

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

FEBRUARY 14, 2011

RESOLUTION

RESOLVED, That the American Bar Association urges states and territories to adopt the Model State Code of Military Justice and the Model Manual for Courts-Martial to provide an updated body of law for military forces not subject to the Uniform Code of Military Justice when military forces are serving under the exclusive jurisdiction of Chapter 47 of Title 10, United States Code.

REPORT

Introduction

State National Guard units may serve under Title 32 U.S.C., or Title 10 U.S.C. When “federalized” or mobilized in times of a national emergency, for example, National Guard act under Title 10 U.S.C. At those times, the Uniform Code of Military Justice (“UCMJ”) applies. When mobilized for state missions such as domestic response to natural disasters, or law enforcement, for example, the National Guard operates under Title 32.

The conversion of the National Guard from a strategic reserve to an operational force means that members of the National Guard are mobilized to perform Title 10 active duty at unprecedented levels and at an unprecedented frequency.

Additionally, the National Guard’s mission in domestic response is also changing. Hurricane Katrina, the Kentucky Ice Storms, the Southwest Border mission, and significant national events requiring National Guard support, e.g. national political conventions, the Presidential inauguration, and the general requirements to provide security against possible terrorist threats, require the National Guard of the States to operate within the borders of other States or pair with National Guard members or organizations of other States. In order to ensure a properly disciplined force across a wide spectrum of National Guard units operating together for a common purpose, uniformity in the rules of military discipline is paramount.

Moreover, in terms of preparedness, National Guard members need to operate under rules of discipline that are uniform with the Title 10 U.S.C. active duty and allow the States to field a well-disciplined force capable of performing its active duty mission when called upon by the President. A well-disciplined force means that as an organization, units perform better and a better performing organization is more likely to suffer fewer casualties.

State military laws are not uniform. More consistency between state military law and the UCMJ would help maintain good order and a parity of discipline for Title 32 and Title 10 military members who increasingly serve side-by-side. When Title 32 forces from several states deploy to a common location, for example, consistent disciplinary consequences would enhance morale, engender a sense of fairness for those forces, and ensure those who commit crimes are properly held accountable for their crimes.

The following examples may better illustrate the need for uniformity:

a. While performing security duties during the Southwest Border missions, a National Guard airman in Title 32 status is accused of committing a violent offense against another military member. The local district attorney, facing scarce resources, declines to prosecute under the assumption that the military could court-martial the airman. If the airman was from a State which had adopted the Model Code of Military Justice, the airman could be prosecuted for the offense and if convicted, he could be incarcerated. Conversely, if the airman was from a State

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that had not adopted the Model Code of Military Justice, he could be reduced in rank, administratively separated, but would not face a felony conviction or incarceration for his crime.

b. A National Guard airman in Title 32 status works side-by-side with an active duty (Title 10) airman and both refuse to follow a lawful order. The active duty airman could be court-martialed for his insolence whereas the National Guard airman could not be court-martialed if he was from a State that had not adopted the Model Code of Military Justice. At most he would face a reduction in rank or an administrative separation but not a court-martial. The disparate treatment and the failure to properly hold the Title 32 airman accountable serves to undermine good order, discipline, and morale within the unit.

The Model State Code draws from the UCMJ as its seminal body of law. The Model State Code of Military Justice (Appendix 1) would be a model of legislation intended for State National Guard operating in a Title 32 military status or in a state active duty military status. Addressing a patchwork of existing State military laws, The Model State Code provides an update for the States and Territories and also provides a companion Model Manual for Courts-Martial (“MCM”) (Appendix 2). [Model Code of Military Justice](#) [Model Manual for Courts-Martial](#)

That National Guard serving as a Title 32 force should be governed by laws more synchronous with the UCMJ, is not a new concept. The proposed Model State Code which is the subject of this Report, was first prepared in 2003, revised and re-drafted several times and presented in December, 2003 to Congress. Since then the Model State Code has received the approval of the Department of Defense, and been passed with minor modifications in at least six states.

Brief History

In 2002, there was an initiative to standardize and update the state military codes. In 2003, with the passage of the National Defense Authorization Act (“NDAA”), Section 512 amended Title 32 U.S.C. and required the Secretary of Defense to prepare a model state code and a model MCM, consistent with a 1998 military justice panel recommendation for creation of a standardized and updated state code for use by the National Guard in Title 32 status. The National Guard Bureau played a key role in the drafting and development of the Model Code.

In July 2003, the first draft of the Model Code was completed, with a draft model MCM produced in September 2003. Both draft documents were sent to Congress, as required in the NDAA, in December 2003.

From January through June 2004, the documents were reviewed by the Departments of Defense, Air Force, and Army, and their comments were ultimately incorporated into the draft Model Code. The final draft of the Model Code was approved by the Department of Defense in 2005.

Statement of Need

Most state military codes were designed for a “strategic reserve” of National Guard units serving one weekend per month, two weeks per year, often at a home post or base. These codes simply did not contemplate the new role served by the National Guard, that of a more “operational

reserve,” operating domestically in more than one state, and often operating side-by-side with active duty Title 10 service members, governed by the UCMJ. Existing state military codes are inadequate to maintain good order and discipline in modern state missions, as they provide for no viable non-judicial punishment, or court martial system. Commanders are left with administrative discharge as the default disciplinary tool to enforce military orders in a Title 32 state active duty status.

National Guard units are now called up regularly for federal duty, deploying to Iraq and Afghanistan. When federalized, they are subject to the UCMJ; a state code that is more consistent with the UCMJ will better prepare the Guard for such duty.

Key Features of the Model State Code

The Model State Code of Military Justice focuses on military offenses. It does not supplant civilian criminal courts, as civilian criminal prosecution is possible under Article 134 (General Article). Article 134 lists 54 offenses (such as: robbery, arson, or murder), that are contained in the UCMJ, but instead prosecuted in civilian criminal courts under the Model State Code.

The Model State Code provides a right to counsel at court-martial and nonjudicial punishment if restraints on liberty are contemplated. An accused may use civilian counsel at his own expense. Nonjudicial punishment is of two varieties: where a restraint of freedom is contemplated, and where it is not. In the former case, an accused has a right to counsel and may turn down the punishment to proceed via court-martial. In the latter, no right to counsel exists, and the accused has no right to turn down the punishment in lieu of court-martial.

For military offenses, military judges will oversee court-martial proceedings and the Federal Rules of Evidence apply.

As long as there is a nexus of the offense to the military, the Model State Code governs National Guard members regardless of duty status, even outside the state.

Punishments under both the Model State Code and the UCMJ are similar, except the Model Code provides a maximum of 10 years confinement, and has no death penalty. In this respect and others, the Model State Code recognizes state versus federal constitutional issues and resolves them.

Conclusion

Congress and the Department of Defense have directed the drafting of an updated military code for Title 32 National Guard. The Model State Code of Military Justice and its accompanying Model Manual for Courts-Martial fulfill this directive and provide a ready framework for adoption by states and U.S. territories. Both the Model State Code and the MCM deserve the endorsement of the ABA.

Respectfully submitted,
Linda Strite Murnane, Chair
Standing Committee on Armed Forces Law
February 2011

GENERAL INFORMATION FORM

Submitting Entity: ABA Standing Committee on Armed Forces Law

Submitted By: Gary Jackson

1. Summary of Recommendation.

To endorse a “Model State Code of Military Justice” and an accompanying “Manual for Courts-Martial,” as a resource to urge States and Territories to revise the patchwork of currently enacted laws governing State National Guard. Specifically, the endorsed Model State Code, and the Manual would provide a more uniform set of laws and discipline for State National Guard military forces not already subject to exclusive jurisdiction under Chapter 47, of Title 10, United States Code. When serving under Title 10, the federal Uniform Code of Military Justice applies.

2. Approval by Submitting Entity.

Unanimously approved on 21 April 2010

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

SCAFL does not know of any relevant, existing ABA policies that would be affected by the adoption of this recommendation.

5. What urgency exists which requires action at this meeting of the House?

Ongoing wars in Afghanistan and in Iraq, and the increased reliance on National Guard units, provide ample urgency for the House to act on this recommendation.

6. Status of Legislation.

Not Applicable.

7. Cost to the Association. (Both direct and indirect costs.)

None.

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8. Disclosure of Interest.

Not Applicable.

9. Referrals.

Criminal Justice Section, October 2010, Voted to Co-Sponsor
Government and Public Sector Lawyers Division, October 2010, Voted to Co-Sponsor
Young Lawyers Division, October 2010, Voted to Co-Sponsor
General Practice, Solo, and Small Firm Division, October 2010, Voted to Co-Sponsor

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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EXECUTIVE SUMMARY

1. Summary of the Recommendation

The Standing Committee on Armed Forces Law urges the ABA to pass a resolution urging states and territories to adopt the Model State Code of Military Justice and the Model Manual for Courts-Martial to provide an updated body of law for military forces not subject to the Uniform Code of Military Justice when military forces are serving under the exclusive jurisdiction of Chapter 47 of Title 10, United States Code.

2. Summary of the Issue that the Resolution Addresses

National Guard may serve either in State or in Federal status. When in Federal status, they are subject to the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial applies. When in State status, they are subject to discipline at the hand of the State Chief Executive (Governor), and there is not a consistent or uniform code in place. What results from 50 States and 4 Territories is a patchwork of laws and rules with few effective disciplinary tools and limited means to enforce military orders.

Two examples are provided to further explain the need for uniformity.

a. While performing security duties during the Southwest Border missions, a National Guard airman in Title 32 status is accused of committing a violent offense against another military member. The local district attorney, facing scarce resources, declines to prosecute under the assumption that the military could court-martial the airman. If the airman was from a State which had adopted the Model Code of Military Justice, the airman could be prosecuted for the offense and if convicted, he could be incarcerated. Conversely, if the airman was from a State that had not adopted the Model Code of Military Justice, he could be reduced in rank, administratively separated, but would not face a felony conviction or incarceration for his crime.

b. A National Guard airman in Title 32 status works side-by-side with an active duty (Title 10) airman and both refuse to follow a lawful order. The active duty airman could be court-martialed for his insolence whereas the National Guard airman could not be court-martialed if he was from a State that had not adopted the Model Code of Military Justice. At most he would face a reduction in rank or an administrative separation but not a court-martial. The disparate treatment and the failure to properly hold the Title 32 airman accountable serves to undermine good order, discipline, and morale within the unit.

3. Please Explain How the Proposed Policy Position will Address the Issue

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A Model State Code of Military Justice would provide more effective disciplinary tools for commanders and make more consistent the application of such discipline from one state to another. Such uniformity thereby facilitates Total Force Integration and inter-operability, and it prepares State National Guard members for Federal Title 10 duty, where the UCMJ applies.

4. Summary of Minority Views

Some concerns over States' rights have been expressed, suggesting there may be reluctance by some to accept a more "federal" military code. Otherwise, there are no minority or dissenting views of the members of the Standing Committee on Armed Forces Law.

MODEL STATE CODE OF MILITARY JUSTICE
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MODEL STATE CODE OF MILITARY JUSTICE

PART I. GENERAL PROVISIONS

Article 1. Definitions; gender neutrality

(a) In this Act, unless the context otherwise requires:

(1) The term “accuser” means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused.

(2) The term “cadet,” “candidate,” or “midshipman” means a person who is enrolled in or attending a state military academy, a regional training institute, or any other formal education program for the purpose of becoming a commissioned officer in the state military forces.

(3) The term “classified information” means —

(A) any information or material that has been determined by an official of the United States or any state pursuant to law, an Executive order, or regulation to require protection against unauthorized disclosure for reasons of national or state security, and

(B) any restricted data, as defined in section 11(y) of the Atomic Energy Act of 1954 (42 U.S.C. § 2014(y)).

(4) The term “code” means this Act.

(5) The term “commanding officer” includes only commissioned officers of the state military forces and shall include officers in charge only when administering nonjudicial punishment under article 15 of this code. The term ‘commander’ has the same meaning as ‘commanding officer’ unless the context otherwise requires.

(6) The term “convening authority” includes, in addition to the person who convened the court, a commissioned officer commanding for the time being or a successor in command to the convening authority.

(7) The term “day” means calendar day and is not synonymous with the term “unit training assembly.” Any punishment authorized by this article which is measured in terms of days shall, when served in a status other than annual field training, be construed to mean succeeding duty days.

(8) The term “duty status other than state active duty” means any other type of duty not in federal service and not full-time duty in the active service of the state; under an order issued by authority of law and includes travel to and from such duty.

(9) The term “enlisted member” means a person in an enlisted grade.

(10) The term “judge advocate” means a commissioned officer of the organized state military forces who is a member in good standing of the bar of the highest court of a State, and is

(A) certified or designated as a judge advocate in the Judge Advocate General’s Corps of the Army, Air Force, Navy, or the Marine Corps or designated as a law specialist as an

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officer of the Coast Guard, or a reserve component of one of these,; or

(B) certified as an non-federally recognized judge advocate, under regulations promulgated pursuant to this provision, by the senior judge advocate of the commander of the force in the state military forces of which the accused is a member, as competent to perform such military justice duties required by this Code. If there is no such judge advocate available, then such certification may be made by such senior judge advocate of the commander of another force in the state military forces, as the convening authority directs.

(11) The term “may” is used in a permissive sense. The phrase “no person may . . .” means that no person is required, authorized, or permitted to do the act prescribed.

(12) The term “military court” means a court-martial or a court of inquiry.

(13) The term “military judge” means an official of a general or special court-martial detailed in accordance with article 26 of this code.

(14) The term “military offenses” means those offenses prescribed under articles 77 (Principals), 78 (Accessory after the fact), 80 (Attempts), 81 (Conspiracy), 82 (Solicitation), 83 (Fraudulent enlistment, appointment, or separation), 84 (Unlawful enlistment, appointment, or separation), 85 (Desertion), 86 (Absence without leave), 87 (Missing movement), 88 (Contempt toward officials), 89 (Disrespect towards superior commissioned officer), 90 (Assaulting or willfully disobeying superior commissioned officer), 91 (Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer), 92 (Failure to obey order or regulation), 93 (Cruelty and maltreatment), 94 (Mutiny or sedition), 95 (Resistance, flight, breach of arrest, and escape), 96 (Releasing prisoner without proper authority), 97 (Unlawful detention), 98 (Noncompliance with procedural rules), 99 (Misbehavior before the enemy), 100 (Subordinate compelling surrender), 101 (Improper use of countersign), 102 (Forcing a safeguard), 103 (Captured or abandoned property), 104 (Aiding the enemy), 105 (Misconduct as prisoner), 107 (False official statements), 108 (Military property — Loss, damage, destruction, or wrongful disposition), 109 (Property other than military property — Waste, spoilage, or destruction), 110 (Improper hazarding of vessel), 112 (Drunk on duty), 112a. (Wrongful use, possession, etc., of controlled substances), 113 (Misbehavior of sentinel), 114 (Dueling), 115 (Malingering), 116 (Riot or breach of peace), 117 (Provoking speeches or gestures), 132 (Frauds against the government), 133 (Conduct unbecoming an officer and a gentleman), and 134 (General article) of this code.

(15) The term “national security” means the national defense and foreign relations of the United States.

(16) The term “officer” means a commissioned or warrant officer.

(17) The term “officer in charge” means a member of the naval militia, the Navy, the Marine Corps, or the Coast Guard designated as such by appropriate authority.

