly caused by his condition, and the question whether he acted reasonably does not enter into the matter.

Accordingly, the defense, when confronted with a physical disability factual situation, must be able to determine whether the facts constitute an impossibility or an inability because, in the former, the defense must be able to show that the physical disability caused the offense with which the accused is charged; whereas, in the latter, it must be able to show that the accused had reasonable justification for what he did. On the other hand, once the defense bears its burden of raising the issue, the prosecution must rebut it beyond a reasonable doubt. Furthermore, it is important to realize that the two concepts can be raised and argued in the same case. An example would be when the defense theory, supported by evidence, is that it was physically impossible to obey an order, but that even if the court resolved this issue adversely to the accused, the accused's conduct was excusable because of reasonable justification due to physical inability to comply with the order alleged. United States v. Lee, 16 M.J. 278 (C.M.A. 1983).

C. Other examples

1. Accused failed to tie certain sandbags after being ordered to do so. Accused had a hand injury and was unable to perform the task. The court held that failure of the law officer to instruct on the "legal consequences of physical disability" was error. United States v. Heims, 3 C.M.A. 418, 422, 12 C.M.R. 174, 178 (1953).

2. Accused was ordered to proceed to the front line. Accused said he was unable to move. He was suffering from combat anxiety. Held: This was a question of mental responsibility (ability to adhere to the right) not physical impossibility, and the instruction on mental responsibility was sufficient, absent a request for a more particularized instruction. United States v. Latsis, 5 C.M.A. 596, 18 C.M.R. 220 (1955).

3. Accused was ordered to get certain required uniforms. Accused did not get them, but presented evidence that he had no money and could not get advance pay or borrow funds. Held: This raised a defense of impossibility (not self-incurred after imposition of the obligation to act). Hence, the failure to instruct on impossibility was prejudicial error. United States v. Pinkston, 6 C.M.A. 700, 21 C.M.R. 22 (1956). Notice that the financial inability preceded the order and, if believed, would be a complete defense to any order violation.

4. Accused was home on leave. He became ill, but couldn't see a doctor. Doctor's brother-in-law gave him some pills and recommended that he rest for a few days before returning to camp. He spent four days at home. Held: C.M.A. could not rule that, as a matter of law, the evidence did not raise an impossibility defense to the unauthorized absence charge. Therefore, the law officer's failure to instruct sua sponte on impossibility was prejudicial error. United States v. Amie, 7 C.M.A. 514, 22 C.M.R. 304 (1957); United States v. Irving, 2 M.J. 967 (A.C.M.R. 1976).

5. Accused was found sleeping on post as a sentinel and failing to report for duty at the motor pool as ordered. At trial, the defense evidence showed that the accused suffered from a narcoleptic condition which made it physically impossible for him to stay awake. The reason for the accused's failure to stay awake on post, and to report to the motor pool as ordered, was his narcoleptic condition which he could not control. Held: The accused had raised the physical impossibility defense. United States v. Cooley, 16 C.M.A. 24, 36 C.M.R. 180 (1966).

1010 IGNORANCE OR MISTAKE (Key Numbers 832, 983, 1266)

A. Mistake of fact. Ignorance or mistake of fact is an affirmative defense when knowledge of a certain fact is necessary to establish the offense charged. R.C.M. 916(j), MCM, 1984. Although ignorance of a fact and a mistaken belief about a fact are distinct phenomena, the legal consequences of each state of mind are generally identical. See United States v. Nickson, 35 C.M.R. 753 (A.F.B.R. 1964); United States v. Carr, 18 M.J. 297 (C.M.A. 1984); R.C.M. 916(j).

B. Application to specific intent offenses. An honest ignorance or mistake of fact, even though unreasonable, is a complete defense to a specific intent offense (i.e., one which requires a specific intent or state of mind). United States v. Tucker, 14 C.M.A. 376, 34 C.M.R. 156 (1964); United States v. Ward, 16 M.J. 341 (C.M.A. 1983). Honest mistake is also a defense to offenses requiring premeditation or willfulness. R.C.M. 916(j), MCM, 1984. But see United States v. McFarlin, 19 M.J. 790 (A.C.M.R. 1985), where the Army held that mistake as to the consent element within the specific intent offense of indecent assault must be both honest and reasonable.

1. Honest mistake. An honest ignorance or mistake is one which is in good faith and not feigned, it is a subjective factor. United States v. St. Pierre, 3 C.M.A. 33, 11 C.M.R. 33 (1953); United States v. Archibald, 5 C.M.A. 578, 18 C.M.R. 202 (1955); United States v. Coleman, 6 C.M.A. 773, 21 C.M.R. 95 (1956).

2. Knowledge. Some offenses require that the accused possess a certain specific knowledge. An honest ignorance or mistake of fact will be a complete defense to such offenses, even though the ignorance or mistake was unreasonable. United States v. Tucker, supra; R.C.M. 916(j), MCM, 1984.

3. Examples

a. Larceny. Larceny requires that the accused specifically intended to deprive the owner of the property permanently. If the accused

honestly but mistakenly believed that he or she owned the property or had permission to take it, such a belief negates the requisite criminal intent, no matter how unreasonable that belief was. United States v. Rowan, 4 C.M.A. 430, 16 C.M.R. 4 (1954); United States v. Greenfeather, 13 C.M.A. 151, 32 C.M.R. 151 (1962); United States v. Sicley, 6 C.M.A. 402, 20 C.M.R. 118 (1955).

b. Desertion. Desertion requires that the accused specifically intend to remain away without authority from the unit permanently. Thus, one who honestly but mistakenly believed that he or she had been discharged from the service could not possibly have a criminal intent to remain away without authority permanently, even though the mistaken belief was unreasonable. United States v. Holder, 7 C.M.A. 213, 22 C.M.R. 3 (1956); United States v. Vance, 17 C.M.A. 444, 38 C.M.R. 242 (1968); United States v. Welstead, 36 C.M.R. 707 (A.B.R. 1966).

c. Fraudulent enlistment. The offense of fraudulent enlistment requires a specific intent to conceal disqualifying facts. Hence, an honest ignorance or mistake concerning the undisclosed facts is a complete defense. One cannot fraudulently conceal what one doesn't know. United States v. Holloway, 18 C.M.R. 909 (A.F.B.R. 1955).

d. Possession of controlled substances. Possession of a controlled substance, such as marijuana, must be knowing and conscious. United States v. Mance, 26 M.J. 244 (C.M.A. 1988). Therefore, if an accused honestly didn't know he or she possessed a controlled substance, such an honest ignorance is a complete defense, no matter how unreasonable. United States v. Lampkins, 4 C.M.A. 31, 15 C.M.R. 31 (1954); United States v. Greenwood, 6 C.M.A. 209, 19 C.M.R. 335 (1955); United States v. Wilson, 7 M.J. 290 (C.M.A. 1979); United States v. Hughes, 5 C.M.A. 324, 17 C.M.R. 374 (1954).

C. Application to general intent offenses. To be a defense to a general intent offense, the accused's ignorance or mistake of fact must be both honest and reasonable. United States v. Perruccio, 4 C.M.A. 28, 15 C.M.R. 28 (1954); United States v. McCluskey, 6 C.M.A. 545, 20 C.M.R. 261 (1955); United States v. Carr, 18 M.J. 297 (C.M.A. 1984).