(18) The term “record,” when used in connection with the proceedings of a court-martial, means —

(A) an official written transcript, written summary, or other writing relating to the proceedings; or

(B) an official audiotape, videotape, digital image or file, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.

(19) “Shall” is used in an imperative sense.

(20) “State” means one of the several states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands.

(21) “State active duty” means full-time duty in the state military forces under an order of the Governor or otherwise issued by authority of law, and paid by state funds, and includes travel to and from such duty.

(22) “Senior force judge advocate” means the senior judge advocate of the commander of the same force of the state military forces as the accused and who is that commander’s chief legal advisor.

(23) “State military forces” means the National Guard of the State, as defined in title 32, United States Code, the organized Naval Militia of the State, and any other military force organized under the Constitution and laws of the State, (not to/to include the unorganized militia [the state defense force/state guard/home guard _____]) when not in a status subjecting them to exclusive jurisdiction under chapter 47 of title 10, United States Code. The unorganized militia, state defense force, state national guard, home guard or any other name of any state force that does not meet this definition (nevertheless shall) (shall not be) part of the “state military forces” under this Code.

(24) The term “superior commissioned officer” means a commissioned officer superior in rank or command.

(25) “Senior force commander” means the commander of the same force of the state military forces as the accused.

(b) The use of the masculine gender throughout this code shall also include the feminine gender.

Annotation to Article I

The definitions were updated and condensed. Some deletions were made because terms were better defined in state statutes or regulations or in active duty military regulations. The continued validity of certain definitions in the rapidly changing world of military doctrine and the evolving state of military culture and environment was a primary reason for the deletion of terms once commonly used.

(1, 5, 9, 13, 16, 17, & 24) The terms “accuser,” “commanding officer,” “enlisted member,” “military judge,” “officer,” “officer in charge,” and “superior commissioned officer” were adopted as defined by the UCMJ with clarifying language added. Specifically, the term “commanding officer” includes only commissioned officers of the state military forces, thus ensuring that officers exclusively in a title 10 status and without state authority cannot convene a state court. (2) “Cadet,” “candidate,” and “midshipman.” These terms include the concept of distinguished designation of officer candidates pursuant to 10 U.S.C. § 12209. Article 1(6) and (7) of the UCMJ were combined to ensure the “cadet” term also included any state candidates in state commissioning processes or attending state academies of like nature. “Midshipman” was included since “Naval Militia” was included in the term “state military forces.” Additionally, the drafters discussed whether the term midshipman should be an option for state inclusion. It is recommended that such term be included. See the comments contained in the annotation on the Naval Militia for a more complete discussion. The inclusion of the term does not affect any other part of the Model Code, but failure to include it could affect the Model Code in the future should a state activate a naval militia. It also allows for those situations wherein a midshipman assigned to another state military force is attached to a unit within the state.

(3) “Classified information.” The definition was broadened by insertion of the phrase “or any state” to allow for the classification of information not only by persons in the state military forces while not in federal service but also by any state official. An example would include the State Emergency Management Agency (SEMA) and other state agencies that may classify certain information as a matter of course.

(10) “Judge advocate.” The drafters combined subsections 11, 12, and 13 of article 1 of the UCMJ into the term “judge advocate.” Even though the Coast Guard duty position of ‘law specialist’ does not require TJAG certification and does not specifically correspond by function to the national guard, the term was included to cover the situations where, by request of an accused, or by virtue of expanding homeland security and defense missions in the states, Coast Guard law specialists perform military justice duties under this Code. Exclusion of this term, on balance, is outweighed by the potential for its use. Any ‘judge advocate’ can, regardless of legal duty title or position, or being designated a ‘staff’ judge advocate, perform the military justice duties required by this Code. Thus the preface ‘staff’ to ‘judge advocate’ was eliminated as a criterion. The term ‘Law Officer’ pre-dates the 1968 Military Justice Act, which predominantly replaced that term with ‘military judge.’ ‘Certification’ of a judge advocate by a service TJAG is primarily an active component term. ‘Designation’ of a judge advocate by a service TJAG is primarily a reserve component term. Since only active duty judge advocates can be ‘certified,’ the distinction between ‘certification’ and ‘designation’ has no effect on competency to perform military justice duties under this Code, the normal though not necessarily exclusive performance of which under this Code will be in non-federal duty status. The first qualifying criteria to be a judge advocate thus includes those judge advocates in the active component, activated reserves or activated national guard who have been ‘certified,’ as well as those members of the national guard or reserves who have been ‘designated’ as a judge advocate (i.e. federally recognized) by a service TJAG. Because a commissioned officer member in good standing of the bar of the highest court of a State may not be certified or designated as a judge advocate by a service TJAG, but may be needed or requested to perform military justice duties under this Code, a second qualifying alternative is provided to determine competency to perform those duties. An example of such a non-federally recognized ‘judge advocate’ would be a civilian prosecutor newly commissioned with no prior military judge advocate experience, but who has been practicing for 10 years. An example of a person who would not be eligible to perform military justice duties under this Code would be an enlisted member of the state military forces who was an attorney and a civilian prosecutor practicing for 10 years, because being a commissioned officer is a pre-requisite to being a ‘judge advocate.’ Certification is best left first to the accused’s force’s senior judge advocate assigned to the force commander and who supervises the administration of military justice in that force, and if none, then to another force’s similarly assigned, senior judge advocate as determined by the convening authority. This is because there is more likely at least one force judge advocate in each state rather than a ‘state judge advocate,’ and military justice is administered by a force in a state rather than by state for all forces in that state, similar to the separate active duty service TJAGs. If a state includes such entities as the ‘state defense force,’ ‘state guard,’ ‘home guard’ or similar entities in its definition of ‘state military forces,’ an attorney – officer of such organization may qualify as a ‘judge advocate’ and under the second alternative, may qualify to be ‘certified’ as competent to perform military justice duties under this Code.

(14) ‘Military Offenses.’ The drafters listed as ‘Reserved’ those articles not used in this Code but derived from the UCMJ. Use of ‘Reserved’ permits this Code to maintain the article numbering system corresponding to the UCMJ for those articles derived from the UCMJ and used in this Code. Thus, articles not listed in the definition of ‘military offenses’ are ‘Reserved’ in this Code. Comparison with those articles marked ‘Reserved’ and the UCMJ reflects the specific intent of the drafters to avoid re-writing a state’s civilian penal statute. Offenses under such statutes are among the ‘non-military’ offenses referred to in Article 2.

(18) “Record.” The term was updated to include digital images and files.

(21) “State active duty.” This term is the statutory, regulatory, and fiscally correct terminology in the National Guard.

(23) “State military forces.” Discussions involved the uncommon usage of this term in recent decades. In today’s current military environment, the term “National Guard” generally means the Army National Guard and the Air National Guard. More detailed definitions of those components are found in titles 10 and 32, United States Code. A review of state constitutions and state statutes reveals that usage of the term “militia” is prevalent, and by statute, often divided into the “organized militia” and the “unorganized militia.” *See* 10 U.S.C. § 311. Arizona is the only state that uses the term “National Guard” in its Constitution. *See* AZ Const. art. 16, § 3. North Carolina uses the term “military force.” *See* NC Const. art. XII. West Virginia uses the term “military service.” *See* WV Const. art. III, § 12. All other state constitutions use the term “Militia.” *See* AK Const. art. I, § 1.19; AL Const. art I, § 8, art XV, § 271; AR Const. art. 11; CA Const. art. 5; CO Const. art. II, § 8; CT Const. art. I, § 8; DE Const. art. I, § 8; FL Const. art. X, § 2; GA Const. art. I, § VI, ¶ II(2); HI Const. art. I, § 10; ID Const. art. XIV § 2; IL Const. art. XII; IN Const. art. 12; IA Const. art. VI, 1; KS Const. art. 8, § 2; KY Const. pt. 2, § 221; LA Const. art. I, § 15; ME Const. art. 7, § 4; MD Const. art. IX; MA Const. art. 18; MI Const. art. III, § 4; MN Const. art. XIII, § 9; MO Const. art. III, § 46; MS Const. art. IX, § 215; MT Const. art. VI, § 13; NE Const. art. XIII, § 1; NV Const. art. 12, § 1; NH Const. art. 16; NJ Const. art. V, § 3(1); NM Const. art. 2, § 14; NY Const. art. XII, § 1; ND Const. art. XI, § 17; OH

Const. art. 9, § 1; OK Const. art. VI, § VI-6; OR Const. art. X, § 1; PA Const. art. 1, § 10; RI Const. art. 1, § 7; SC Const. art. XIII, § 1; SD Const. art. XV, § 3; TN Const. art. VIII; TX Const. art. I, § 10; UT Const. art. XV, § 2; VT Const. ch. II, § 59; VA Const. art. I, § 13; WA Const. art. X, § 2; WI Const. art. IV, § 29; WY Const. art. XVII, § 2. The drafters discussed the adoption of the term “National Guard” in lieu of “state military forces.” Both terms contain diametrically opposing terms — “National” and “State.” Most members of the state national guard consider themselves members of the “National Guard.” The term “state military forces” may connote fringe militia groups in the mind of the public, but most state codes currently use this term. It is intended that the members of the state National Guard, not in federal service, be subject to this code. The inclusion of other state forces other than the states’ National Guard and their subjection to this Code is left to individual state determination. The term “Naval Militia” was included since it currently exists in a few states and in the current environment, defense of waterways and water sources may result in stand up of such a component in other jurisdictions. Inclusion of “Naval Militia” would make this code applicable to all additional Naval Militia units stood up in the future. In the current environment, defense of waterways and water sources may take on greater significance. The source of the term “state military forces” could not be located, statutorily or historically, but for the 1961 Uniform Commission Military Justice Act. Public Law No. 33 was an act entitled “An act to promote the efficiency of the militia and for other purposes” enacted on January 21, 1903. *See* 32 Stat. 778. Popularly known as the Dick Act of 1903 or the Dick Acts (Militia), it proved to be the first of several steps towards “federalization” of part of the militia as it made state militias and national guards the reserve component of the federal army. It named the “organized militia” the “National Guard,” a name already adopted by most states. It was originally used in 1824 when certain New York units took the title of “National Guard” to honor Lafayette on a visit to the United States because he had once commanded the National Guard of Paris in 1789. Colonel Emmons Clark, *History of the Seventh Regiment of New York* (1890). In 1908, the Militia Dick Acts was amended. *See* 35 Stat. 399, Ch. 204. The drafters’ purpose is the standardization of one term to represent the state military forces and elimination of potential confusion in the public arena and other military components.

References and Notes:

- Captain Dennis A. York, *State Codes of Military Justice* (1958), (unpublished thesis, Judge Advocate General’s School U.S. Army).
- David P. Currie, *The Constitution in Congress: The Second Congress, 1791-1793*, 90 NW. U. L. Rev. 606 (1996).
- Patrick Todd Mullins, Note, *The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War*, 57 Geo. Wash. L. Rev. 328 (1988).
- Brannon P. Denning, *Palladium of Liberty? Causes and Consequences of the Federalization of State Militias in the Twentieth Century*, 21 Okla. City U. L. Rev. 191 (1996).
- Chuck Dougherty, *The Minutemen, the National Guard and the Private Militia Movement: Will the Real Militia Please Stand Up?*, 28 J. Marshall L. Rev. 959 (1995).
- Lt. Col. Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of “In Federal Service”*, 1994 Army Law. 35 (1994).
- William S. Fields & William T. Hardy, *The Militia and the Constitution: A Legal History*, 136 Mil. L. Rev. 1 (1992).
- Alan Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919 (1988).
- Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 Wake Forest L. Rev. 1213 (1997).
- John E. Theuman, Annotation, *Review by Federal Civil Courts of Court-Martial Convictions – Modern Status*, 95 A.L.R. Fed. 472 (2002).
- 32 U.S.C. § 101 (2003).
- 32 U.S.C. §§ 326 - 327 (2003).
- 10 U.S.C. §§ 802 - 803 (2003).

The drafters attempted to use gender neutral terms throughout the Code. However, such application was particularly strained within the punitive articles; therefore, subsection (b) was inserted to accommodate those situations.

Article 2. Persons subject to this code; jurisdiction

- (a) This code applies to all members of the state military forces at all times.
- (b) Subject matter jurisdiction is established if a nexus exists between an offense, either military or non-military, and the state military force. Courts-martial have primary jurisdiction of

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military offenses as defined in article 1(a) (14) of this code. A proper civilian court has primary jurisdiction of a non-military offense when an act or omission violates both this code and local criminal law, foreign or domestic. In such a case, a court-martial may be initiated only after the civilian authority has declined to prosecute or dismissed the charge, provided jeopardy has not attached. Jurisdiction over attempted crimes, conspiracy crimes, solicitation, and accessory crimes must be determined by the underlying offense.

Annotation to Article 2

Comprehensive, inclusive language was utilized. Members of the state military forces as defined above fall under the Code at all times, 24 hours a day, 7 days a week, regardless of duty status as a result of their membership in the state military forces. Some states' military justice codes only apply while the member is in a duty status. *See, e.g.*, RSMo § 40.234 (2003). The drafters' reasoning is that a member of the state military forces is under obligation of oath, and therefore, under the jurisdiction of the state during a period of service regardless of whether they are in a duty status. *See Solorio v. United States*, 483 U.S. 435 (1987). Subject matter jurisdiction is established by nexus and can occur in the following four situations: (1) The military offenses in this code apply when members of the state military forces are in a duty status; (2) Non-military offenses may apply to state military forces in a duty status if a nexus exists between the non-military offense and the state military forces; (3) The military offenses in this code apply when members of the state military forces are in a non-duty status if a nexus exists between the military offense and the state military forces and; (4) Non-military offenses may apply to state military forces in a non-duty status if a nexus exists between the non-military offense and the state military forces. Those non-military offenses with the established nexus may be prosecuted under Articles 133 (for officers) and 134 (for all members). Moreover, non-military offenses may apply to state military forces in a non-duty status if a nexus exists between the civilian offense and the state military forces.

Article 3. Jurisdiction to try certain personnel

(a) Each person discharged from the state military forces who is later charged with having fraudulently obtained a discharge is, subject to article 43 of this code, subject to trial by court-martial on that charge and is, after apprehension, subject to this code while in custody under the direction of the state military forces for that trial. Upon conviction of that charge that person is subject to trial by court-martial for all offenses under this code committed before the fraudulent discharge.

(b) No person who has deserted from the state military forces may be relieved from amenability to the jurisdiction of this code by virtue of a separation from any later period of service.

Annotation to Article 3

This article was adopted from the UCMJ, section 803, Art. 3(b) and (c) with clarifying language.

Article 4. [Reserved]

Article 5. Territorial applicability of the code

(a) This code has applicability at all times and in all places, provided that either the person subject to the code is in a duty status or, if not in a duty status, that there is a nexus between the act or omission constituting the offense and the efficient functioning of the state military forces; however, this grant of military jurisdiction shall neither preclude nor limit civilian jurisdiction over an offense, which is limited only by the prohibition of double jeopardy.

(b) Courts-martial and courts of inquiry may be convened and held in units of the state military forces while those units are serving outside the State with the same jurisdiction and powers as to

persons subject to this code as if the proceedings were held inside the State, and offenses committed outside the State may be tried and punished either inside or outside the State.

Annotation to Article 5

Discussion arose on the extent of the applicability of the Code within other states. The drafters recommend that application of this Code be as far-reaching as possible. Here, military jurisdiction is based on the person and the offense, not the location. Each state is authorized to prosecute the offenses of the members of its state military forces wherever committed within the United States, thus maximizing the code's portability. In absence of agreement or regulation, each state shall prosecute its own members wherever in the United States the offenses were committed.

Article 6. Judge Advocates

- (a) The senior force judge advocates in each of the state's military forces or that judge advocate's delegates shall make frequent inspections in the field in supervision of the administration of military justice in that force.
- (b) Convening authorities shall at all times communicate directly with their judge advocates in matters relating to the administration of military justice. The judge advocate of any command is entitled to communicate directly with the judge advocate of a superior or subordinate command, or with the State Judge Advocate.
- (c) No person who has acted as member, military judge, trial counsel, defense counsel, or investigating officer, or who has been a witness, in any case may later act as a judge advocate to any reviewing authority upon the same case.

Annotation to Article 6

This article was modified to reflect the fact that although a staff judge advocate's position is different among the services, this Code does not differentiate. The functions of the position described can be performed by any qualified judge advocate in any branch within the state; the title is not determinative of the function. The senior force Judge Advocate must be a member in good standing of the bar of the state's highest court (unlike a judge advocate pursuant to Article 1(10), who is not required to be licensed in the state wherein membership is held in the state military forces) and must be a member of the state military forces. Waiver of the state bar requirement for the senior force Judge Advocate was considered by the drafters but rejected, because state licensing will lend credibility to those positions and may well be required for facilitating and processing state prosecution of offenses

Article 6a. [Reserved]

Annotation to Article 6a

The article was entitled "Investigation and disposition of matters pertaining to the fitness of military judges." The drafters recognized that there is sufficient regulatory and statutory law regarding judicial conduct and qualifications. The state bar or organization involved in the state judiciary selection process will preside over any issues regarding suitability to serve as a judge in the state's military court. The state should address any state-specific judicial qualifications that may conflict with the military judge qualifications under this Code. The state also may consider creating a military judge position within the state with its own required qualifications and appointment procedures so as to incorporate established state requirements for judicial appointment.

PART II. APPREHENSION AND RESTRAINT

Article 7. Apprehension

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

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- (b) Any person authorized by this code or by chapter 47 of title 10, United States Code, or by regulations issued under either, to apprehend persons subject to this code, any marshal of a court-martial appointed pursuant to the provisions of this code, and any peace officer or civil officer having authority to apprehend offenders under the laws of the United States or of a State, may do so upon probable cause that an offense has been committed and that the person apprehended committed it.
- (c) Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays, and disorders among persons subject to this code and to apprehend persons subject to this code who take part therein.
- (d) If an offender is apprehended outside the State, the offender's return to the area must be in accordance with normal extradition procedures or by reciprocal agreement.
- (e) No person authorized by this article to apprehend persons subject to this code or the place where such offender is confined, restrained, held, or otherwise housed may require payment of any fee or charge for so receiving, apprehending, confining, restraining, holding, or otherwise housing a person except as otherwise provided by law.

Annotation to Article 7

This article was adopted from the UCMJ, section 807, Art. 7, with clarifying language. Because the civilian criminal justice system uses the term "probable cause," the drafters changed the term "reasonable belief" to "probable cause" to reflect the current standard usage and maintain consistency within the Code.

Article 8. [Reserved]

Annotation to Article 8

The last sentence of Article 8 of the UCMJ was added as subsection (d) of Article 7, and the specific reference to the offense of "desertion" was deleted because no practical utilization could be discerned by singling out that offense from any of the other offenses that require apprehension. The use of the term "summarily" could not be distinguished.

Article 9. Imposition of restraint

- (a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.
- (b) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this code. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of the commanding officer's command or subject to the commanding officer's authority into arrest or confinement.
- (c) A commissioned officer, a warrant officer, or a civilian subject to this code or to trial there under may be ordered into arrest or confinement only by a commanding officer to whose authority the person is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.
- (d) No person may be ordered into arrest or confinement except for probable cause.

(e) This article does not limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

Annotation to Article 9

This article was adopted from Section 809, Art. 9 UCMJ with no substantive changes.

Article 10. Restraint of persons charged with offenses

Any person subject to this code charged with an offense under this code may be ordered into arrest or confinement, as circumstances may require. When any person subject to this code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform the person of the specific wrong of which the person is accused and diligent steps shall be taken to try the person or to dismiss the charges and release the person.

Annotation to Article 10

This article was adopted from Section 810, Art. 10, UCMJ with clarifying language. Specifically, the term “shall” was changed to “may” because there is no mandate for an order of arrest or confinement of those charged with offenses. This also affords flexibility to not arrest or confine those charged with offenses normally tried by a summary court. The reference to summary court-martial was eliminated because the guidance need not be statutory. The term “immediate” was changed to “diligent” in order to eliminate any interpretation that the term “immediate steps” serve as a modifier to the trial or dismissal and release provisions of the article. This ensures the language was consistent and in accord with the speedy trial rules and other guidance in this Code. It was considered that some interpretations might conclude that “immediate” means “immediate” in the sense of exigency at any cost and not within the term of days prescribed by speedy trial or Article 43 of this Code.

Article 11. Place of Confinement; Reports and receiving of prisoners

(a) If a person subject to this code is confined before, during, or after trial, confinement shall be in a civilian or military confinement facility.

(b) No person authorized to receive prisoners pursuant to subsection (a) may refuse to receive or keep any prisoner committed to the person’s charge by a commissioned officer of the state military forces, when the committing officer furnishes a statement, signed by such officer, of the offense charged against the prisoner, unless otherwise authorized by law.

(c) Every person authorized to receive prisoners pursuant to subsection (a) to whose charge a prisoner is committed shall, within twenty-four (24) hours after that commitment or as soon as the person is relieved from guard, report to the commanding officer of the prisoner the name of the prisoner, the offense charged against the prisoner, and the name of the person who ordered or authorized the commitment.

Annotation to Article 11

This article is taken from section 811, Art. 11, UCMJ. This article defines confinement locations to reflect current terminology and include any federal or state confinement facility. Discussion of the place of confinement eliminated the term “guard house” because such use historically relates to the place or the length of detention. The revised definition eliminates the need to include a long list of names of confinement facilities. The language “unless authorized by law” was added to subsection (b) to ensure that supremacy clause issues do not arise. The Model Code recognizes that a federal military confinement facility may not be able to confine a member because of law and this phrase allows for refusal based on law. See also article 58.

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Article 12. Confinement with enemy prisoners prohibited

No member of the state military forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.

Annotation to Article 12

This article was adopted from section 812, Art. 12, UCMJ. The state should review its constitution and statutes to determine who is an “enemy” of the state. With the probable National Guard role in Homeland Defense in mind, an “enemy” of the state may include a person within the borders of the United States who intends to inflict damage or harm to the United States or its citizens. The drafters recommend that the state be cognizant of the real possibility that any enemy of the United States will also be an enemy of the individual state. *See* Articles 99, 100, 104, and 105. For clarity, language was added in the remaining subsections dealing with reports of prisoners. The term “foreign national” was adopted and included to recognize those situations where legal or illegal aliens or immigrants may be confined within the same facility as a member. Although a prisoner may not be a formally designated enemy combatant, such a prisoner may be a terrorist and considered an enemy. Members of state military forces are due protection and segregation from any of these persons. Hence, the member cannot be placed in immediate physical association with either an enemy or foreign national. Compliance with the term “immediate association” should not involve punitive measures such as solitary confinement. Common sense should be used in these situations to support the interest of protection of the state military forces member.

Article 13. Punishment prohibited before trial

No person, while being held for trial or awaiting a verdict, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against the person, nor shall the arrest or confinement imposed upon such person be any more rigorous than the circumstances required to insure the person’s presence, but the person may be subjected to minor punishment during that period for infractions of discipline.

Annotation to Article 13

This article was adopted from section 813, Art. 13 of the UCMJ with clarifying language.

Article 14. Delivery of offenders to civil authorities

(a) A person subject to this code accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial or confinement.

(b) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for the offense shall, upon the request of competent military authority, be returned to the place of original custody for the completion of the person’s sentence.

Annotation to Article 14

This article was adopted from the UCMJ with clarifying language. Issues surrounding funding arose with regard to apprehension. Numerous situations were identified and discussed as problematic but beyond the scope of this project. States have specific methods of funding confinement, necessitating review in conjunction with this Code. The situation involving states sharing facilities with federal military facilities as well as federal civilian facilities requires additional legal review and coordination with respective entities.

PART III. NON-JUDICIAL PUNISHMENT

Article 15. Commanding officer's non-judicial punishment

(a) Under such regulations as prescribed, any commanding officer (and for purposes of this article, officers-in-charge) may impose disciplinary punishments for minor offenses without the intervention of a court-martial pursuant to this article. The Governor, The Adjutant General, or an officer of a general or flag rank in command may delegate the powers under this article to a principal assistant who is a member of the state military forces.

(b) Any commanding officer may impose upon enlisted members of the officer's command —

- (1) an admonition;
- (2) a reprimand;
- (3) the withholding of privileges for not more than six (6) months which need not be consecutive;
- (4) the forfeiture of pay of not more than seven (7) days' pay;
- (5) a fine of not more than seven (7) days' pay;
- (6) a reduction to the next inferior pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction;
- (7) extra duties, including fatigue or other duties, for not more than fourteen (14) days, which need not be consecutive; and
- (8) restriction to certain specified limits, with or without suspension from duty, for not more than fourteen (14) days, which need not be consecutive.

(c) Any commanding officer of the grade of major or lieutenant commander, or above may impose upon enlisted members of the officer's command —

- (1) any punishment authorized in subsections (b)(1), (2), and (3);
- (2) the forfeiture of not more than one-half (1/2) of one (1) month's pay per month for two (2) months;
- (3) a fine of not more than one (1) month's pay;
- (4) a reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two (2) pay grades;
- (5) extra duties, including fatigue or other duties, for not more than forty-five (45) days which need not be consecutive; and
- (6) restriction to certain specified limits, with or without suspension from duty, for not more than sixty (60) days which need not be consecutive.

(d) The Governor, The Adjutant General, an officer exercising general court-martial convening authority, or an officer of a general or flag rank in command may impose —

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- (1) upon officers of the officer's command —
 - (A) any punishment authorized in subsections (c)(1), (2), (3), and (6); and
 - (B) arrest in quarters for not more than thirty (30) days which need not be consecutive.
 - (2) upon enlisted members of the officer's command —
 - (A) any punishment authorized in subsection (c).
- (e) Whenever any of those punishments are combined to run consecutively, the total length of the combined punishment cannot exceed the authorized duration of the longest punishment in the combination, and there must be an apportionment of punishments so that no single punishment in the combination exceeds its authorized length under this article..
- (f) Prior to the offer of non-judicial punishment, the commanding officer shall determine whether arrest in quarters or restriction shall be considered as punishments. Should the commanding officer determine that the punishment options may include arrest in quarters or restriction, the accused shall be notified of the right to demand trial by court-martial. Should the commanding officer determine that the punishment options will not include arrest in quarters or restriction, the accused shall be notified that there is no right to trial by courts-martial in lieu of non-judicial punishment
- (g) The officer who imposes the punishment, or the successor in command, may, at any time, suspend, set aside, mitigate, or remit any part or amount of the punishment and restore all rights, privileges, and property affected. The officer also may —
- (1) mitigate reduction in grade to forfeiture of pay;
 - (2) mitigate arrest in quarters to restriction; or
 - (3) mitigate extra duties to restriction.

The mitigated punishment shall not be for a greater period than the punishment mitigated. When mitigating reduction in grade to forfeiture of pay, the amount of the forfeiture shall not be greater than the amount that could have been imposed initially under this article by the officer who imposed the punishment mitigated.

(h) A person punished under this article who considers the punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority within fifteen (15) days after the punishment is either announced or sent to the accused, as the commander may determine. The appeal shall be promptly forwarded and decided, but the person punished may in the meantime be required to undergo the punishment adjudged. The superior authority may exercise the same powers with respect to the punishment imposed as may be exercised under subsection (g) by the officer who imposed the punishment. Before acting on an appeal from a punishment, the authority that is to act on the appeal may refer the case to a judge advocate for consideration and advice.

(i) The imposition and enforcement of disciplinary punishment under this article for any act or omission is not a bar to trial by court-martial or a civilian court of competent jurisdiction for a serious crime or offense growing out of the same act or omission and not properly punishable under this article; but the fact that a disciplinary punishment has been enforced may be shown by

the accused upon trial and, when so shown, it shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

(j) Whenever a punishment of forfeiture of pay is imposed under this article, the forfeiture may apply to pay accruing before, on, or after the date that punishment is imposed.

(k) Regulations may prescribe the form of records to be kept of proceedings under this article and may prescribe that certain categories of those proceedings shall be in writing.

Annotation to Article 15

This provision is derived in large part from section 815, Art. 15, UCMJ but is extensively modified to incorporate practical changes.

The punishments are adopted from the UCMJ with clarifying language that excludes correctional custody, confinement on bread and water, and detention of pay. The punishments were adjusted to correlate with rank. Most states do not maintain a “correctional custody” facility, and a detention of pay is little more than a forced savings plan. Language that restricted the imposition of a fine or forfeiture with a reduction in rank simultaneously was eliminated.

The available punishments are intended to provide commanding officers maximum flexibility in achieving the purposes of non-judicial punishment. Unlike many existing state codes, but like the UCMJ, punishments are cumulative, meaning in appropriate cases, commanding officers, within the authority granted in the article, may impose more than one of them for an offense. Also, unlike many existing state codes, but like the UCMJ, reduction in grade may be more than one grade below the one held by the enlisted member at the time of the offense. Forfeitures and fines are based on the comparable active duty pay of the accused at the grade held at the time of the offense, except when the offense was committed while the accused was on state active duty, in which case, the forfeiture or fine is based on the amount of pay the accused was entitled to for a comparable period on state active duty.

The issue of forfeiture and fine fiscal audits was discussed. Currently any forfeiture would revert back to the federal government. Innovative methods or procedures or creative fiscal law developments that would circumvent this monetary loss to the state were beyond the scope of this project. The collection of fines is discussed in Article 142. The ability to take forfeiture from funds currently due and earned is clarified.

Punishments in terms of days or months may be either consecutive to accommodate longer duty periods or not consecutive so that the punishment may be imposed on succeeding duty days in keeping with the definition of ‘day’ in Article 1. (a) (7).

The UCMJ provides a right to demand trial by court-martial in all cases except for those embarked upon a vessel. Most state statutes codified similar language without modification. *See, e.g.,* A.R.S. § 26-1015; 20 Del. C § 163; Idaho Code § 46-1107; Iowa Code § 29B.14; K.S.A. § 48-2301; La. R. S. § 29:115; Minn. Stat. § 192A.085. Other states do not grant the accused any statutory rights. *See, e.g.,* A.C.A. §12-64-301; Fla. Stat. § 250.35; O.C.G.A. § 38-2-360; HRS § 124A21; Ind. Code Ann. § 1 0-2-5-6; KRS § 35.070; MCL § 32.1015. The discussions raised two separate rights of the accused: (1) the right to demand a court-martial when faced with possible confinement, and (2) the separate the right to counsel in a nonjudicial proceeding.