1. Example. The accused is charged with unauthorized absence. One fact which must be proven is that the accused's absence was without authority. If the accused can show that he or she genuinely believed, on reasonable grounds, that he or she had authority to be absent, the mistake will be a defense. United States v. Graham, 3 M.J. 962 (N.C.M.R. 1977); see United States v. Holder, 7 C.M.A. 213, 22 C.M.R. 3 (1956) and United States v. Vance, 17 C.M.A. 444, 38 C.M.R. 242 (1968).

2. Example. Accused was charged with bigamy, a general intent offense. Accused's mistaken belief that he was not married (i.e., mistaken as to the existence and validity of a divorce) at the time of the bigamous marriage is a defense only if he had taken such steps as would have been taken by a reasonable man under the circumstances to determine the validity of the belief. See United States v. McCluskey, 6 C.M.A. 545, 20 C.M.R. 261 (1955).

D. Application to negligent offenses

1. Simple negligence. Ignorance or mistake of fact is a defense to an offense requiring only simple negligence only if the ignorance or mistake is both honest and reasonable. See, e.g., United States v. Perruccio, 4 C.M.A. 28, 15 C.M.R. 28 (1954).

2. Higher degree of negligence. When an offense requires a greater degree of negligence than simple negligence, ignorance or mistake of fact will be a defense only if it was honest and not the result of a degree of negligence required for conviction. For example, the article 134 offense of dishonorable failure to maintain sufficient funds in a checking account requires either an intentional failure or a grossly (culpably) negligent failure by the accused to maintain sufficient funds to cover checks drawn against the accused. Thus, if the accused honestly but mistakenly believed that there were sufficient funds in the account, the accused has a complete defense, provided that the mistake was not the result of gross indifference or culpable negligence in handling the account. In other words, the accused's mistake may be honest and unreasonable, but it cannot be culpably negligent. United States v. Connell, 7 C.M.A. 228, 22 C.M.R. 18 (1956); United States v. Brown, 14 C.M.A. 633, 34 C.M.R. 413 (1964).

E. Not applicable to strict liability offenses. Some offenses impose criminal liability notwithstanding the accused's knowledge or belief. Ignorance or mistake of fact, no matter how honest and reasonable, is not a defense to such offenses.

1. Example: assault with a dangerous weapon. The accused brandishes a loaded pistol in the face of the victim. The accused's honest and reasonable belief that the pistol is merely a toy is no defense, because the accused's knowledge or belief concerning the character of the weapon is irrelevant. The accused is guilty of assault with a dangerous weapon, a serious aggravated form of assault under article 128. See Part IV, para. 54c(4)(a), MCM, 1984.

2. Example: carnal knowledge. The military counterpart to statutory rape is the offense of carnal knowledge with a female, not one's wife, under age 16. The accused's knowledge or belief concerning the victim's age, no matter how honest or reasonable, is irrelevant. Therefore, an honest and reasonable belief that the victim was older than age 16 is no defense. See Part IV, para. 45c(2), MCM, 1984.

F. Litigation. Once evidence raises the affirmative defense of ignorance or mistake of fact, the prosecution assumes the burden of proving beyond reasonable doubt that the accused was not laboring under a misapprehension sufficient to constitute a defense to the charge. The military judge has a sua sponte obligation to instruct. United States v. Dixon, 6 C.M.A. 484, 20 C.M.R. 200 (1955).

G. Ignorance or mistake of law

1. Rule. In military law, as at common law, ignorance or mistake of law is generally no defense. R.C.M. 916(l), MCM, 1984. In the military, "law" includes not only statutes, but also general orders and regulations which

have the force of law. See Chapter IV of this study guide for a detailed analysis of the legal effect of orders. See also United States v. Tolkach, 14 M.J. 239 (C.M.A. 1982) (while ignorance of the law will not excuse an act in violation thereof regardless of whether the law is statutory or a duly promulgated regulation, some form of proper publication of a regulation is necessary before knowledge will be presumed).

2. Exception. Notwithstanding the provisions of R.C.M. 916(l), supra, ignorance or mistake of law may become extremely relevant and ultimately result in a defense if the effect of the accused's misapprehension was to negate a required mental element, such as actual knowledge of law or the legal effect of known facts. See United States v. Bateman, 23 C.M.R. 312 (1957); United States v. Bishop, 2 M.J. 741 (A.F.C.M.R. 1977). For example, an accused is charged with larceny from the government by obtaining money through a false representation on a travel claim. The accused testifies that he honestly believed he was entitled to reimbursement of dependents' travel before it was actually performed. Although this is clearly a mistake of law rather than fact, it negates the mental element required for a larceny through wrongful obtaining by false pretenses. United States v. Sicley, 6 C.M.A. 402, 20 C.M R. 118 (1955); United States v. McLeod, 18 C.M.R. 814 (A.F.B.R. 1955).

H. Mistaken belief. In order for the defense of mistaken belief to be a successful defense, the mistaken belief must be such that would exculpate the accused if the facts upon which that belief was based were true. United States v. Rowan, 4 C.M.A. 430, 16 C.M.R. 4 (1954). Thus, in United States v. Anderson, 46 C.M.R. 1073 (A.F.C.M.R. 1973), the Air Force court held that the accused was guilty of sale of LSD despite the fact he believed the substance he sold was mescaline. The court's rationale was that mescaline also was a contraband substance and his conduct still remained unlawful. This principle was reaffirmed in United States v. Coker, 2 M.J. 304 (A.F.C.M.R. 1976). Other cases discussing the principle that mistaken belief of fact, if true, would make the accused's conduct otherwise lawful are United States v. Mack, 6 M.J. 598 (A.C.M.R. 1978) and United States v. Calley, 46 C.M.R. 1131 (A.C.M.R.), aff'd, 22 C.M.A. 534, 48 C.M.R. 19 (1973).

1011 DURESS (Key Number 839)

A. General concept. The defense of duress is available to any crime less serious than murder, and is founded on the lack of voluntariness necessary for an act to be categorized as criminal. For duress to provide a defense to a crime such as larceny, the duress or coercion must be of such a degree as to cause a reasonable, well-grounded apprehension on the part of the accused that if he or she did not perform the action, that person, or some other innocent person, would be immediately killed or would immediately suffer serious bodily injury. See United States v. Margelony, 14 C.M.A. 55, 33 C.M.R. 267 (1963); United States v. Figueroa, 39 C.M.R. 494 (A.B.R. 1968); United States v. Palus, 13 M.J. 179 (C.M.A. 1982). See also United States v. Barnes, 12 M.J. 779 (A.C.M.R. 1981) (duress not raised by a threat to harm the accused's finances). R.C.M. 916(h). United States v. Roberts and Sutek, 14 M.J. 671 (N.M.C.M.R. 1982), summary disposition, 15 M.J. 106 (C.M.A. 1983).

B. Duress or necessity?

1. Duress and necessity distinguished. An accused has available the defense of duress or coercion when another's unlawful threat causes him to commit a proscribed act. Necessity, on the other hand, is available as a defense where either physical forces of nature or the press of circumstances threaten the accused and cause him to take unlawful action to avoid harm. United States v. Hullum, 15 M.J. 261 (C.M.A. 1983).