Whether an accused has a constitutional right to counsel in a proceeding under article 15 was addressed in *Middendorf v. Henry*, 425 U.S. 25; 96 S. Ct. 1281; 47 L.Ed.2d 556 (1976). *See also United States v. Booker*, 5 M.J. 238 (C.M.A. 1977); *United States v. Alsup*, 17 M.J. 166 (C.M.A. 1984). Pursuant to case law, there is no constitutional right to counsel in an Article 15 proceeding or a summary court-martial under either the 5th, 6th, or 14th amendments. The discussion to R.C.M. 1301(e) within the federal Manual for Courts-Martial expressly provides that neither the Constitution nor any statute establishes any right to counsel in summary courts-martial. Pursuant to common practice, general policy, and regulation, however, the accused is entitled to counsel in the both the Article 15 and summary court-martial proceedings in the active duty component in accordance with AFI 51-202 and AR 27-10. The codification of this right cannot be practically fulfilled by any state’s current judge advocate manpower allocation. One of the failings of state nonjudicial punishment (NJP) statutes in the past has been the right to demand court-martial, which every accused knew would likely never happen because of the time, expense, and burden of conducting a military court. This effectively did away with NJP as an option for unit commanders. Taking away the right of this NJP “turn down” and the right to demand a court-martial in lieu of NJP in most cases allows the commander to utilize the disciplinary tool of the NJP while protecting the accused and avoiding restraint of liberty issues.

The drafters created a bifurcated procedure that accommodates the accused's right to turn down NJP and demand a court-martial. Because restraints on liberty drive due process considerations, it is provided that the commander must decide, prior to an offer of NJP to the accused, if imposition of a restraint of freedom punishment shall remain a viable option in the proceedings regardless of the evidence actually produced at the NJP hearing. If restraint of freedom remains a punishment option, the accused has a right to demand trial by court-martial. If such a punishment is not retained as an option, the accused has no right to make such demand.

If a disciplinary punishment has been enforced, an accused may show this on any sentencing in a military or civilian court if the trial arises out of a serious crime or offense growing out of the same act or omission and not properly punished non-judicially. The addition of usage in a civilian court recognizes this reality among members of the state military forces.

This Code provides that any judge advocate may review NJP actions at any time within the proceeding.

Any regulations prescribed for this article are pursuant to Article 36 (The Governor or The Adjutant General Prescribe Rules) and Article 140 (Delegation by the Governor). No subordinate commander may prescribe rules unless pursuant to proper delegation in accordance with the Model Code.

PART IV. COURT-MARTIAL JURISDICTION

Article 16. Courts-martial classified

The three kinds of courts-martial in the state military forces are —

- (1) general courts-martial, consisting of —
 - (A) a military judge and not less than five (5) members; or
 - (B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;
- (2) special courts-martial, consisting of —
 - (A) a military judge and not less than three (3) members; or
 - (B) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in subsection (1) (B) so requests; and
- (3) summary courts-martial, consisting of one (1) commissioned officer.

Annotation to Article 16

The types of courts-martial were adopted from Section 816, Art. 16, CMJ with clarifying language, deleting the death penalty requirements and a special court-martial without a presiding military judge. This latter court-martial option was eliminated because it is not exercised in reality and would not result in a state criminal conviction. Every state general and special court-martial will have a military judge.

Article 17. Jurisdiction of courts-martial in general

Each component of the state military forces has court-martial jurisdiction over all members of the particular component who are subject to this code. Additionally, the Army and Air National Guard state military forces have court-martial jurisdiction over all members subject to this code.

Annotation to Article 17

This provision was derived from section 817, Art. 17 UCMJ. The drafters intended that the Army and Air National Guard have jurisdiction over their members, each other's members, any member of the Naval Militia, and any member of the State Defense Force or State Guard. The Naval Militia and the State Guard Force *only* have jurisdiction over *their members* and not the Army or Air Guard members. Section (b) of the UCMJ was deleted because the drafters acknowledge that all state military forces are under the command of the state adjutant general,

thus review by a different component of the state military forces as directed by the state adjutant general is appropriate. Obliteration of branch or department distinctions creates expediency and flexibility. In practice, the review will most likely be hedged within the respective branch of the state National Guard forces, but this article recognizes the future joint force structure.

Article 18. Jurisdiction of general courts-martial

Subject to article 17 of this code, general courts-martial have jurisdiction to try persons subject to this code for any offense made punishable by this code, and may, under such limitations as the Governor may prescribe, adjudge any punishment not forbidden by this code.

Annotation to Article 18

This court-martial was adopted from section 818, Art. 18, UCMJ with clarifying language, specifically deleting the death penalty considerations and the punishment limits. The Governor may prescribe regulations that will list the punishments applicable to the various punitive articles. See Article 56 (adopting the punishments provided in the UCMJ). Language was adopted from the UCMJ with clarifying provisions providing for flexible punishment limits that are imposed depending on the type of courts-martial.

Article 19. Jurisdiction of special courts-martial

Subject to article 17, special courts-martial have jurisdiction to try persons subject to this code for any offense made punishable by this code, and may, under such limitations as the Governor may prescribe, adjudge any punishment not forbidden by this code except dishonorable discharge, dismissal, confinement for more than one (1) year, forfeiture of pay exceeding two-thirds (2/3) pay per month, or forfeiture of pay for more than one (1) year.

Annotation to Article 19

This court-martial was adopted from Section 819, Article 19, UCMJ with clarifying language, incorporating punishment changes previously discussed in Articles 15 and 18. Hard labor without confinement was deleted as impractical and fiscally burdensome upon the state. A record, equivalent to that of general courts-martial, is required. The record of a court-martial within a state is addressed in Articles 54, 64 and 65.

Article 20. Jurisdiction of summary courts-martial

(a) Subject to article 17 of this code, summary courts-martial have jurisdiction to try persons subject to this code, except officers, cadets, candidates, and midshipmen, for any offense made punishable by this code under such limitations as the Governor may prescribe.

(b) No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if that person objects thereto. If objection to trial by summary court-martial is made by an accused, trial by special or general court-martial may be ordered, as may be appropriate. Summary courts-martial may, under such limitations as the Governor may prescribe, adjudge any punishment not forbidden by this code except dismissal, dishonorable or bad-conduct discharge, confinement for more than one (1) month, restriction to specified limits for more than two (2) months, or forfeiture of more than two-thirds (2/3) of one (1) month's pay.

Annotation to Article 20

This article was adopted from Section 820, Art. 20, UCMJ with clarifying language.

Article 21. [Reserved]*Annotation to Article 21*

Section 821, Art. 21, Jurisdiction of courts-martial, UCMJ is not applicable in a state military justice code.

PART V. APPOINTMENT AND COMPOSITION OF COURTS-MARTIAL**Article 22.** Who may convene general courts-martial

(a) General courts-martial may be convened by—

- (1) The Governor, or;
- (2) The Adjutant General;
- (3) the commanding officer of a force of the state military forces; or
- (4) the commanding officer of a division or a separate brigade; or
- (5) the commanding officer of a separate wing.

(b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority and may in any case be convened by such superior authority if considered desirable by such authority.

Annotation to Article 22

This article was adopted from the Section 822, Art. 22, UCMJ with clarifying language. 32 U.S.C. section (b) (1) authorizes the President of the United States to convene state general courts-martial of National Guard members not in Federal service, and is the only federal officer so authorized. The 2002 amended version retained the authority of POTUS to convene a state court-martial in 32 U.S.C. 327 (b) (1). Cognizant that 32 U.S.C. § 327(b) (1) was retained but recognizing certain constitutional dilemmas, the drafters did not see the need to incorporate that section of Title 32 herein again. Additionally, Article 1(5) defines commanding officer as a commissioned officer of the state military forces thus ensuring that an officer serving exclusively on federal active duty and without state authority could not convene a state court-martial. The Code provides that a superior competent (i.e., convening) authority may elect to reserve the courts-martial convening authority to themselves. R.C.M. 140(a); 504(b) (1); 504(b)(2). The Model State Manual requires that such reservation be in writing. The convening authority may only be a brigade or wing commander if, in the case of a brigade, it is not part of a division in the state military forces where the brigade is located, and in the case of a wing, if the wing is part of another state's military forces, although located in a different state.

Article 23. Who may convene special courts-martial

(a) Special courts-martial may be convened by —

- (1) any person who may convene a general court-martial;
- (2) the commanding officer of a garrison, fort, post, camp, station, Air National Guard base, or naval base or station;
- (3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;
- (4) the commanding officer of a wing, group, separate squadron, or corresponding unit of the Air Force; or
- (5) the commanding officer or officer in charge of any other command when empowered by The Adjutant General.

(b) If any such officer is an accuser, the court shall be convened by superior competent authority and may in any case be convened by such superior authority if considered desirable by such authority.

Annotation to Article 23

This article was adopted from Section 823, Art. 23, UCMJ with clarifying language.

Article 24. Who may convene summary courts-martial

(a) Summary courts-martial may be convened by —

- (1) any person who may convene a general or special court-martial;
- (2) the commanding officer of a detached company or other detachment, or corresponding unit of the Army;
- (3) the commanding officer of a detached squadron or other detachment, or corresponding unit of the Air Force; or
- (4) the commanding officer or officer in charge of any other command when empowered by The Adjutant General.

(b) When only one commissioned officer is present with a command or detachment that officer shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases. Summary courts-martial may, however, be convened in any case by superior competent authority if considered desirable by such authority.

Annotation to Article 24

This article was adopted from Section 824, Art. 24, UCMJ with clarifying language. Insertion of the term “corresponding unit” provides for future currency with future military force doctrine or structural changes.

Article 25. Who may serve on courts-martial

(a) Any commissioned officer of the state military forces is eligible to serve on all courts-martial for the trial of any person subject to this code.

(b) Any warrant officer of the state military forces is eligible to serve on general and special courts-martial for the trial of any person subject to this code, other than a commissioned officer.

(c) Any enlisted member of the state military forces who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member subject to this code, but that member shall serve as a member of a court only if, before the conclusion of a session called by the military judge under article 39(a) of this code prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third (1/3) of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained. In this article, “unit” means any regularly organized body of the

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state military forces not larger than a company, a squadron, a division of the naval militia, or a body corresponding to one of them.

- (d) When it can be avoided, no person subject to this code may be tried by a court-martial any member of which is junior to the accused in rank or grade.
- (e) When convening a court-martial, the convening authority shall detail as members thereof such members of the state military forces as, in the convening authority's opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of the state military forces is eligible to serve as a member of a general or special court-martial when that member is the accuser, a witness, or has acted as investigating officer or as counsel in the same case.
- (f) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. The convening authority may delegate the authority under this subsection to a judge advocate or to any other principal assistant.

Annotation to Article 25

This article was adopted from Section 825, Art. 25, UCMJ with clarifying language. Discussion was raised over the definition of "principle assistant." It is not defined in the UCMJ. The drafters intend that this term be defined in the Manual. Although the UCMJ only excludes prosecution witnesses as court members in the same case, the drafters exclude any witness from being a court member in the same case, in fairness to all parties.

Article 25a. [Reserved]

Annotation to Article 25a

Any articles referencing the death penalty were deleted because such punishment is not available in this Code.

Article 26. Military judge of a general or special court-martial

- (a) A military judge shall be detailed to each general and special court-martial. The military judge shall preside over each open session of the court-martial to which the military judge has been detailed.
- (b) A military judge shall be —
 - (1) an active or retired commissioned officer of an organized state military force;
 - (2) a member in good standing of the bar of the highest court of a State or a member of the bar of a Federal court for at least five (5) years; and
 - (3) certified as qualified for duty as a military judge by the senior force judge advocate which is the same force as the accused.
- (c) In the instance when a military judge is not a member of the bar of the highest court of the State, the military judge shall be deemed admitted *pro hac vice*, subject to filing a certificate with the senior force judge advocate which is the same force as the accused setting forth such qualifications provided in subsection (b).
- (d) The military judge of a general or special court-martial shall be designated by the senior force judge advocate which is the same force as the accused, or a designee, for detail by the convening authority. Neither the convening authority nor any staff member of the convening authority shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to performance of duty as a military judge.

- (e) No person is eligible to act as military judge in a case if that person is the accuser or a witness, or has acted as investigating officer or a counsel in the same case.
- (f) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel nor vote with the members of the court.

Annotation to Article 26

This article was adopted from Section 826, Art. 26, UCMJ with clarifying and modifying language. The military judge must be a commissioned officer of an organized state military force. There is no requirement that a military judge be a member of the same state military force or the same branch of the convening authority or accused. The drafters recognize that a judge may have to qualify pursuant to state requirements including bar membership. The state needs to address this area if a conflict exists. The federal case law that supports a separate military justice system should support separate state military justice systems including military judges with uniquely military qualifications. An out-of-state military judge would enhance the concept of an independent judiciary. This article provides that the military judge must be a member of a state military force or a retiree of a state military force. Specifically excluded are active duty judge advocates or retirees there from or a person who is a resident of the state and is a judge of any court of record of the state or formerly held such posts. This eliminates the concern over civilian political appointments and avoids federal active duty oversight by a judge with little familiarity or experience with the National Guard culture or structure. Thus, active component officers are excluded. This gives credibility to the position while allowing a wide range of flexibility to fill the need. The minimum five (5) year requirement applies to both state bar and Federal court membership. Although the UCMJ only excludes prosecution witnesses as military judges in the same case, the drafters exclude any witness from being a military judge in the same case, in fairness to all parties.

The section on *pro hac vice* was added to provide for utilization of other state military judges and to document the qualifications of the military judge for challenge.

Article 27. Detail of trial counsel and defense counsel

(a)

(1) For each general and special court-martial the authority convening the court shall detail trial counsel, defense counsel, and such assistants as are appropriate.

(2) No person who has acted as investigating officer, military judge, witness or court member in any case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant or associate defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense nor may any person who has acted for the defense act later in the same case for the prosecution.

(b) Except as provided in subsection (c), trial counsel or defense counsel detailed for a general or special court-martial must be —

(1) a judge advocate as defined in article 1(10) of this code; and (2) in the case of trial counsel, a member in good standing of the bar of the highest court of the State where the court-martial is held.

(c) In the instance when a defense counsel is not a member of the bar of the highest court of the State, the defense counsel shall be deemed admitted *pro hac vice*, subject to filing a certificate with the military judge setting forth the qualifications that counsel is —

(1) a commissioned officer of the armed forces of the United States or a component thereof; and

(2) a member in good standing of the bar of the highest court of a state; and

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- (3) certified as a judge advocate in the Judge Advocate General's Corps of the Army, Air Force, Navy, or the Marine Corps; or
- (4) a judge advocate as defined in article 1 (10) of this Code .

Annotation to Article 27

This article is derived from Section 827, Art. 27, UCMJ. It is anticipated that before detailing trial or defense counsel or appropriate assistants, the convening authority will consult with the senior force judge advocate of the commander of the force of the state military forces who serves as that commander's chief legal advisor and who is a member of the same force as the accused. The same standards for appointment to a general or special courts-martial apply. See the annotation to Article 38 for more information on state prosecutorial authority. The detail of counsel requires the trial counsel to be a member of the state bar in order to prosecute in the name of the state. The same requirement is not necessary for defense counsel, and this Code provides for out-of-state defense counsel, including reservists and active duty judge advocates. The *pro hac vice* requirement for defense counsel should satisfy state bar practice issues.

Article 28. Detail or employment of reporters and interpreters

Under such regulations as may be prescribed, the convening authority of a general or special court-martial or court of inquiry shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that court and may detail or employ interpreters who shall interpret for the court.