2. Under such a definition, necessity has been recognized and applied to the offenses of UA and escape from confinement, but always under the name of duress. Some examples:

a. United States v. Blair, 16 C.M.A. 257, 36 C.M.R. 413 (1966) (error not to instruct on defense raised by accused's flight from cell to avoid a beating by a brig guard).

b. United States v. Peirce, 42 C.M.R. 390 (A.C.M.R. 1970) ("duress" to escape from confinement not raised by defense offer of proof regarding stockade conditions, but lacking a showing of imminent danger).

c. United States v. Guzman, 3 M.J. 740 (N.C.M.R. 1977) (accused with injury which would have been aggravated by duty assignment had no defense of "duress" to crime of UA because performing duty would not have caused immediate death or serious bodily injury).

d. In an early case in which a sailor went UA because of death threats by a shipmate, the Navy Board of Review held that the defense of duress was not raised. Noting that the accused was never in danger of imminent harm and that the threatener had never demanded that the accused leave his ship, the board concluded that there is no right to leave a duty station in order to find a place of greater safety. United States v. Wilson, 30 C.M.R. 630 (N.B.R. 1960).

e. United States v. Harrell, NCM 78-0870 (N.C.M.R. 30 Nov 1978) (duress defense not raised where the accused, receiving poor medical treatment for a back injury and fearing that impending shipboard duty would aggravate the condition, went UA to avoid the possible injury). See also Note, Medical Necessity as a Defense to Criminal Liability, 46 Geo. Wash. L. Rev. 273 (1978).

f. An escapee is not entitled to a duress or necessity instruction unless he offers evidence that he made a bona fide effort to surrender or return to custody once the coercive force of the alleged duress/necessity has dissipated. United States v. Bailey, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980).

g. Sexual abuse. Serious bodily harm has been held in one civilian jurisdiction to include sexual abuse, especially when the fear of such abuse causes the accused to escape from prison. For example, in People v. Lovercamp, 43 Cal. App. 3d 823 (1974), duress was recognized as a defense where the accused escaped from prison because of his fear of threatened homosexual abuse, had complained to the authorities to no avail, had no time or opportunity to resort to the courts, had escaped without resort to force or

violence, and had reported his whereabouts to authorities once he had attained a position of safety. Similar principles may permit duress to be raised in similar circumstances as a defense to unauthorized absence. See Gardner, The Defense of Necessity and the Right to Escape from Prison, 49 S. Cal. L. Rev. 110 (1975) and Duress -- Defense to Escape, 3 Am. J. Crim. L. 331 (1975).

3. What constitutes reasonable fear? Fear sufficient to cause a person of ordinary fortitude and courage to yield. United States v. Logan, 22 C.M.A. 349, 47 C.M.R. 1 (1973) (reasonable fear did not exist where accused was in Korea and threats to harm his family in the U.S. were made by local Korean nationals).

4. The requirement of immediate death or great bodily harm

a. The requirement? United States v. Fleming, 7 C.M.A. 543, 23 C.M.R. 7 (1957); United States v. Brookman, 7 C.M.A. 729, 23 C.M.R. 193 (1957). Even though accused was subjected to great privation as POW, actions of captors did not constitute defense against charge of collaboration with the enemy since accused's resistance had not brought him to the "last ditch." The fear must be of immediate, vice future, harm. United States v. Jemmings, 50 C.M.R. 247 (A.F.C.M.R. 1975), rev'd, 1 M.J. 414 (C.M.A. 1976).

b. The new test? "The immediacy element of the defense is designed to encourage individuals promptly to report threats rather than breaking the law themselves (citation omitted)." United States v. Jemmings, 1 M.J. at 418 (held: vague threat to inflict harm to children sufficient to activate defense such that plea of guilty improvident). Whether this constitutes a new test is questionable, particularly in light of the court's further statement: "It, therefore, cannot be said that [the accused's] acknowledgement that his children would not be harmed 'that night' ended the threat of immediate grievous bodily harm to them." Id. Certainly, it serves to raise sufficient doubt to improvidence a plea due to accused's potential lack of full understanding of his plea, but whether it is sufficient to define "immediate" as including "the future" or such broad terms is debatable.

5. Who must be endangered?

a. The obsolete rule: the accused personally. See United States v. Jemmings, supra.

b. The expanding rule

(1) United States v. Pinkston, 18 C.M.A. 261, 39 C.M.R. 261 (1969) (threat against fiancee and illegitimate child actuates defense of duress); United States v. Palus, 13 M.J. 179 (C.M.A. 1982) (threat against immediate family).

(2) United States v. Jemmings, supra (threat against accused's children actuates defense of duress).

(3) United States v. Roberts, 14 M.J. 671 (N.M.C.M.R. 1982), disposed of by summary disposition, 15 M.J. 106 (C.M.A. 1983) (valid duress defense for wife absenting herself to escape gruesome initiation, as well as for husband who absented himself to save his wife from physical harm).

(4) R.C.M. 916h, MCM, 1984 (threat against accused or any innocent person).

C. Raising the issue

1. The defense was raised where the accused stated that he had been "jumped" by 3 to 6 men while on board the base, had suffered a broken bone in his neck, and feared to return to the base because he thought he would be killed. United States v. Brown, NCM 77-0642 (N.C.M.R. 29 June 1977); see United States v. Roby, 49 C.M.R. 544 (N.C.M.R. 1975).

2. The defense, however, was held not to have been raised where the accused had been cut over his eye, received stitches and a "light duty chit," but was ordered to work in the mess kitchen washing pots and pans where the temperature exceeded 100°F. He did not report and the court held the evidence failed to show a fear of immediate death or bodily harm. United States v. Guzman, 3 M.J. 740 (N.C.M.R. 1977); United States v. Talty, 17 M.J. 1127 (N.M.C.M.R. 1984) (hazardous levels of radiation not defense to willful disobedience).

3. The defense was also not raised where the accused absented himself from his ship after being told that his whereabouts would be reported to another who had previously threatened to kill him. The court said that the accused could have reported the incident to his superiors who had been responsive and cooperative in assisting the accused in similar situations. United States v. Moon, NCM 77-1272 (N.C.M.R. 21 Sep 1977); United States v. Sartor, NCM 78-0656 (N.C.M.R. 13 Dec 1978); United States v. Campfield, 17 M.J. 715 (N.M.C.M.R. 1983).

4. The accused stated that he always felt "scared and worried." The court held that this did not raise the defense. United States v. Bradshaw, NCM 79-1540 (N.C.M.R. 6 Mar 1980). "Vague threats of death" do not amount to a reasonable fear. United States v. Clark, NCM 79-1948 (N.C.M.R. 30 May 1980).

D. Rebuttal evidence. Accused's use of the duress defense creates an opportunity for the prosecution to introduce evidence of the defendant's other voluntary crimes in order to rebut the defense. United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977).

1012 JUSTIFICATION (Key Number 832)

A. Text of R.C.M. 916(c), MCM, 1984

> A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful.

B. Protection of property

1. Use of nondeadly force. Reasonable, nondeadly force may be used to protect personal property from trespass or theft. United States v. Regalado, 13 C.M.A. 480, 33 C.M.R. 12 (1963) (one lawfully in charge of premises may use reasonable force to eject another, if the other has refused an oral request to leave and a reasonable time to depart has been allowed); United States v. Hines, 7 C.M.A. 75, 21 C.M.R. 201 (1956) (with regard to on-post quarters, commander on military business is not a trespasser subject to accused's right to eject); United States v. Gordon, 33 C.M.R. 489 (A.B.R. 1963) (the necessity to use force in defense of personal property need not be real, but only reasonably apparent); United States v. Wilson, 7 M.J. 997 (A.C.M.R. 1979) (accused had no right to resist execution of a search warrant, even though warrant subsequently held to be invalid). See Peck, "The Use of Force to Protect Government Property, 26 Mil. L. Rev. 81 (1964).

2. Use of deadly force. Deadly force may be employed to protect property only if (1) the crime is of a forceful, serious or aggravated nature, (2) the accused honestly believes use of deadly force is necessary to prevent loss of the property, and (3) less severe methods for preventing the loss are not available. United States v. Lee, 3 C.M.A 501, 13 C.M.R. 57 (1953).

C. Prevention of crime. Under military law, a private person may use force essential to prevent commission of a felony in his presence, although the degree of force should not exceed that demanded by the circumstances. United States v. Hamilton, 10 C.M.A. 130, 27 C.M.R. 204 (1959); United States v. Person, 7 C.M.R. 298 (A.B.R. 1953) (soldier on combat patrol justified in killing unknown attacker of another patrol member where (1) victim was committing a felony in the accused's presence, and (2) the accused attempted to inflict less than deadly force).

D. Obedience to orders. Orders of military superiors are inferred to be legal. Part IV, para. 16c(1)(c), MCM, 1984.

-- While it is a good defense that the accused committed the act pursuant to an order which (a) appeared legal and which (b) the accused did not know to be illegal [United States v. Calley, 46 C.M.R. 1131, 1183 (A.C.M.R.), aff'd, 22 C.M.A. 534, 48 C.M.R. 19 (1973)], the defense is unavailable if a person of ordinary sense and understanding would know the order to be unlawful. United States v. Griffen, 39 C.M.R. 586 (A.B.R. 1968) (no error to refuse request for instruction on defense where accused shot POW pursuant to a superior's order); United States v. Cherry, 22 M.J. 284 (C.M.A. 1986); United States v. Calley, supra. See R.C.M. 916(d), MCM, 1984.

E. The right to resist restraint. All restraint must be legally imposed by one having authority to do so. See Articles 7, 10, 13, UCMJ; Part IV, para. 19, MCM, 1984; and Analysis of Article 95 at appendix 21.

1. Illegal confinement. There can be no "escape" from confinement if the confinement itself was illegal. United States v. Gray, 6 C.M.A. 615, 20 C.M.R. 331 (1956) (no crime to escape from confinement where accused's incarceration was contrary to orders of a superior commander who had authority); United States v. Brown, 15 M.J. 501 (A.F.C.M.R. 1982) (where confinement was not imposed by neutral and detached magistrate, accused could not be convicted of escape).

2. Illegal apprehension/arrest. An individual is not guilty of having resisted apprehension if that apprehension was without authority. United States v. Clark, 37 C.M.R. 621 (A.B.R. 1967) (accused physically detained by private citizen for satisfaction of a debt may, under the standards of self-defense, forcefully resist and seek to escape); United States v. Rozier, 1 M.J. 469 (C.M.A. 1976) (by forcibly detaining accused immediately following his illegal apprehension, NCO's involved acted beyond scope of their offices and with excessive force); but see United States v. Lewis, 7 M.J. 348 (C.M.A. 1979) (accused cannot assert illegality of apprehension as defense to assault charge although there is a subsequent determination that the apprehension was not based on probable cause where the officers had not exceeded the scope of their office).

1013 EXCUSE: ACCIDENT OR MISADVENTURE (Key Number 840)

A. Accident defined. R.C.M. 916f, MCM, 1984, and United States v. Ferguson, 15 M.J. 12 (C.M.A. 1983), set forth two requirements for the defense of accident:

1. The accused must be performing a lawful act; and

2. it must be performed in a lawful manner.

B. Lawful act. Compare United States v. Sandoval, 4 C.M.A. 61, 15 C.M.R. 61 (1954) (carrying a weapon in violation of local regulation constitutes an unlawful act so as to prevent accused charged with murder from successfully arguing defense of accident) with United States v. Small, 45 C.M.R. 700 (A.C.M.R. 1972) (where the violation of the general regulation prohibiting carrying a firearm was not the proximate cause of the victim being shot, the accused was entitled to have the court instructed on the defense of accident). See also United States v. Femmer, 14 C.M.A. 358, 34 C.M.R. 138 (1964). In an assault case, the accused pushed the victim away while holding a razor. Since the injury resulted from an unlawful act intentionally directed at the victim, the fact that the ultimate consequence was unintended does not raise the defense of accident.

C. Lawful manner. Performing an act in a lawful manner requires doing so with due care and without simple negligence. R.C.M. 916f, MCM, 1984. See United States v. Moyler, 47 C.M.R. 82 (A.C.M.R. 1973) (carrying a weapon within the base camp with a magazine inserted, a round chambered, the safety off, and the selection on automatic constitutes negligence as a matter of law); and United States v. Redding, 14 C.M.A. 242, 34 C.M.R. 22 (1963) (practicing "fast draw" with pistols while armed for sentry duty constitutes negligence precluding accident defense).

1014 SELF-DEFENSE (Key Number 836)

See Chapter VIII, OFFENSES AGAINST THE PERSON

1015 VOLUNTARY INTOXICATION (Key Number 845)

See Insanity, supra

1016 VOLUNTARY ABANDONMENT (Key Numbers 832)

See Chapter I, BASIC CONCEPTS OF CRIMINAL LIABILITY

1017 GENERAL DENIAL DEFENSES (EXAMPLE: ALIBI) (Key Numbers 832-834, 842)

A. Alibi is not an affirmative or special defense. United States v. Wright, 48 C.M.R. 295 (A.F.C.M.R. 1974). It is, like misidentification, evidence which tends to deny the commission by the accused of the objective acts charged. R.C.M. 916(a) discussion, MCM, 1984. Alibi is rebuttal evidence; it is a "showing that it would have been physically impossible for the accused to have committed the crime...." United States v. Wright, supra.

B. Raised by evidence. Alibi is raised when some evidence shows that the accused was elsewhere at the time of the commission of a crime. United States v. Wright, supra; United States v. Zayas-Gonzales, 31 C.M.R. 370 (A.B.R. 1962); United States v. Brooks, 25 M.J. 175 (C.M.A. 1987). It is, therefore, essential that the time and date of the commission of the offense charged be established with exactitude. United States v. Bigger, 2 C.M.A. 297, 8 C.M.R. 97 (1953); United States v. Moore, 15 C.M.A. 345, 35 C.M.R. 317 (1965). Once raised, the government has the burden to disprove the defendants alibi beyond a reasonable doubt. United States v. Radford, 14 M.J. 322 (C.M.A. 1982).

CHAPTER XI

INSTRUCTIONS

1100 INTRODUCTION (Key Numbers 1263-1269, 1321)

When an accused elects to be tried by court members rather than by military judge alone, the military judge has the responsibility of explaining the law to the members in the form of instructions. In commenting upon this role, the Court of Military Appeals noted that "[w]hat is contemplated is the affirmative submission of the respective theories, both of the Government and the accused in the trial, to the triers of fact, with lucid guideposts, to the end that they may knowledgeably apply the law to the facts as they find them." United States v. Smith, 13 C.M.A. 471, 474, 33 C.M.R. 3, 6 (1963). For an excellent article on the importance of instructions from the trial advocacy perspective, see Note, Instructions and Advocacy," 126 Mil. L. Rev. 147 (1989).