Annotation of Article 28

This article was adopted from Section 828, Art. 28, UCMJ with clarifying language.

Article 29. Absent and additional members

- (a) No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.
- (b) Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below five (5) members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than the applicable minimum number of five (5) members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.
- (c) Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below three (3) members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three (3) members. The trial shall proceed with the new members present as if no evidence had been introduced previously at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the military judge, the accused, and counsel for both sides.
- (d) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of article 16(1)(B) or (2)(B) of this code, after the detail of a new military judge as if no evidence had previously been

introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new military judge, the accused, and counsel for both sides.

Annotation to Article 29

This article was derived from Section 829, Art. 29, UCMJ. In the UCMJ, subsection (b) was recently subdivided into (b) (1) and (b) (2) through Pub. L. No. 108-21 enacted on April 30, 2003. Subsection (b) (2) dealing with the death penalty is deleted and subsection (b) has not been further subdivided in this code.

PART VI. PRE-TRIAL PROCEDURE

Article 30. Charges and specifications

(a) Charges and specifications shall be signed by a person subject to this code under oath before a commissioned officer authorized by article 136(a) of this code to administer oaths and shall state —

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of the signer's knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges as soon as practicable.

Annotation to Article 30

This article was adopted from Section 830, Art. 30, UCMJ with clarifying language. The military methodology of charges and specifications is not utilized in state criminal justice systems. For purposes of uniformity, and specifically for purposes of training, the UCMJ method was adopted. The drafters raised the issue of whether to follow state criminal procedures or the UCMJ procedures for a court-martial. For the reasons discussed in the annotation to Article 26, the UCMJ procedures were adopted as applicable.

Article 31. Compulsory self-incrimination prohibited

(a) No person subject to this code may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this code may interrogate or request any statement from an accused or a person suspected of an offense without first informing that person of the nature of the accusation and advising that person that the person does not have to make any statement regarding the offense of which the person is accused or suspected and that any statement made by the person may be used as evidence against the person in a trial by court-martial.

(c) No person subject to this code may compel any person to make a statement or produce evidence before any military court if the statement or evidence is not material to the issue and may tend to degrade the person.

(d) No statement obtained from any person in violation of this article or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against the person in a trial by court-martial.

Annotation to Article 31

This article was adopted from Section 831, Art. 31, UCMJ with clarifying language. This article applies when suspicion attaches regardless of custody status. This provision exceeds any federal constitutional requirement for the rights warning when a suspect is in custody. The drafters adopt the greater protections of the Code to maintain consistency with the UCMJ.

Article 32. Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against the accused and of the right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in article 38 of this code and in regulations prescribed under that article. At that investigation, full opportunity shall be given to the accused to cross-examine witnesses against the accused, if they are available, and to present anything the accused may desire in the accused's own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after the accused is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in the accused's own behalf.

(d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense without the accused having first been charged with the offense if the accused —

- (1) is present at the investigation;
- (2) is informed of the nature of each uncharged offense investigated; and
- (3) is afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b).

(e) The requirements of this article are binding on all persons administering this code but failure to follow them does not constitute jurisdictional error.

Annotation to Article 32

This article was adopted from Section 832, Art. 32 UCMJ with clarifying language.

Article 33. Forwarding of charges

When a person is held for trial by general court-martial, the commanding officer shall within eight (8) days after the accused is ordered into arrest or confinement, if practicable, forwards the

charges, together with the investigation and allied papers, to the person exercising general court-martial jurisdiction. If that is not practicable, the commanding officer shall report in writing to that person the reasons for delay.

Annotation to Article 33

This article was adopted from Section 833, Art. 33 UCMJ with clarifying language.

Article 34. Advice of judge advocate and reference for trial

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to a judge advocate for consideration and advice. The convening authority may not refer a specification under a charge to a general court-martial for trial unless the convening authority has been advised in writing by a judge advocate that —

(1) the specification alleges an offense under this code;

(2) the specification is warranted by the evidence indicated in the report of investigation under article 32 of this code, if there is such a report; and

(3) a court-martial would have jurisdiction over the accused and the offense.

(b) The advice of the judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the judge advocate —

(1) expressing conclusions with respect to each matter set forth in subsection (a); and

(2) recommending action that the convening authority take regarding the specification.

If the specification is referred for trial, the recommendation of the judge advocate shall accompany the specification.

(c) If the charges or specifications are not correct formally or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made.

Annotation to Article 34

This article was adopted from Section 834, Art. 34, UCMJ with clarifying language. The primary change to this provision permits any judge advocate — not only the convening authority's staff judge advocate — to provide this advice. The drafters assumed that judge advocates would address any conflict of interest or ethical considerations potentially inherent in this action. The changes would permit judge advocates from other units to provide this advice if such conflicts arose or judge advocate manpower resources were an issue.

Article 35. Service of charges

The trial counsel shall serve or caused to be served upon the accused a copy of the charges. No person may, against the person's objection, be brought to trial before a general court-martial case within a period of five (5) days after the service of charges upon the accused, or in a special court-martial, within a period of three (3) days after the service of charges upon the accused.

Annotation to Article 35

This article was adopted from Section 835, Art. 35, UCMJ with clarifying language. The absence of including the 39 (a) session after 'brought to trial' although included in the UCMJ, was deemed unnecessary since under this code, Article 39 is part of the trial.

PART VII. TRIAL PROCEDURE

Article 36. Governor or The Adjutant General may prescribe rules Pretrial, trial, and post-trial procedures, including modes of proof, for courts-martial cases arising under this code, and for courts of inquiry, may be prescribed by the Governor or The Adjutant General by regulations, or as otherwise provided by law, which shall apply the principles of law and the rules of evidence generally recognized in military criminal cases in the courts of the armed forces but which may not be contrary to or inconsistent with this code.

Annotation to Article 36

This article was adopted from Section 836, Art. 36, UCMJ with clarifying language. Although the federal Manual for Courts-Martial is an Executive Order, the drafters recognized other methods of state manual implementation. State administrative procedure acts may apply to the Governor's "regulation." Governors can also act pursuant to an Executive Order and an adjutant general can issue regulations as an inherent function of command authority. For purposes of uniformity in state military court proceedings, the drafters chose to have states adopt the federal Military Rules of Evidence in lieu of the states' respective evidence rules. This decision ensures that defense counsel and military judges from other states and trial counsel from the home state operate under the same set of evidentiary rules.

Article 37. Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, or officer serving on the staff thereof, may censure, reprimand, or admonish the court or any member, the military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court or with respect to any other exercise of its or their functions in the conduct of the proceedings. No person subject to this code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or court of inquiry or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to their judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial or (2) to statements and instructions given in open court by the military judge, summary court-martial officer, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the state military forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the state military forces, or in determining whether a member of the state military forces should be retained on active status, no person subject to this code may, in preparing any such report, (1) consider or evaluate the performance of duty of any such member as a member of a court-martial or witness therein or (2) give a less favorable rating or evaluation of any counsel of the accused because of zealous representation before a court-martial.

Annotation to Article 37

This article was adopted from section 837, Art. 37, UCMJ with clarifying language. Prohibitions against retaliation against court members, military judges and counsel in (a) were extended to staff officers of the commanding officer

or convening authority which are beyond that provided in the UCMJ. The drafters extended this protection in (b) to witnesses of a court-martial.

Article 38. Duties of trial counsel and defense counsel

(a) The trial counsel of a general or special court-martial shall be a member in good standing of the State bar and shall prosecute in the name of the State (Commonwealth/People), and shall, under the direction of the court, prepare the record of the proceedings.

(b)

(1) The accused has the right to be represented in defense before a general or special court-martial or at an investigation under article 32 of this code as provided in this subsection.

(2) The accused may be represented by civilian counsel at the provision and expense of the accused.

(3) The accused may be represented —

(A) by military counsel detailed under article 27 of this code; or

(B) by military counsel of the accused's own selection if that counsel is reasonably available as determined under paragraph (7).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under article 27 of this code to detail counsel, in that person's sole discretion —

(A) may detail additional military counsel as assistant defense counsel; and

(B) if the accused is represented by military counsel of the accused's own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The senior force judge advocate of the same force of which the accused is a member, shall determine whether the military counsel selected by an accused is reasonably available.

(c) In any court-martial proceeding resulting in a conviction, the defense counsel —

(1) may forward for attachment to the record of proceedings a brief of such matters as counsel determines should be considered in behalf of the accused on review, including any objection to the contents of the record which counsel considers appropriate;

(2) may assist the accused in the submission of any matter under article 60 of this code; and

(3) may take other action authorized by this code.

Annotation to Article 38

This article was adopted from Section 838, Art. 38, UCMJ with clarifying language. Section (a) expands the language of “state” to include “people” and “commonwealth” as deference to those sovereignties so called. Discussion arose regarding the issue of what state authority allowed judge advocates to prosecute. The drafters concluded that coordination with the state’s attorney general would be essential to ensure that judge advocates can prosecute with the cooperation and acknowledgement of the civilian state prosecutors. Those states that adopted the Uniform Commission Military Justice Act of 1961 adopted language from this article that reads: “The trial counsel . . . shall prosecute in the name of the state.” The drafters contemplated whether this would be sufficient authority to support a court-martial conviction as a state conviction. Most state statutes addressing attorney general and state attorney appointments require that the attorney be a member of that state bar. Pursuant to Article 27, trial counsel must be a member of the state bar. Subsection (b) (7) substituted senior force judge advocate of the same force of which the accused is a member or the Secretary as the authority to determine military counsel availability. Language dealing with limitations on availability was deleted as superfluous and more appropriately found in existing regulations. Unlike the UCMJ, Subsection (b) (7) in the Code leaves to the specified judge advocate to determine ‘reasonable availability’ rather than providing for regulations.

Article 39. Sessions

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject article 35 of this code, call the court into session without the presence of the members for the purpose of —

- (1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;
- (2) hearing and ruling upon any matter which may be ruled upon by the military judge under this code, whether or not the matter is appropriate for later consideration or decision by the members of the court;
- (3) holding the arraignment and receiving the pleas of the accused; and
- (4) performing any other procedural function which does not require the presence of the members of the court under this code.

These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of court members and without regard to Article 29.

(b) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and the military judge.

Annotation to Article 39

This article was adopted from section 839, Art. 39, UCMJ with clarifying language.

Article 40. Continuances

The military judge of a court-martial or a summary court-martial may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

Annotation to Article 40

This article was adopted from Section 840, Art. 40, UCMJ without change.

Article 41. Challenges

(a)

(1) The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge or the court shall determine the relevancy and validity of challenges for cause and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(2) If exercise of a challenge for cause reduces the court below the minimum number of members required by article 16 of this code, all parties shall, notwithstanding article 29 of this code, either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court. However, peremptory challenges shall not be exercised at that time.

(b)

(1) Each accused and the trial counsel are entitled initially to one (1) peremptory challenge of members of the court. The military judge may not be challenged except for cause.

(2) If exercise of a peremptory challenge reduces the court below the minimum number of members required by article 16 of this code, the parties shall, notwithstanding article 29 of this code, either exercise or waive any remaining peremptory challenge, not previously waived, against the remaining members of the court before additional members are detailed to the court.

(3) Whenever additional members are detailed to the court, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one (1) peremptory challenge against members not previously subject to peremptory challenge.

Annotation to Article 41

This article was adopted from Section 841, Art. 41, UCMJ with clarifying language. The state should determine whether the number of peremptory challenges allowed by this article conflicts with state procedural law.

Subsections (a)(2) and (b)(2) reference the minimum number of members necessary to conduct courts-martial (five for a general court-martial and three for a special court-martial). This may conflict with the state law mandating a minimum number of jury member votes necessary for a state criminal conviction. *See* annotation to Article 52.

Article 42. Oaths or Affirmations

(a) Before performing their respective duties, military judges, general and special courts-martial members, trial counsel, defense counsel, reporters, and interpreters shall take an oath or affirmation in the presence of the accused to perform their duties faithfully. The form of the oath or affirmation, the time and place of the taking thereof, the manner of recording the same, and whether the oath or affirmation shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulation or as provided by law. These regulations may provide that an oath or affirmation to perform faithfully the duties as a military judge, trial counsel, or defense counsel may be taken at any time by any judge advocate or other person certified or designated to be qualified or competent for the duty, and if such an oath or affirmation is taken, it need not again be taken at the time the judge advocate or other person is detailed to that duty.

(b) Each witness before a court-martial shall be examined under oath or affirmation.

Annotation to Article 42

This article was adopted in large part from Section 842, Art. 42, UCMJ. The drafters recognize that some states allow an “affirmation” that does not invoke religion, and additional language was added to accommodate those oaths. The drafters added “in the presence of the accused” recognizing that the UCMJ and the Constitution does not require this. Rather, this practice is based on common law.

Article 43. Statute of limitations

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

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

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

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

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

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

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

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

(e)

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

(A) has expired; or will be met.

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

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

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

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

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

Annotation to Article 43

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

Article 44. Former jeopardy

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

Annotation to Article 44

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

Article 45. Pleas of the accused

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

Annotation to Article 45

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

Article 46. Opportunity to obtain witnesses and other evidence

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

Annotation to Article 46

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

Article 47. Refusal to appear or testify

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

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

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

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

Annotation to Article 47

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

Authorizing military courts to punish violations the same as civilian courts in the state eliminates the need to cede jurisdiction to civilian prosecutors and courts as provided in (b) and (c) of the UCMJ. All persons not subject to the Code may be charged under the state laws for failure to appear or testify. The authorization of military courts to

punish violations as could a civilian court of the state under state law provides jurisdiction to the military court to punish persons not subject to the code, but under state civilian law, which the Code incorporates by reference here. This is a valid exercise of jurisdiction to the military court when the Code is enacted into law by the State. The maximum fines and the sentencing for those absent military witnesses were adopted from the UCMJ with clarifying language for the sake of uniformity. All other witnesses not subject to the Code may be charged under the state laws for failure to appear or testify.

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

Article 48. Contempts

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

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

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

Annotation to Article 48

Those persons subject to the Code may be punished for contempt as defined by this Code. Either the military judge or the summary court-martial authority has the authority to punish for contempt. This differs from Section 848, Art. 48, UCMJ which states that a court-martial has the authority to punish for contempt. The State Model Code does not allow the president or panel members to punish for contempt. This is congruent with civilian criminal procedures wherein the judge, not the jury, punishes for contempt. Those persons not subject to the Code are subject to the state statutes on contempt.

Article 49. Depositions

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

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

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

(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, digital image or file, or similar material, may be played in evidence before any military court, if it appears —

(1) that the witness resides or is beyond the State in which the court is ordered to sit, or beyond one hundred (100) miles from the place of trial or hearing Section 848, Art. 48;

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(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, non amenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.

Annotation to Article 49

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

Article 50. Admissibility of records of courts of inquiry

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

(b) Such testimony may be read in evidence only by the defense in cases extending to the dismissal of a commissioned officer.

(c) Such testimony may also be read in evidence before a court of inquiry.

Annotation to Article 50

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

Article 50a. Defense of lack of mental responsibility

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

(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

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

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of lack of mental responsibility.