1101 SOURCES OF INSTRUCTIONS

A. Military Judges' Benchbook, DA Pam 27-9 (1982). The Military Judges' Benchbook is the principal tool utilized by judges and counsel in drafting instructions for delivery by the judge to the members. Essentially a formbook, it provides the standard set of instructions required in every case, as well as sample instructions which can be adapted to the demands of a particular trial with regard to the various offenses, defenses, and evidentiary concerns. The U.S. Army Trial Judiciary has the primary responsibility for updating the Benchbook. Change 3 was published 15 February 1989, to reflect modifications based upon case law and the implementation of the Manual for Courts-Martial, 1984.

1. When selecting instructions from this guide, caution must be exercised to ensure that the model instructions are "tailored" to correspond to the issues in the case. See, e.g., United States v. Allison, 8 M.J. 143 (C.M.A. 1979) (military judge erroneously utilized a pattern cautionary instruction intended for accomplice testimony introduced by the government, even though the accomplice was called as a witness by defense); United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982) (error for military judge to give aider and abettor instruction when the theory of the government's case treated the accused as the perpetrator); United States v. Williams, 17 M.J. 207 (C.M.A. 1984) (military judge failed to instruct members that the offense must occur at a place where there is exclusive or concurrent jurisdiction when charged under article 134(3)). Tailoring may not conflict with the intent of Congress or the President and must be supported by the evidence. United States v. Soriano, 20 M.J. 337 (C.M.A. 1985) (on request of trial counsel, MJ instructed members that a BCD may be a lifetime stigma as opposed to the standard instruction that it will permanently stigmatize). United States v. Eason, 21 M.J. 79 (C.M.A. 1985) (clearly erroneous to instruct that there was no entrapment if the government had reasonable grounds to suspect the accused of criminal activity).

2. The forms selected must not contain terms that are inconsistent or contradictory when read as a whole. See, e.g., United States v. Harrison, 19 C.M.A. 179, 41 C.M.R. 179 (1970) (military judge gave pattern instructions on the offense of malingering and a defense of accident which contained inconsistent mental elements). United States v. Stafford, 22 M.J. 825 (N.M.C.M.R. 1986) (improper to instruct that defense of alibi must be proven beyond a reasonable doubt).

3. It should also be noted that special circumstances may arise during trial that will require instructions not covered by the Benchbook. United States v. Haywood, 19 M.J. 675 (A.F.C.M.R. 1984) (military judge may properly instruct members as to how to consider the fact that the accused refused to appear in a uniform). In these situations, counsel may propose instructions in accordance with R.C.M. 920(e), MCM, 1984, or the military judge may draft an instruction for submission to the members. Compare United States v. Warren, 13 M.J. 278 (C.M.A. 1982) (authorizing the military judge to give an instruction advising the members that the false testimony of the accused may be considered as a matter in aggravation for sentencing) with United States v. Brown, 15 M.J. 620 (N.M.C.M.R. 1982) (military judge's refusal to give defense-requested instructions not error, since it compared authorized punishment with irrelevant one). The test for determining whether refusal to give a requested instruction is error is whether the requested instruction is in itself a correct charge, whether it is substantially covered elsewhere in the judge's instructions, and whether it is on such a vital point in the case that failure to give it deprived the accused of a defense or seriously impaired an effective presentation. United States v. Aker, 19 M.J. 733 (A.F.C.M.R. 1984); United States v. Foster, 14 M.J. 246 (C.M.A. 1982). United States v. McLauren, 22 M.J. 310 (C.M.A. 1986) (not plain error to fail to sua sponte instruct on identification testimony where members attention was clearly focused on issue).

4. Users of the Benchbook must be careful to verify that the selected provisions comply with current appellate court decisions. Such neglect has occasioned reversible error when the military judge submitted a pattern instruction equating "reasonable doubt" with "substantial doubt" despite appellate judicial admonishment that such an instruction was in disfavor. United States v. Ansari, 15 M.J. 812 (N.M.C.M.R. 1983) citing United States v. Cotten, 10 M.J. 260 (C.M.A. 1981). See also United States v. Prince, 14 M.J. 654 (A.C.M.R. 1982) (although the military judge's instruction defining "insulting language" conformed to the sample instruction set forth in the sample form, it was inadequate because of its failure to require that the members find that such language conveyed a libidinous message); United States v. Mitchell, 15 M.J. 214 (C.M.A. 1983) (pattern instructions regarding solicitation were fatally defective in failing to require finding of specific intent). Indeed, the military practitioner attempting to rely solely upon the Benchbook would do well to heed the warning of the Court of Military Appeals that "merely because an instruction is standard does not mean that it is either correct or adequate." United States v. Cotten, supra, at 261. See also United States v. Vanzandt, 1 M.J. 332 (C.M.A. 1982) (to overcome defense of entrapment government is no longer required to show a reasonable ground to believe the accused was involved in similar criminal conduct as the form instruction indicated). Id. at 344, n. 15. United States v. Eason, supra. The recent

Supreme Court case of Francis v. Franklin, 471 U.S. 307, 85 L.Ed.2d 344, 105 S.Ct. 1965 (1985) struck down form instructions which create mandatory rebuttable presumptions, since they effectively relieve the state of its burden. Additionally, the Court of Military Appeals recently stated that, to be complete, instruction on wrongful possession or use of a controlled substance should include specific reference to the two types of knowledge which are required to establish criminal liability: knowledge of the presence of the substance and knowledge of the character of the substance. United States v. Mance, 26 M.J. 244 (C.M.A. 1988). The court went on to say, however, that the "knowledge" required to show "possession" or "use" and the "knowledge" required to show "wrongfulness" may, in appropriate circumstances, be inferred from the presence of the controlled substance. Id. at 254. See also United States v. Harper, 22 M.J. 157 (C.M.A. 1986) and United States v. Brown, 26 M.J. 266 (C.M.A. 1988).

5. Some instructions in the Benchbook appear to be inadequate, incorrect, and inconsistent with corresponding provisions in the Manual for Courts-Martial, 1984. In the following cases, counsel must be particularly diligent in submitting modified versions of the form instructions to the military judge.

a. Paragraph 3-2 in the Benchbook on attempts suggests, in element four, that the commission of intended crime must be interrupted by an unknown or unforeseeable factor. This is inconsistent with the Manual discussion at Part IV, para. 4c(2), MCM, 1984.

b. Paragraph 7-6 in the Benchbook on judicial notice still contains language that the members may, but are not required to, accept as conclusive the matters judicially noticed. Where the matter noticed is a matter of law, the members are required to accept it as conclusive. Mil.R. Evid. 201A. See United States v. Anderson, 22 M.J. 885 (A.C.M.R. 1986) as to matters which may properly be noticed.

c. Paragraph 5-5 of the Benchbook on duress still states that the intimidation must be directed at the accused or a member of his/her immediate family. R.C.M. 916(h) expands the scope of this defense to any innocent person.

d. There appears to be no present authority in the Manual, or in the Rules of Evidence, for the instruction at para. 4-3 of the Benchbook. It appears to be a throwback to pre-Mil.R.Evid. practice.

B. Military Rules of Evidence. The evidentiary rules recently adopted for use in the military judicial system are also relevant to the area of instructions, particularly in light of the philosophical shift regarding the respective responsibilities of the military judge and trial defense counsel which these new rules effectuate.

1. Prior practice gave total responsibility to the military judge. As discussed in Hoover, "The Application of the Doctrine of Waiver to Instructional Errors at Trial", 11 The Reporter 46 (Apr. 1982), previous decisions by the Court of Military Appeals had placed almost total responsibility on the military judge for properly instructing the court members. Indeed, the trial defense counsel had no obligation to place before the triers of fact his theory of the case, through requests for or objections to instructions.

a. For example, in United States v. Graves, 1 M.J. 50 (C.M.A. 1975), while addressing the failure of the defense counsel to request an instruction on intoxication as it pertained to the accused's confession, the court noted that:

> The trial judge is more than a mere referee, and as such he is required to assure that the accused receives a fair trial. Advocacy leaves the proceeding at the juncture of instructing the court members. Irrespective of the desires of counsel, the military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law. Simply stated, counsel do not frame issues for the jury; that is the duty of the military judge based upon his evaluation of the testimony related by the witnesses during the trial.

Id. at 53.

b. This position was reaffirmed in United States v. Grunden, 2 M.J. 116 (C.M.A. 1977), where the court reversed the accused's conviction based upon the failure of the military judge to give a limiting instruction on uncharged misconduct, despite the fact that he was merel· ıcceding to the trial defense counsel's specific request.

2. With the adoption of the new rules of evidence, however, this insistence that the military judge alone is responsible for instructing the court members has been revised. Indeed, Mil.R.Evid. 105 overrules United States v. Grunden, supra, by requiring the military judge to give such a limiting instruction only upon counsel's specific request. Similarly, the new rules require the trial defense counsel to elect whether to provide the members with cautionary instructions regarding the accused's exercise of his right not to testify during the proceeding [Mil.R.Evid. 301(g)], as well as the exercise of a privilege by a witness (Mil.R.Evid. 512). United States v. Owens, 21 M.J. 117, 125 (C.M.A. 1985).

3. Recent decisions by the Court of Military Appeals reflect this shift in philosophy by ruling that trial defense counsel's failure to make such a request will be viewed as a waiver of this issue for purposes of appeal absent "plain error" (error that materially prejudices a substantial right of the accused). See, e.g., United States v. Wray, 9 M.J. 361 (C.M.A. 1980) (the failure of the military judge to give a cautionary instruction on misconduct not charged was not error in light of his compliance with defense counsel's request); United States v. Robinson, 11 M.J. 218 (C.M.A. 1981) (the absence of a defense request for a limiting instruction regarding the evidence admitted to attack the accused's character for truthfulness waived any claim of error on appeal); and United States v. Thomas, 11 M.J. 388 (C.M.A. 1981) (the ambiguity in the military judge's instruction on uncharged misconduct was waived by the defense counsel's failure to object); United States v. Charette, 15 M.J. 197 (C.M.A. 1983) (military judge did not err in failing to instruct upon the accused's failure to testify where the defense expressly requested that no such

instruction be given); United States v. Haywood, 19 M.J. 675 (A.F.C.M.R. 1984) (military judge's failure to instruct on accused's in-court misconduct not prejudicial, especially absent defense request); United States v. Randolf, 20 M.J. 850 (A.C.M.R. 1985) (military judge's failure to sua sponte instruct on incompetent evidence during sentencing not prejudicial where defense failed to object). United States v. Fitzhugh, 14 M.J. 594 (A.F.C.M.R. 1982). The Rules of Court-Martial reiterate the philosophy that trial defense counsel must actively participate in the framing of instructions or risk waiving the issue under R.C.M. 920(f) and 1005(f), MCM, 1984. United States v. McLauren, 22 M.J. 310 (C.M.A. 1986) (failure to give eyewitness instruction not plain error where defense failed to request).

4. While the exact parameters of this change in the trial defense counsel's responsibilities have yet to be ascertained, it is safe to assume that the military judge will retain primary and sua sponte responsibility for instructing the members on those matters deemed crucial to the accused's receipt of a fair trial. As the following section demonstrates, included in this category are those instructions that place before the court the elements of the offenses charged and any lesser included offenses or affirmative defenses reasonably in issue, as well as instructions upon the burden of proof and the presumption of innocence.

a. The military judge may incur a sua sponte duty to instruct on particular issues if the circumstances of the case would make it "plain error" to omit the instruction. For instance, while Mil.R.Evid. 301(d) contemplates that the defense will have to request an instruction on the accused's failure to testify, where the members specifically questioned the silence of the accused, the military judge must instruct. United States v. Jackson, 6 M.J. 116 (C.M.A. 1979). The military judge must instruct members on an absent accused when the trial proceeds in his or her absence. United States v. Minter, 8 M.J. 867 (N.C.M.R. 1980). Note, however, that while the accused's absence cannot be considered as proof of guilt, it may be considered insofar as it demonstrates the accused's rehabilitative potential under R.C.M. 1001. See United States v. Denney, 28 M.J. 521 (A.C.M.R. 1989). A witness' opinion during sentencing, as to whether the accused should receive a bad conduct discharge, is incompetent evidence and requires a sua sponte curative instruction. United States v. Randolf, 19 M.J. 850 (A.C.M.R. 1985). Military judge must take curative action in the form of reinstruction when a member falls asleep during instructions. United States v. Bishop, 21 M.J. 541 (A.F.C.M.R. 1985).

b. Accomplice testimony presents a difficult dilemma for the military judge. Normally, the defense must request the instruction (DA Pam 27 9, para. 7-10) in the appropriate case before error would be assigned for failure to give it. United States v. Lee, 6 M.J. 96 (C.M.A. 1978); United States v. Hand, 8 M.J. 701 (A.F.C.M.R. 1980); United States v. Dubose, 19 M.J. 877 (A.F.C.M.R. 1985). However, where the accomplice's testimony is uncorroborated, uncertain or improbable, and pivotal to the government's case, it is plain error, even absent a request, for the judge to fail to give the instruction. United States v. Stephen, 35 C.M.R. 286 (C.M.A. 1965); United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985); United States v. Oxford, 21 M.J. 983 (N.M.C.M.R. 1986) (failure to give accomplice instruction sua sponte is plain error where accomplice is "pivotal" and uncorroborated).

1103 INSTRUCTIONS ON FINDINGS

A. R.C.M. 920(e), MCM, 1984, indicates that the military judge must provide the court with certain instructions. Matters specifically encompassed by this responsibility include instruction upon:

1. The elements of the offense charged in each specification. Compare United States v. Jackson, 6 M.J. 116 (C.M.A. 1979) (holding reversible error occurred when the military judge omitted an instruction on the elements of a charged offense of possession of marijuana) and United States v. Canter, 42 C.M.R. 753 (A.C.M.R. 1970) (reversible error for the military judge to fail to instruct on the elements of the substantive offense that was the object of the alleged conspiracy, notwithstanding the fact that correct instructions as to the elements of conspiracy were given) with United States v. McDonald, 14 M.J. 684 (A.F.C.M.R. 1982) (it is not essential that such instructions follow a particular form or sequence; if a missing element is included with sufficient clarity that the court is fairly informed, the trial judge has adequately covered the subject).

The Court of Military Appeals recently reaffirmed that the failure to instruct on an element of an offense is plain error. See United States v. Brown, 26 M.J. 266 (C.M.A. 1988) (failure to instruct members that staff sergeant could be convicted of single use of marijuana, only upon showing that use was knowing and conscious, constituted plain error in special court-martial proceeding founded almost entirely on results of urinalysis test).