(d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only or a summary court-martial officer,

whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge or summary court-martial officer shall find the accused —

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

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

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

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

Annotation to Article 50a

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

Article 51. Voting and rulings

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

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

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

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

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

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

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

(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact

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arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition, on request, find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Annotation to Article 51

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

Article 52. Number of votes required

- (a) No person may be convicted of an offense except as provided in article 45(b) of this code or by the concurrence of two-thirds (2/3) of the members present at the time the vote is taken.
- (b) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

Annotation to Article 52

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

Article 53. Court to announce action

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

Annotation to Article 53

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

Article 54. Record of trial

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

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

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

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

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

Annotation to Article 54

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

PART VIII. SENTENCES

Article 55. Cruel and unusual punishments prohibited

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

Annotation to Article 55

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

Article 56. Maximum limits

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

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

Annotation to Article 56

This article follows the numbering system of Section 856, Art. 56, UCMJ but is more extensive. The drafters set a maximum sentence of ten years confinement and eliminated the death penalty. Types of crimes were delineated by types of courts-martial and in conjunction with the terms of the sentence. Additionally, the characterization of discharge is prescribed as is contained in the federal Manual for Courts-Martial. The issue of discharge validity and effect on the reserve appointment in the federal system was discussed. If a state court-martial dishonorably

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discharges the member, the member is discharged from the state military forces but does not lose federal membership. The member may be free to secure another position in another state's National Guard or another reserve component. The active duty component may have to effectuate regulatory changes to recognize or incorporate state punitive discharges as a basis for removal of federal recognition and discharge. Since the state Code establishes that state court-martial is a civilian criminal conviction, a valid discharge basis currently exists in federal regulations.

Article 56a. [Reserved]

Annotation to Article 56(a)

Articles such as this one, were not carried forth from the UCMJ because they do not apply to the State Code. The '[Reserved]' designation and maintenance of the UCMJ article number, keeps the corresponding article number sequence between the Code and the UCMJ.

Article 57. Effective date of sentences

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

Annotation to Article 57

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

Article 57a. Deferment of sentences

- (a) On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under that person's jurisdiction, the person exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in that person's sole discretion defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the person who granted it or, if the accused is no longer under that person's jurisdiction, by the person exercising general court-martial jurisdiction over the command to which the accused is currently assigned.
- (b)
 - (1) In any case in which a court-martial sentences an accused referred to in paragraph (2) to confinement, the convening authority may defer the service of the sentence to confinement, without the consent of the accused, until after the accused has been permanently released to the state military forces by a State, the United States, or a foreign country referred to in that paragraph.
 - (2) Paragraph (1) applies to a person subject to this code who —

(A) while in the custody of a State, the United States, or a foreign country is temporarily returned by that State, the United States, or a foreign country to the state military forces for trial by court-martial; and

(B) after the court-martial, is returned to that State, the United States, or a foreign country under the authority of a mutual agreement or treaty, as the case may be.

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

(c) In any case in which a court-martial sentences an accused to confinement and the sentence to confinement has been ordered executed, but in which review of the case under article 67(a) of this code is pending, The Adjutant General may defer further service of the sentence to confinement while that review is pending.

Annotation to Article 57a

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

Article 58. Execution of confinement

(a) A sentence of confinement adjudged by a court-martial, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place authorized by this code. Persons so confined are subject to the same discipline and treatment as persons regularly confined or committed to that place of confinement.

(b) The omission of ‘hard labor’ as a sentence authorized under this code does not deprive the state confinement facility from employing it, if it otherwise is within the authority of that facility to do so.

(c) No place of confinement may require payment of any fee or charge for so receiving or confining a person except as otherwise provided by law.

Annotation to Article 58

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

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

(a) A court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, that includes —

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

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

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(b) If the sentence of a member who is reduced in pay grade under subsection (a) is set aside or disapproved, or, as finally approved, does not include any punishment named in subsection (a) (1) or (2), the rights and privileges of which the person was deprived because of that reduction shall be restored, including pay and allowances.

Annotation to Article 58a

This article was adopted from Section 858a, Art. 58a, UCMJ with the deletion of the sentence “Unless otherwise provided in regulations to be prescribed by the Secretary concerned.” A reduction is therefore required of those court-martial conviction sentences that include a bad conduct discharge or confinement. Also deleted was subsection (a)(3) regarding “hard labor,” which is not a sentence under the Model Code but is instead dictated by the state confinement facility where the accused is placed.

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

(a)

(1) A court-martial sentence described in paragraph (2) shall result in the forfeiture of pay, or of pay and allowances, due that member during any period of confinement or parole. The forfeiture pursuant to this article shall take effect on the date determined under article 57(a) of this code and may be deferred as provided by that article. The pay and allowances forfeited, in the case of a general court-martial, shall be all pay and allowances due that member during such period and, in the case of a special court-martial, shall be two-thirds (2/3) of all pay due that member during such period.

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

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

(B) confinement for six (6) months or less and a dishonorable or bad-conduct discharge or dismissal.

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

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

Annotation to Article 58b

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

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

Article 59. Error of law; lesser included offense

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

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

Annotation to Article 59

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

Article 60. Action by the convening authority

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

(b)

(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. Any such submission shall be in writing. Except in a summary court-martial case, such a submission shall be made within ten (10) days after the accused has been given an authenticated record of trial and, if applicable, the recommendation of a judge advocate under subsection (d). In a summary court-martial case, such a submission shall be made within seven (7) days after the sentence is announced.

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

(3) In a summary court-martial case, the accused shall be promptly provided a copy of the record of trial for use in preparing a submission authorized by paragraph (1).

(4) The accused may waive the right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of subsection (c) (2), the time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of such a waiver to the convening authority.

(c)

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

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

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

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

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

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

(e)

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

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

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

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

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

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

Annotation to Article 60

This article was adopted from Section 860, Art. 60, UCMJ with clarifying language. Section (d) requires that the convening authority consider the recommendation of a judge advocate in general or special courts-martial with a guilty finding. The drafters deleted the language requiring a recommendation from the "Staff Judge Advocate" because many convening authorities do not have an assigned or imbedded "Staff Judge Advocate" in their chain of

command. *See* annotation to Article 1 (defining “judge advocate”). The drafters recognize that most convening authorities will utilize their staff judge advocate if they have one. Deletion of the term “staff” lifts the requirement of a recommendation by only one particular judge advocate, who may or may not be available. In some cases the next judge advocate in the chain of command may be the State Judge Advocate who has separate review responsibility under Article 64 and, therefore, should not draft the recommendation. This also provides for cross use of Army and Air Guard judge advocates when manpower resources are an issue.

Article 61. Withdrawal of appeal

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

(b) The accused may withdraw an appeal at any time in accordance with appellate procedures as provided by law.

Annotation to Article 61

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

Article 62. Appeal by the State

(a)

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

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

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

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

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

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

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

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within seventy-two (72)

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hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and, if the order or ruling appealed is one which excludes evidence, that the evidence excluded is substantial proof of a fact material in the proceeding.

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

Annotation to Article 62

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

Article 63. Rehearings

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

Annotation to Article 63

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

Article 64. Review by the Senior Force Judge Advocate

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

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

- (1) Conclusions as to whether —
 - (A) the court had jurisdiction over the accused and the offense;
 - (B) the charge and specification stated an offense; and
 - (C) the sentence was within the limits prescribed as a matter of law.
 - (2) A response to each allegation of error made in writing by the accused.
 - (3) If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.
- (b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to The Adjutant General, if —
- (1) the judge advocate who reviewed the case recommends corrective action;
 - (2) the sentence approved under article 60(c) of this code extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six (6) months; or
 - (3) such action is otherwise required by regulations of The Adjutant General.
- (c)
- (1) The Adjutant General may —
 - (A) disapprove or approve the findings or sentence, in whole or in part;
 - (B) remit, commute, or suspend the sentence in whole or in part;
 - (C) except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or
 - (D) dismiss the charges.
 - (2) If a rehearing is ordered but the convening authority finds a rehearing impracticable, the convening authority shall dismiss the charges.
 - (3) If the opinion of the senior force judge advocate, or designee, in the senior force judge advocate's review under subsection (a) is that corrective action is required as a matter of law and if The Adjutant General does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and action thereon shall be sent to the Governor for review and action as deemed appropriate.
- (d) The senior force judge advocate, or a designee, may review any case in which there has been a finding of not guilty of all charges and specifications. The senior force judge advocate, or designee, may not review a case under this subsection if that person has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense. The senior force judge advocate's review shall be limited to questions of subject matter jurisdiction.
- (e) The record of trial and related documents in each case reviewed under subsection (d) shall be sent for action to The Adjutant General.

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(1) The Adjutant General may —

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

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

Annotation to Article 64

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

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

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

Annotation to Article 65

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

Article 66. [Reserved]

Article 67. [Reserved]

Article 67a. Review by State Appellate Authority

Decisions of a court-martial are from a court with jurisdiction to issue felony convictions and appeals are to the court provided by the law of the state in which the court-martial was held. The appellate procedures to be followed shall be those provided by law for the appeal of criminal cases thereto.

Annotation to Article 67a

There is no automatic appellate review of court-martial convictions in the State Model Code. The state must determine whether it chooses to process an appeal by the accused through its criminal appellate courts or directly to the state's highest court. Due to the procedural differences between a court-martial and a civilian criminal trial, the drafters recommend the state rely on the state's highest court to act as the appellate authority. *See* Annotation to Article 61. This recommendation is based on several factors that include the projected low number of courts-martial that would reach the civilian appellate courts and the goal that one court would develop consistent and uniform case law within the state.

Article 68. [Reserved]

Article 69. [Reserved]

Article 70. Appellate counsel

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

Annotation to Article 70

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

Article 71. Execution of sentence; suspension of sentence

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

Annotation to Article 71

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

Article 72. Vacation of suspension

(a) Before the vacation of the suspension of a special court-martial sentence, which as approved includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on an alleged violation of probation. The probationer shall be represented at the hearing by military counsel if the probationer so desires.

(b) The record of the hearing and the recommendation of the officer having special court-martial jurisdiction shall be sent for action to the officer exercising general court-martial jurisdiction over the probationer. If the officer vacates the suspension, any unexecuted part of the sentence, except a dismissal, shall be executed, subject to applicable restrictions in this code.

(c) The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence.

Annotation to Article 72

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

Article 73. Petition for a new trial

At any time within two (2) years after approval by the convening authority of a court-martial sentence the accused may petition The Adjutant General for a new trial on the grounds of newly discovered evidence or fraud on the court-martial.

Annotation to Article 73

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

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

Article 74. Remission and suspension

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

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

Annotation to Article 74

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

Article 75. Restoration

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

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

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

Annotation to Article 75

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

Article 76. Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this code, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States and the several states, subject only to action upon a petition for a new trial as provided in article 73 of this code and to action under article 74 of this code.

Annotation to Article 76

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

Article 76a. Leave required to be taken pending review of certain court-martial convictions
Under regulations prescribed, an accused who has been sentenced by a court-martial may be required to take leave pending completion of action under this article if the sentence, as approved under article 60 of this code, includes an unsuspended dismissal or an unsuspended dishonorable

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or bad-conduct discharge. The accused may be required to begin such leave on the date on which the sentence is approved under article 60 of this code or at any time after such date, and such leave may be continued until the date on which action under this article is completed or may be terminated at any earlier time.

Annotation to Article 76a

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

Article 76b. Lack of mental capacity or mental responsibility: commitment of accused for examination and treatment [*State option required; see Annotation*]

(a) Persons incompetent to stand trial.

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

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

(3)

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

(B) Upon receipt of a notification, the general court-martial convening authority shall promptly take custody of the person unless the person covered by the notification is no longer subject to this code. If the person is no longer subject to this code, the State Attorney General shall take any action within the authority of the State Attorney General that the State Attorney General considers appropriate regarding the person.

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

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

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

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

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

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

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

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

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

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

(c) General provisions.

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

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

(d) Applicability.

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

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

Annotation to Article 76b

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

PART X. PUNITIVE ARTICLES

Article 77. Principals

Any person subject to this code who —

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

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

is a principal.

Annotation to Article 77

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

Article 78. Accessory after the fact

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

Annotation to Article 78

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

Article 79. Conviction of lesser included offense

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

Annotation to Article 79

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

Article 80. Attempts

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

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

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

Annotation to Article 80

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

Article 81. Conspiracy

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

Annotation to Article 81

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

Article 82. Solicitation

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

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

Annotation to Article 82

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

Article 83. Fraudulent enlistment, appointment, or separation

Any person who —

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

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

shall be punished as a court-martial may direct.

Annotation to Article 83

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

Article 84. Unlawful enlistment, appointment, or separation

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

Annotation to Article 84

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

Article 85. Desertion

(a) Any member of the state military forces who —

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

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

(3) without being regularly separated from one of the state military forces enlists or accepts an appointment in the same or another one of the state military forces, or in one of the armed forces of the United States, without fully disclosing the fact that he has not been regularly separated, or enters any foreign armed service except when authorized by the United States;

is guilty of desertion.

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

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

Annotation to Article 85

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

Article 86. Absence without leave

Any person subject to this code who, without authority —

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

(2) goes from that place; or

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

shall be punished as a court-martial may direct.

Annotation to Article 86

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

Article 87. Missing movement

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

Annotation to Article 87

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

Article 88. Contempt toward officials

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of the State shall be punished as a court-martial may direct.

Annotation to Article 88

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

Article 89. Disrespect toward superior commissioned officer

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

Annotation to Article 89

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

Article 90. Assaulting or willfully disobeying superior commissioned officer

Any person subject to this code who —

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

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

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

Annotation to Article 90

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

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

Any warrant officer or enlisted member who —

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

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

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

shall be punished as a court-martial may direct.

Annotation to Article 91

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

Article 92. Failure to obey order or regulation

Any person subject to this code who —

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

shall be punished as a court-martial may direct.

Annotation to Article 92

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

Article 93. Cruelty and maltreatment

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

Annotation to Article 93

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

Article 94. Mutiny or sedition

(a) Any person subject to this code who —

(1) with intent to usurp or override lawful military authority, refuses, in concert with any other person, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny;

(2) with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence, or other disturbance against that authority is guilty of sedition;

(3) fails to do his utmost to prevent and suppress a mutiny or sedition being committed in his presence, or fails to take all reasonable means to inform his superior commissioned officer or commanding officer of a mutiny or sedition which he knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition.

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

Annotation to Article 94

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

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

Any person subject to this code who —

- (1) resists apprehension;
- (2) flees from apprehension;

- (3) breaks arrest; or
- (4) escapes from custody or confinement;

shall be punished as a court-martial may direct.

Annotation to Article 95

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

Article 96. Releasing prisoner without proper authority

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

Annotation to Article 96

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

Article 97. Unlawful detention

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

Annotation to Article 97

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

Article 98. Noncompliance with procedural rules

Any person subject to this code who —

- (1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this code; or
 - (2) knowingly and intentionally fails to enforce or comply with any provision of this code regulating the proceedings before, during, or after trial of an accused;
- shall be punished as a court-martial may direct.

Annotation to Article 98

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

Article 99. Misbehavior before the enemy

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

- (1) runs away;
- (2) shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;
- (3) through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;
- (4) casts away his arms or ammunition;
- (5) is guilty of cowardly conduct;
- (6) quits his place of duty to plunder or pillage;

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(7) causes false alarms in any command, unit, or place under control of the armed forces of the United States or the state military forces;

(8) willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or

(9) does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies, to the State, or to any other state, when engaged in battle;

shall be punished as a court-martial may direct.

Annotation to Article 99

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

Article 100. Subordinate compelling surrender

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

Annotation to Article 100

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

Article 101. Improper use of countersign

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

Annotation to Article 101

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

Article 102. Forcing a safeguard

Any person subject to this code who forces a safeguard shall be punished as a court-martial may direct.

Annotation to Article 102

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

Article 103. Captured or abandoned property

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

(b) Any person subject to this code who —

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

(2) buys, sells, trades, or in any way deals in or disposes of taken, captured, or abandoned property, whereby he receives or expects any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or

(3) engages in looting or pillaging;

shall be punished as a court-martial may direct.

Annotation to Article 103

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

Article 104. Aiding the enemy

Any person subject to this code who —

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

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

shall be punished as a court-martial may direct.

Annotation to Article 104

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

Article 105. Misconduct as prisoner

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

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

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

shall be punished as a court-martial may direct.

Annotation to Article 105

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

Article 106. [Reserved]

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Annotation to Articles 106

The drafters recommend prosecution under title 38, United States Code.

Article 106a. [Reserved]

Annotation to Articles 106a

The drafters recommend prosecution under title 38, United States Code.

Article 107. False official statements

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

Annotation to Article 107

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

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

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

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

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

Annotation to Article 108

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

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

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

Annotation to Article 109

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

Article 110. Improper hazarding of vessel

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

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

Annotation to Article 110

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

Article 111. [Reserved]**Article 112.** Drunk on duty

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

Annotation to Articles 112

This article was adopted in its entirety from the UCMJ.

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

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

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

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

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

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

Annotation to Articles 112a

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

Article 113. Misbehavior of sentinel

Any sentinel or look-out who is found drunk or sleeping upon his post or leaves it before being regularly relieved, shall be punished, if the offense is committed in time of war, by confinement

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of not more than ten (10) years or other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment as a court-martial may direct.

Annotation to Article 113

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

Article 114. Dueling

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

Annotation to Article 114

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

Article 115. Malingering

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

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

shall be punished as a court-martial may direct.

Annotation to Article 115

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

Article 116. Riot or breach of peace

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

Annotation to Article 116

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

Article 117. Provoking speeches or gestures

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

Annotation to Article 117

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

Article 118. [Reserved]

Article 119. [Reserved]

Article 120. [Reserved]

Article 121 [Reserved]

Article 122. [Reserved]

Article 123. [Reserved]

Article 123a. [Reserved]

Article 124. [Reserved]

Article 125. [Reserved]

Article 126. [Reserved]

Article 127. [Reserved]

Article 128. [Reserved]

Article 129. [Reserved]

Article 130. [Reserved]

Article 131. [Reserved]

Annotation to Articles 118-131

Articles 118-131 were reserved as these crimes are provided in state civilian criminal statutes.

Article 132. Frauds against the government

Any person subject to this code —

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

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

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

(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States, the State, or any officer thereof —

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

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

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

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

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

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

Annotation to Article 132

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

Article 133. Conduct unbecoming an officer and a gentleman

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

Annotation to Article 133

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

Article 134. General article

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

Annotation to Article 134

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

PART XI. MISCELLANEOUS PROVISIONS

Article 135. Courts of inquiry

- (a) Courts of inquiry to investigate any matter of concern to the state military forces may be convened by any person authorized to convene a general court-martial, whether or not the persons involved have requested such an inquiry.
- (b) A court of inquiry consists of three (3) or more commissioned officers. For each court of inquiry, the convening authority shall also appoint counsel for the court.
- (c) Any person subject to this code whose conduct is subject to inquiry shall be designated as a party. Any person subject to this code who has a direct interest in the subject of inquiry has the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and has the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.
- (d) Members of a court of inquiry may be challenged by a party, but only for cause stated to the court.
- (e) The members, counsel, the reporter, and interpreters of courts of inquiry shall take an oath to faithfully perform their duties.
- (f) Witnesses may be summoned to appear and testify and be examined before courts of inquiry, as provided for courts-martial.
- (g) Courts of inquiry shall make findings of fact but may not express opinions or make recommendations unless required to do so by the convening authority.
- (h) Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. If the record cannot be authenticated by the president, it shall be signed by a member in lieu of the president. If the record cannot be authenticated by the counsel for the court, it shall be signed by a member in lieu of the counsel.

Annotation to Article 135

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

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

- (a) The following persons may administer oaths for the purposes of military administration, including military justice:
 - (1) All judge advocates.
 - (2) All summary courts-martial.
 - (3) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.
 - (4) All commanding officers of the naval militia.
 - (5) All other persons designated by regulations of the armed forces of the United States or by statute.
- (b) The following persons may administer oaths necessary in the performance of their duties:
 - (1) The president, military judge, and trial counsel for all general and special courts-martial.
 - (2) The president and the counsel for the court of any court of inquiry.

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- (3) All officers designated to take a deposition.
 - (4) All persons detailed to conduct an investigation.
 - (5) All recruiting officers.
 - (6) All other persons designated by regulations of the armed forces of the United States or by statute.
- (c) The signature without seal of any such person, together with the title of his office, is prima facie evidence of the person's authority.

Annotation to Article 136

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

Article 137. Articles to be explained

- (a)
- (1) The articles of this code specified in paragraph (3) shall be carefully explained to each enlisted member at the time of, or within thirty (30) days after, the member's initial entrance into a duty status with the state military forces.
 - (2) Such articles shall be explained again —
 - (A) after the member has completed basic or recruit training; and
 - (B) at the time when the member reenlists.
 - (3) This subsection applies with respect to articles 2, 3, 7-15, 25, 27, 31, 37, 38, 55, 77-134, and 137-139 of this code.
- (b) The text of the code and of the regulations prescribed under such code shall be made available to a member of the state military forces, upon request by the member, for the member's personal examination.

Annotation to Article 137

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

Article 138. Complaints of wrongs

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

Annotation to Article 138

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

Article 139. Redress of injuries to property

(a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that the person's property has been wrongfully taken by members of the state military forces, that person may, under such regulations prescribed, convene a board to investigate the complaint. The board shall consist of from one (1) to three (3) commissioned officers and, for the purpose of that investigation, it has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by that officer shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for payment to the injured parties of the damages so assessed and approved.

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

Annotation to Article 139

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

Article 140. Delegation by the Governor

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

Annotation to Article 140

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

Article 141. Payment of fees, costs, and expenses

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

(b) For the foregoing purposes, there is created in the state treasury a fund to be designated the (military justice fund) that shall be administered by The Adjutant General, from which expenses of military justice shall be paid in the amounts and manner as prescribed by law. The legislature may appropriate and have deposited in the (military justice fund) such funds as it deems necessary to carry out the purposes of this code.

Annotation to Article 141

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

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Article 142. Payment of fines and disposition thereof

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

(1) By cash or money order;

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

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

(b) Any sum so received or retained shall be deposited in the (military justice fund) or to whomever the court so directs.

Annotation to Article 142

This article contains various fiscal law issues and the discussions within the annotation remarks are worthy of a separate working group. Possible funding methods include a congressionally funded mandate and creation of a state military justice fund with state appropriations and payment of forfeitures to the state via USPFO regulatory changes. Although restitution is not discussed in the Model State Code, it is generally codified in all states' criminal statutes. It is the intent of the drafters that restitution be considered in those situations requiring equity.

Article 143. Uniformity of interpretation.

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

Annotation to Article 143

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

Article 144. Immunity for action of military courts

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

Annotation to Article 144

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

Article 145. Severability

The provisions of this code are hereby declared to be severable and if any provision of this code or the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this code.

Annotation to Article 145

A severability clause is added to allow states to remove and replace articles found to be in dissonance with a state's laws without affect to the other parts of this Code.

Article 146. Short Title

This act may be cited as the Uniform State Code of Military Justice (USCMJ).”

Annotation to Article 146

To avoid confusion with the federal UCMJ, but to create uniformity among the states, the drafters opted to use the Uniform State Code of Military Justice as the short title.

Article 147. Time of taking effect

This act takes effect _____.

Annotation to Article 147

States should insert the actual date the Code will take effect. Normally, all new laws go into effect on the same certain date. Most states, however, provide for emergency enactment, which ordinarily effectuates the law on the date the bill is signed by the Governor. States should consider enacting the Code as soon as possible to allow for its immediate use by the state military forces.

Article 148. Supersedes existing state military justice codes

Upon enactment and the effective date, this law supersedes all existing statutes, ordinances, directives, rules, regulations, orders and other laws in the state covered by the subject matter of this law, and all such statutes, ordinances, directives, rules, regulations, orders and other laws are hereby repealed.

**State
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Appendix A - References

Appendix B - Military Offenses

1-1. Introduction; definitions; gender neutrality. (Article 1)*

- (a) This shall be known as the Manual for State Courts-Martial and is referred to herein as either ‘Manual’ or ‘MSCM’. This Manual shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay. The purpose of military law is to promote justice, to maintain good order and discipline, to promote efficiency and effectiveness in the military, and to strengthen the security of the several states and of the United States. This Manual prescribes the policies and procedures pertaining to the administration of military justice and implements the applicable portions of the Uniform Code of Military Justice [Hereinafter Code], and the Manual for Courts-Martial, United States (2002), as amended [hereinafter MCM].
- (b) To the extent allowed by the laws of the State where military justice is administered and as modified by this Manual and the Code, this Manual incorporates the MCM, as amended from time to time. Hence, the Manual must be construed so as to make it uniform so far as practical with the MCM. The Manual may be supplemented, but not superseded, by the MCM. All matters relating to the administration of military justice in the state military forces not otherwise provided for in this Manual or the MCM shall be regulated by the customs and usage of the appropriate force or of the armed forces of the United States.
- (c) Insofar as any reference to the United States, President, or other federal official exists in the MCM, the reference also will refer to or be substituted for the State, the Governor, or state official as appropriate.
- (d) The Governor or equivalent official in the territories and District of Columbia (herein collectively referred to as “Governor”) is vested with the authority to make *or adopt* rules and regulations in conformity with the Code which as nearly as practicable must conform to the rules and regulations governing the armed forces of the United States. Such rules and regulations shall have the same force and effect as the statutory provisions of the Code when not in conflict with the Code. If the Governor makes a finding that it is impracticable to conform rules and regulations to those governing the armed forces of the United States, such finding shall be conclusive and such rules and regulations shall have force and effect over inconsistent rules, regulations, directives, manuals, or practices governing any of the armed forces of the United States.

* The corresponding article from the State Code of Military Justice is provided in parentheses following the Manual subsection.

*Discussion***

The Model State Manual for Courts-Martial (Manual) serves to advance two purposes: that of military law in general and of the Manual itself. The Manual anchors those purposes by creating stable policies and procedures reinforced by the established rules and provisions incorporated from the federal Manual for Courts-Martial (MCM) and Uniform Code of Military Justice (UCMJ), where applicable and when not in conflict with three criteria: the State Constitution, the State Code, and the spirit of the law. Consequently, the Manual expressly incorporates the MCM with all subsequent amendments. As a matter of priority, however, the Manual provides that the MCM is subordinate to the Manual in cases of conflicting provisions. Nevertheless, the goal is to construe the Manual in uniformity with the MCM whenever practical to effectively implement the Code.

It is important to note that the Manual is a tool for the judge advocate and not a commander's handbook for the administration of military justice at the unit level. As such, it is anticipated that judge advocates, while primarily referring to their state codes of military justice for the majority of direction, will rely on the state manual as a supplemental source. Such reliance, however, is not singular. The judge advocate must ensure that all sources are consulted to include applicable service regulations and rules, relevant case law, policy letters, directives, manuals, etc. States are free to create a commander's handbook or provide the Manual to commanders, as they are a necessary component of the administration of military justice.

Some states' manuals were in actuality regulations. States should adopt this Manual in its form rather than convert it to a regulation, which would require adherence to the state's administrative procedures act. States may choose to promulgate specific rules and regulations needed for implementation of certain provisions of the Code. Requirements of the state's administrative procedures act should be followed whenever necessary if this means of implementation is desired by the state. Nevertheless, this is a manual rather than a regulation. It incorporates the applicable portions of the federal Manual for Courts-Martial. Readers are encouraged, however, to consult the respective active duty and National Guard service regulations for additional guidance.

See State Code Article 36 (2004); Manual for Courts-Martial, United States, pt. I, (2002) [Hereinafter MCM]; Manual for Courts-Martial, United States, R.C.M. 102 [hereinafter R.C.M.]; AR 27-10. *See also* State Code Article 140.

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- (e) There is no substitute for strong and effective military leadership. Commanders, officers, and non-commissioned officers should not attempt to replace leadership with military justice and punitive measures, except as a last resort and as punishment for offenses that have been committed. Proper leadership, guidance, and counseling can be effective in preserving good order and discipline within the state military forces and should reduce the need for use of the military justice system.
 - (f) Required and related publications and referenced forms are listed in Appendix A.
 - (g) *Definitions:* All terms defined or explained in the Code apply equally in the Manual unless the context otherwise requires.

** The supplementary "Discussions" following certain subchapters in this Manual are for explanatory purposes only and are not binding as law. Rather, such supplemental text is dicta, and readers are urged to consult other binding authority such as relevant statutes, service regulations, directives, and case law. The "Discussions" are meant to supplement the Manual and do not constitute the official views of the State, the State National Guard, or any other authority of the Government of State. These "Discussions" do not create rights or responsibilities that are binding on any person, party, or other entity of the State of State. Failure to comply with any matter set forth in the "Discussions" does not, in and of itself, constitute error, legal or otherwise, although this supplemental text may refer to requirements in the rules set forth in other binding military and legal authority, which are based on sources of authority independent of the "Discussions."

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(1) “Principal Assistant” is defined as a commissioned officer of the state military forces serving in a position immediately subordinate to the convening authority who would assume command in the event of the commander’s death, prolonged absence, or disability, or to the vice-commander of the organization. However, in the case of the Air Guard, the principal assistant may include an officer who is not “air rated” (as defined in the applicable service regulation pertaining to commanders) and is serving in a position immediately subordinate to the convening authority. Any delegation of authority to a “principal assistant” shall be in writing, unless exigencies prevent such written delegation. Verbal authorization shall be reduced to writing as soon as possible thereafter.

Discussion

A principal assistant cannot be a civilian or be appointed. This position is limited to commissioned officers. In the case of the Air National Guard, the subordinate to the convening authority may not be able to serve as the principal assistant if there is a requirement that an officer be a pilot and air rated in order to command. The officer serving as the principal assistant should be no more than one grade below the grade of the convening authority's authorized grade position or not below the grade of O6.

See State Code arts. 1, 25; R.C.M. 505, UCMJ arts. 1, 25. *See also* R.C.M. 103.

(h) *Gender neutrality*: The use of the masculine gender throughout this code shall also include the feminine gender.

(i) *Regulations, directives, instructions, pamphlets, forms and the like referred to in the Manual, include as they may be amended or replaced from time to time.*

Discussion

See State Code Article 1(b).

1-2. Persons subject to this code; jurisdiction. (Article 2)

(a) *General Statement*: No person may be punished under the Code for any offense provided for in the Code unless —

- (1) the person is a member of the “state military forces” as defined by the Code, and
- (2) the offense is either a purely military offense or a civilian offense where there is a nexus between the offense and the state military forces.

(b) In order to impose disciplinary action under the Code, there must be jurisdiction over the person and jurisdiction over the offense.

(c) *Persons assigned and attached to other Commands*: For jurisdiction issues based on assignment or attachment, each service component shall refer to the current service component guidance therein to include, regulations, and policy directives. Prior to the initiation of any military justice action, the judge advocate will ensure that the commander will resolve any military justice authority issue regarding assigned or attached personnel.