2. The elements of all lesser included offenses reasonably raised by the evidence. Compare United States v. McGee, 1 M.J. 193 (C.M.A. 1975) (military judge erred in failing to instruct sua sponte on LIO of involuntary manslaughter through culpable negligence where issue raised by the testimony of the accused); United States v. Staten, 6 M.J. 275 (C.M.A. 1979) (any doubt concerning whether evidence is sufficient to require sua sponte instruction on LIO must be resolved in favor of the accused); United States v. Jackson, 6 M.J. 261 (C.M.A. 1979) (it is incumbent upon the military judge to instruct upon all LIO's raised by the evidence, whether or not requested by the defense) and United States v. Head, 6 M.J. 840 (N.C.M.R. 1979) (defense counsel's failure to request an instruction on an LIO does not constitute a waiver of this issue for appeal) with United States v. Waldron, 11 M.J. 36 (C.M.A. 1981) (the military judge's instructions on LIO's not raised by evidence as error inviting impermissible compromise verdict); United States v. McCray, 19 M.J. 528 (A.C.M.R. 1984) (impeachment of credibility of witness on sodomy charge does not raise LIO's); United States v. Watts, 19 M.J. 703 (N.M.C.M.R. 1984); United States v. Rodwell, 20 M.J. 264 (C.M.A. 1985) (allegation that assault with intent to commit murder was by repeated stabbings raised the LIO of intentional infliction of grievous bodily harm and the judge was required to so instruct). United States v. Williams, 21 M.J. 330 (C.M.A. 1986); United States v. Johnson, N.M.C.M. 84-4432 (29 July 1985) (incorrect determination of LIO's prejudicial error); and United States v. Anderson, 21 M.J. 75 (N.M.C.M.R. 1985).

3. Any special or affirmative defenses reasonably in issue. Compare United States v. Jones, 13 C.M.A. 635, 33 C.M.R. 167 (1963) (reversible error in trial for larceny when the military judge failed to tailor the instructions to the defense theory of receipt of stolen property); United States v. Sawyer, 4 M.J. 64 (C.M.A. 1977) (failure to instruct on self-defense was reversible error in light of the trial judge's independent and paramount duty to ensure that all defenses reasonably raised by the evidence receive his treatment during instructions); United States v. Taylor, 26 M.J. 127 (C.M.A. 1988) (defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised by the evidence); United States v. Jones, 7 M.J. 441 (C.M.A. 1979) (failure of the military judge to give an instruction regarding the defense of alibi constituted reversible error, particularly in light of the defense counsel's request); United States v. Stafford, 22 M.J. 825 (N.M.C.M.R. 1986) (improper instruction on alibi was prejudicial especially when requested by trial defense counsel); United States v. Davis, 14 M.J. 628 (A.F.C.M.R. 1982) (since the accused is entitled to have an instruction relating to any defense theory for which there is evidence in the record, even though such evidence is improbable or unbelievable, the military judge erred in refusing to give a requested instruction on entrapment); United States v. Steinruck, 11 M.J. 322 (C.M.A. 1981) (military judge should resolve all doubt in favor of the accused); and United States v. Ward, 16 M.J. 341 (C.M.A. 1983) (military judge's failure to instruct that mistake of fact defense need only be honest was prejudicial error despite failure of defense to object where testimony of the accused clearly raised this issue) with United States v. Ferguson, 15 M.J. 12 (C.M.A. 1983) (because one would be hard pressed to find that there was any evidence presented in this case from which the court members could conclude that the accused acted without simple negligence, the accused's characterization of the shooting death of his wife as an accident was not alone sufficient to require the military judge to give the requested instruction thereon); United States v. Kauble, 15 M.J. 591 (A.C.M.R. 1983) (the failure of the defense to request an expanded instruction on mistake of fact defense waived issue where instruction was minimally adequate); United States v. Verasso, 21 M.J. 129 (C.M.A. 1985) (instruction on intervening cause properly denied where there was no evidence of unforeseeability). But see United States v. Symister, 19 M.J. 503 (A.F.C.M.R. 1984); United States v. Johnson, N.M.C.M. 84-4432 (29 July 1985) (honest claim of right to stolen property raises defense of mistake of fact and requires instruction even absent request). Defenses may be raised by government witnesses. United States v. Hunter, 21 M.J. 240 (C.M.A. 1986).

4. Additional instructions that:

a. Only matters properly before the court-martial may be considered;

b. the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;

c. 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 he must be acquitted;

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

e. the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

5. Instructions on deliberation and voting procedures. See R.C.M. 921, MCM, 1984; United States v. Lawson, 16 M.J. 38 (C.M.A. 1983).

B. R.C.M. 920(e)(7) is a catch-all provision which indicates that the military judge should also give any other instructions which are deemed necessary. Such additional instructions could include (depending on the particular case):

1. Each term having a special legal connotation. Compare United States v. Dejewski, 3 C.M.A. 53, 11 C.M.R. 53 (1953) (the term "grievous" is used in its conventional sense under article 128, therefore no definition beyond that contained in the MCM is required) and United States v. Jett, 14 M.J. 941 (A.C.M.R. 1982) (the military judge is not required to define generally known words such as "public record") with United States v. Sanders, 14 C.M.A. 524, 34 C.M.R. 304 (1964) (when the definition of certain terms, in this case "aider and abettor," is required for a proper understanding of the issues involved, it is the responsibility of the military judge to instruct the court members with precision) and United States v. Brauchler, 15 M.J. 755 (A.F.C.M.R. 1983) (military judge erred when he failed to instruct as to the meaning of the term "indecent liberties"); United States v. Fayne, 26 M.J. 528 (A.F.C.M.R. 1988) (military judge erred when he failed to define the term "harassment"); United States v. Silva, 19 M.J. 501 (A.F.C.M.R. 1984) (military judge must inform the members of the meaning of the word felony); United States v. Johnson, 24 M.J. 101 (C.M.A. 1987) (instructions on sabotage were inadequate where military judge failed to give any definition on the terms "national defense material" or "troops" as used in the statute).

2. Any supplemental matters arising under the Military Rules of Evidence, such as:

a. Misconduct not charged. See Mil.R.Evid. 105 (military judge is required to give limiting instruction only upon request of counsel). See also United States v. Wray, 9 M.J. 361 (C.M.A. 1980) (the failure of the military judge to instruct on misconduct not charged was not error in light of his compliance with defense counsel's request); United States v. Haywood, 19 M.J. 675 (A.F.C.M.R. 1984); United States v. Owens, 21 M.J. 117 (C.M.A. 1985).

b. The accused's failure to testify. See Mil.R.Evid. 301(g) (defense counsel's election whether to give a limiting instruction to the court members regarding the failure of the accused to testify is binding upon the military judge, except when such instruction is necessary in the interests of justice); United States v. Charette, 15 M.J. 197 (C.M.A. 1983); United States v. Jackson, 6 M.J. 116 (C.M.A. 1979).

c. Voluntariness of the accused's confession. See Mil.R.Evid. 304(e)(2) (defense counsel may litigate the admissibility of a confession before the military judge and, if he loses, upon admission of the confession to the members, he may present relevant evidence with regard to the voluntariness of such and receive an instruction to the members that they may determine the weight to be given such confession under the circumstances presented). See DA Pam 27-9, Military Judges' Benchbook (1982), para. 4-2.

3. A descriptive summary of the evidence. R.C.M. 920(e) discussion, MCM, 1984, authorizes the military judge to summarize and comment upon the evidence in the case.

In doing so, however, the military judge must be careful not to depart from the role of an impartial judge and assume the role of a partisan advocate. See United States v. Grandy, 11 M.J. 270 (C.M.A. 1981) (the failure of the military judge to give equal treatment to the defense case after summarizing the evidence in favor of the prosecution constituted plain error requiring reversal, even in the absence of defense counsel's objection). Additionally, he must not assume as true the existence or nonexistence of a material fact still in issue. See United States v. Gaiter, 1 M.J. 54 (C.M.A. 1975) (reversible error for the military judge in instructing on evidence of misconduct not charged to assume as true the controverted fact that the accused had attempted to sell drugs to the person whom he was later charged with robbing).

C. Procedures

1. The military judge should recess the proceeding in order to prepare instructions for submission to the members. In this regard, the instructions provided the members must be the only source of law utilized in their determinations. See United States v. Rinehart, 8 C.M.A. 402, 24 C.M.R. 212 (1957) (error for military judge to allow court members to refer to the Manual for Courts-Martial during deliberations). In addition, the military judge may not incorporate previous instructions by reference. See United States v. Waggoner, 6 M.J. 77 (C.M.A. 1978) (error for military judge to instruct court members to consider the preliminary instructions given in previous cases in which the court panel had sat). But cf. United States v. Slubowski, 7 M.J. 461, 466 (C.M.A. 1979) (not error for military judge in oral instructions to refer specifically to written instructions where defense was made aware of contents of the document; the court members indicated they had no question on the matter; and no one challenged the accuracy or completeness of this document).

2. R.C.M. 920(c), MCM, 1984, also requires that counsel for both sides be given an opportunity to submit and present argument upon proposed instructions. See United States v. Neal, 17 C.M.A. 363, 38 C.M.R. 161 (1968) (error for the military judge not to hold a session on instructions in order to act on requests therefore, hear objections thereon, and inform counsel of his intentions). This article 39(a) session normally occurs after the close of each side's case and immediately prior to argument on findings.

3. The members are instructed by the military judge after final arguments by counsel. R.C.M. 920(b). The instructions must be given orally. Written verbatim copies of the instructions may be provided to the members. Absent objection by either side, partial written instructions may also be provided. R.C.M. 920(d) and 1005(d), MCM, 1984; Cf. United States v. Slubowski, supra.

1104 INSTRUCTIONS ON SENTENCING

A. If the accused is convicted of any offense by a court-martial composed of members, the military judge must give appropriate sentence instructions. R.C.M. 1005(a), MCM, 1984. The following instructions are required by R.C.M. 1005(e), MCM, 1984:

1. A statement of the maximum authorized punishment and any mandatory minimum punishment. R.C.M. 1003(c)(1)(C); United States v. Gutierrez, 8 M.J. 865 (N.C.M.R. 1980); United States v. Temple, 11 M.J. 687 (N.C.M.R. 1981) (the maximum is the single total of all offenses of which found guilty). This should include a discussion of the escalator clause and multiplicity for sentencing where applicable. United States v. Timmons, 13 M.J. 431 (C.M.A. 1982); R.C.M. 1003(c)(1)(C); United States v. Beard, N.M.C.M. 86-0656 (22 July 1986).

2. A statement of the deliberation and voting procedures required by R.C.M. 1006, MCM, 1984. This must include an instruction that the members must vote on proposed sentences, starting from the lowest. United States v. Fisher, 21 M.J. 327 (C.M.A. 1986) and United States v. Scott, 22 M.J. 646 (A.C.M.R. 1986). The military judge should also instruct the members that they must vote on each proposed sentence in its entirety. United States v. Allen, 21 M.J. 924 (A.C.M.R. 1986).

3. A statement that the members are solely responsible for the sentence and may not rely on the possibility of subsequent mitigating action. United States v. Keith, 46 C.M.R. 59 (C.M.A. 1972) and United States v. Goetz, 17 M.J. 744 (A.C.M.R. 1983).

4. A statement that the members should consider all matters in extenuation, mitigation, and aggravation whether introduced before or after findings. The members must be specifically advised to consider any pretrial restraint in mitigation. United States v. Davidson, 14 M.J. 81 (C.M.A. 1982) and United States v. Stark, 19 M.J. 519 (A.C.M.R. 1984). A guilty plea is a matter in mitigation to be instructed upon. United States v. McLeskey, 15 M.J. 565 (A.F.C.M.R. 1982).

B. As with instructions on findings, the military judge must tailor the instructions to the facts of the case and may summarize and comment upon the evidence. R.C.M. 920(e)(4) discussion, MCM, 1984; United States v. Wheeler, 17 C.M.A. 274, 38 C.M.R. 72 (1967). See also United States v. Davidson, 14 M.J. 81 (C.M.A. 1982) (note instruction to consider matters in extenuation and mitigation properly before the court was inadequate).

-- The military judge should summarize and tailor the extenuation and mitigation and aggravation to the facts of the case. A guilty plea usually is a matter in mitigation. United States v. McLeskey, supra. It is not, however, a reversible error to fail to so instruct. United States v. Fisher, 21 M.J. 327 (C.M.A. 1986); United States v. Williams, 26 M.J. 644 (A.F.C.M.R. 1988) (instruction that plea of guilty is a mitigating factor is not required when the record justifies not giving it). General deterrence is a legitimate factor to consider in sentencing. United States v. Lania, 9 M.J. 100 (C.M.A. 1980). Consideration as to whether the accused may have lied on the merits goes to rehabilitative potential only. A carefully worded instruction is necessary when trial counsel argues the accused's mendacity. United States v. Warren, 13 M.J. 278 (C.M.A. 1982) and United States v. Ryan, 21 M.J. 627 (A.C.M.R. 1985). The nature and extent of pretrial restraint must be the subject of a specific instruction. United States v. Davidson, 14 M.J. 81 (C.M.A. 1982) and United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

C. In capital cases, special care must be taken to comply with the constitutional mandates made applicable to the military by the C.M.A. decision in United States v. Matthews, 16 M.J. 354 (C.M.A. 1983). These procedures are provided in R.C.M. 1004, MCM, 1984.

D. Procedurally, sentencing instructions are given in the same manner as instructions on findings as discussed in section 1103.C, supra. The military judge must always avoid conclusory statements on appropriateness or relative severity of various punishments. United States v. Holland, 19 M.J. 883 (A.C.M.R. 1985).

E. During sentencing, there are a number of other miscellaneous matters upon which the military judge should or may be asked to instruct. These include, but are not limited to:

1. A description of other, lesser forms of punishment - United States v. Henderson, 11 M.J. 395 (C.M.A. 1981);

2. the implications of a BCD - United States v. Soriano, 20 M.J. 337 (C.M.A. 1985);

3. the applicability and proper use of fines as a form of punishment - United States v. Harris, 19 M.J. 331 (C.M.A. 1985); and

4. all matters in extenuation, mitigation and aggravation, including those presented before as well as after findings - United States v. Randolf, 20 M.J. 820 (A.C.M.R. 1985); United States v. Wilson, 26 M.J. 10 (C.M.A. 1988).