Discussion

This provision distinguishes title 10, sections 504 and 505. Such *in personam* jurisdiction extends to members in all statuses to include state active duty under IDT, ADSW, AT, AGR, and SAD but not federal active duty under title 10. It also encompasses any future status that a member may be under when performing a Homeland Defense or Security function or mission. This also allows a member suspected of committing an offense to be ordered to active duty involuntarily for the purpose of the investigation. The purpose of such a range is to support the Code, which applies to members of the state military forces at all times except when serving in an active federal duty status. Should a member commit a civilian criminal offense while not in a duty status, and it is determined that such civilian criminal offense has a nexus to membership in the state military forces, then the member can be prosecuted under the Code.

See State Code arts. 1(23), 2, 5; R.C.M. 201, 202, 203; UCMJ Article 2, 10 U.S.C. §§ 504, 505; *Solorio v. United States*, 483 U.S. 435 (1987).

1-3. Jurisdiction to try certain personnel. (Article 3)

(a) *Jurisdiction over the person:* The following persons are subject to jurisdiction under the Code:

- (1) a member of the state military forces as defined by the Code;
- (2) a person in custody of the state military forces as defined by the Code before trial or serving a sentence imposed by a court-martial;
- (3) a person who has voluntarily enlisted in the state military forces as defined by the Code and who has the capacity to understand the significance of enlisting in the state military forces; such enlistment shall be valid for purposes of jurisdiction and a change of status from civilian to member of the state military forces as defined by the Code; this form of jurisdiction shall be effective upon the taking of the oath of enlistment; and
- (4) notwithstanding any other provision of law, a person serving in the state military forces as defined by the Code who —
 - (A) submitted voluntarily to military authority;
 - (B) met the mental competence and minimum age qualifications of sections 504 and 505 of title 10, United States Code, at the time of voluntary submission to military authority;
 - (C) received military pay or allowances; and
 - (D) performed military duties;
- (5) a person is subject to this Manual until the person's active service has been terminated in accordance with law or regulations of the state military forces, National Guard Bureau, and the regulations of that person's active component service..

Discussion

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It is important to note that jurisdiction to try someone under the State Code attaches as early as induction and execution of the oath of office. *See* R.C.M. 202(a). Jurisdiction also may be found where a member lacked the capacity to enlist or was involuntarily enlisted, but the later capacity cease or the member continued to receive the benefit of the enlistment. In such a case, a “constructive enlistment” may be found forming the basis for jurisdiction.

Prior to adoption of the State Code, a member serving in a title 10 status would often avoid military justice punishments by the state military forces because jurisdiction was with the active component to which the member was assigned or attached for the duration of the orders. Likewise, the active component could not execute military justice punishments on a member of the state military forces if in a title 32 status for training at an active component school. Thus, a loophole was created. Often when a member on title 10 orders committed an offense while on active duty was that the active component simply sent the member back to the state military forces in lieu of execution of military justice. Upon the member’s return to title 32 status, the state military forces was without the authority to punish the member for the offense committed while on active duty.

The State Code and subsection 1-3 eliminates these situations by granting the state military forces the authority to execute military justice on a title 32 member who commits an offense while under title 10 orders if a nexus exists between the offense and the state military forces. The underlying facts for surrounding the offense can be used to process punishment under Article 134 of the State Code. Such a scenario is similar to a member being in a non-duty status under title 32 for the state and committing an offense that is punishable under Article 134. In this instance, it is advisable that the commanders of the active component unit and the state military forces discuss who will take jurisdiction to punish a member because both may technically have jurisdiction to impose military justice. A waiver of military justice jurisdiction could result from an agreement by one commander to impose military justice against a member when necessary. Such concurrent jurisdiction gives commanders the option of deciding who will prosecute a member for committing an offense punishable under the UCMJ or the State Code.

See State Code arts. 3, 5, 7; UCMJ Article 3, RC.M. 202, 10 U.S.C. §§ 504, 505. *See generally* R.C.M. 201, 204.

(b) *Subject Matter Jurisdiction:*

(1) *Military Offenses.* Offenses of a purely military nature contained in Article 1(14) of the Code may be the subject of administrative measures, nonjudicial punishment, or courts-martial jurisdiction (except as provided in subparagraph (2) below). Offenses of a purely military nature are listed in Appendix B. These offenses are derived from the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.* [hereinafter UCMJ], and *to the extent not inconsistent with the Code provisions of these offenses*, this Manual incorporates each element of the offense as described in the UCMJ with the following clarifications:

(A) Insofar as an element refers to the United States, the element also will refer to the State.

(B) Insofar as an element refers to individuals in the service of the United States or officials thereof, the element also will include in the service of the state military forces or State officials as provided in the Code.

(C) Insofar as an element refers to the property of the United States, the element also will include property of the State.

Discussion

The offenses and their elements of the UCMJ were adopted without change and incorporated in the State Code; therefore, the elements for each offense as contained in the MCM were adopted with appropriate modifications to make the elements relevant to the State Military Forces. Article 79 of the State Code provides that the lesser offense is included in the offense charged. Further, such crimes in the MCM that are crimes against the United States were changed to be crimes against the State, therefore, any elements in the MCM referencing the United States will include reference to the State. Articles 80, 99, 100, 103, 108, 109, and 110 were modified to include the State and/or the Governor, as applicable.

See State Code arts. 1(14), 2 & annot., 5 & annot., 7, 79, 80, 99, 100, 109, 110, app. B; R.C.M. 201(a)(3), 203. *See generally* UCMJ Article 203. *See* applicable portions of punitive articles 77 to 134 of the UCMJ contained in the MCM at pt. IV for additional information regarding the elements of the chargeable offense.

(2) *Non-military offenses*

(A) Offenses of a non-military nature may be the subject of administrative measures, nonjudicial punishment, or courts-martial jurisdiction provided that the person is subject to the Code and there is a nexus between the act or omission constituting the offense and the state military forces. Civilian criminal offenses may be subject to prosecution under Articles 133 and 134 of the Code if that nexus is present.

(B) A proper civilian court has primary jurisdiction when an act or omission violates both the Code and the state's criminal laws or federal criminal law. In such cases, a state court-martial or nonjudicial punishment proceeding may be initiated only after the civilian authority has declined to prosecute or dismissed charges, provided jeopardy has not attached. However, nothing in this Manual precludes a commander from taking administrative action even if the civilian authority exercises jurisdiction. Administrative remedies shall not be considered double jeopardy.

(c) A member of the state military forces who is subject to jurisdiction under the Code may be ordered to duty involuntarily for any purposes under this Manual or the Code.

(d) Coordination with the State Attorney General or similar officials in the State, County or equivalent prosecutorial authorities, and appropriate municipal prosecutorial authorities is essential to ensure that judge advocates prosecute with the cooperation of the local state prosecutors. A commander shall refer all suspected civilian offenses to a judge advocate who shall coordinate with the proper authorities when appropriate.

Discussion

Non-military offenses are punishable under the State Code under Articles 133 and 134 if a nexus is established so as to create a service connection to the non-military offense. This jurisdiction to try a member for non-military crimes is in addition to the Supreme Court's holding in *Solorio v. United States*, 483 U.S. 435 (1987), which provides that the jurisdiction of a military court is based simply on the member's military status. The UCMJ allows prosecution of a service member based solely on the service member military status without consideration of whether the crime has a connection to the member's military service. Thus, an active component member and certain Army reservists are subject to the UCMJ 24 hours a day, 7 days a week. The authority to exercise

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jurisdiction over title 32 members of the state military forces requires that a nexus be present resulting in a service connection to the non-military offense.

When a member is suspected of committing a civilian crime, the civilian authorities have primary jurisdiction to prosecute the member. The state military force must turn the member over to the local law enforcement. Failure to report the commission of a felony crime may be a crime in and of itself in some states. Whereas failure to report a misdemeanor may not be a criminal offense under certain state laws. Nevertheless, the state military force has a subordinate jurisdiction over the crime if there is a nexus. If the civilian prosecutors decline to prosecute, the state military force may prosecute under the Code. Commanders should refer these matters to a judge advocate for coordination with state civilian law enforcement and prosecutors, where appropriate, rather than attempt such coordination themselves. Such coordination does not allow judge advocates to exercise unlimited discretion regarding jurisdiction. Rather, judge advocates must ensure that civilian authorities are contacted when it is possible that there has been the commission of a civilian crime.

For example, a member on title 10 orders goes overseas on a mobilization. While there, the member commits a civilian crime. The member comes back to the state military force and returns to title 32 status. Subsequently, the crime is discovered. The active component refuses to investigate and prosecute the matter because the member is no longer on active duty. Can the state prosecute? The State Code does allow for prosecution in this case if a nexus to the crime and the state military force is established.

A judge advocate not licensed in the state wherein membership is held in the state military force must be careful to consult the state's criminal penal code for the elements of the civilian offense before referring to the applicable punitive article in the State Code or rendering an opinion to a commander.

See State Code arts. 1(23), 2, 5; 79, 80, 99, 100; R.C.M. 201, 202, 203; Solorio v. United States, 483 U.S. 435 (1987), O'Callahan v. Parker, 395 U.S. 258 (1969).

1-4. Dismissed officer's right to trial by court-martial. (Article 4)

Reserved

1-5. Territorial applicability of the code. (Article 5)

This Manual applies wherever and whenever the Code applies. Courts-martial, Courts of Inquiry and nonjudicial punishment proceedings may be convened, conducted, and punishment may be imposed in units of the state military forces while in the State and while those units are serving outside the State with the same jurisdiction and powers as if the proceedings were held within the State.

Discussion

This provision extends the applicability of the State Code outside the state. It essentially allows the authority of the State Code to follow the member at all times and in all places.

See State Code art 5, UCMJ Article 5, R.C.M. 201(a)(2). See also R.C.M. 202, 203.

1-6. Judge Advocates. (Article 6)

Judge advocates must adhere to the state bar licensing requirements pursuant to Articles 1(10), 6, 26, 27, and 38. The senior force judge advocate of each force of the state military forces is responsible for the supervision of the administration of military justice in that force.

Discussion

See State Code art 6, UCMJ Article 6.

Chapter 2. Apprehension and Restraint Articles 7-14

2-1 Apprehension [Reserved]. (Article 7)

Discussion

Unlike Article 7 of the UCMJ, which provides that an apprehension can be made “upon reasonable belief” that a person subject to the code committed a chargeable offense, Articles 7 and 14 of the State Code follow and expands upon R.C.M. 302(c), which requires that before an apprehension is made there be “probable cause” that a chargeable offense has been committed and that the person to be apprehended committed the offense. Persons having apprehension authority in the state military force, the state law enforcement, and the federal military system have authority to apprehend an offender who is subject to the State Code.

See State Code art 7, UCMJ Article 7, R.C.M. 302(c).

2-2 Imposition of restraint [Reserved]. (Article 9)

Discussion

See State Code art 9, UCMJ Article 9. *See generally* R.C.M. 304.

2-3 Restraint of persons charged with offenses. (Article 10)

Judge advocates should be cognizant of speedy trial rules in relation to pretrial confinement issues. However, there is no requirement that the case should proceed immediately to trial. Diligent steps are those rules mandated pursuant to RCM 304 and 305.

Discussion

See State Code art 10, UCMJ Article 10. *See generally* R.C.M. 304, 305.

2-4 Place of Confinement; reports and receiving of prisoners [Reserved]. (Article 11)

Discussion

See State Code art 11, UCMJ Article 11. *See generally* State Code Article 7, 32, UCMJ arts. 7, 32; R.C.M. 302, 305.

2-5 Confinement with enemy prisoners prohibited [Reserved]. (Article 12)

Discussion

See State Code art 12, UCMJ Article 12, R.C.M. 305.

2-6 Punishment prohibited before trial [Reserved]. (Article 13)***Discussion***

See State Code art 13, UCMJ Article 13. See generally R.C.M. 304, 305.

2-7 Delivery of offenders to civil authorities [Reserved]. (Article 14)***Discussion***

See State Code art 14, UCMJ Article 14.

Chapter 3. Nonjudicial Punishment (Article 15)**3-1 Introduction**

(a) *Commander's responsibility.* Commanders are responsible for good order and discipline in their commands. Generally, discipline can be maintained through effective leadership including, administrative corrective measures. Commanders should resort to punitive measures only when administrative measures are inadequate. In determining the method of discipline, commanders should consider the nature of the offense, the record of the service member, the needs for good discipline and the effect of punitive measures on the service member's record.

(b) Commanders must exercise discretion in evaluating the type of punitive measure whether it is court-martial or nonjudicial punishment, the nature of the offense, and the nature of the punishment. Military justice must be exercised promptly and fairly. All disciplinary and punitive matters will be resolved at the lowest appropriate level and will use the least severe discipline appropriate to the offense.

3-2 General Provisions

(a) *Authority.* This section sets forth the law, policies and procedures for nonjudicial punishment in the state military forces. It is a modification of the Part V of the MCM and should be interpreted in accordance with the MCM. Unless modified by the Code or this Manual, the procedures contained in Chapter 3 of Army Regulation (AR) 27-10 and Air Force Instruction (AFI) 51-202 as they may be amended or replaced from time to time apply to nonjudicial punishment under this chapter.

(b) *Purpose.* Nonjudicial punishment provides the commanders with an essential and prompt

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means of maintaining good order and discipline and also promotes positive behavior and changes in service members without the stigma of a court-martial conviction.

(c) *Command Influence.* No superior may direct that a subordinate authority impose nonjudicial punishment in a particular case, issue regulations, orders, or “guides” which suggest to subordinate authorities that certain categories of minor offenses be disposed of by nonjudicial punishment instead of by court-martial or administrative corrective measures, or that predetermined kinds or amounts of punishments be imposed for certain classifications of offenses that the subordinate considers appropriate for disposition by nonjudicial punishment.

(d) *Minor Offenses.* Nonjudicial punishment may be imposed for acts or omissions that are minor offenses. Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender’s age, rank, duty assignment, record and experience; and the maximum possible sentence imposed for the offense if tried by general court-martial. The decision whether an offense is “minor” is a matter of discretion for the commander imposing nonjudicial punishment. But nonjudicial punishment for an offense believed to be minor by a commander is not a bar to a trial by court-martial for the same offense. However, the accused may show at trial that nonjudicial punishment was imposed, and if the accused does so, this fact must be considered in determining an appropriate sentence. Violations of or failures to lawfully obey orders may be minor offenses if the prohibited conduct itself is of a minor nature although prohibited by a general order or regulation.

(e) The implementing regulations and procedures of the service to which the accused is a member shall apply to the extent not inconsistent with the Code, the Manual or their implementing regulations.

3-3 Limitations on Nonjudicial Punishment

(a) *Double Punishment Prohibited.* When nonjudicial punishment has been imposed for an offense, nonjudicial punishment may not again be imposed for the same offense. ‘Same offense’ means an offense that was part of a single incident or course of conduct. Administrative action can be taken for the same offense and will not be considered double punishment under this Manual.

(b) *Increased Punishment Prohibited.* Once nonjudicial punishment has been imposed, it may not be increased, upon appeal or otherwise unless the punishment imposed was not provided for in the Code.

(c) *Multiple Punishments Prohibited.* When a commander determines that nonjudicial punishment is appropriate for a particular service member, all known offenses determined to be appropriate for disposition by nonjudicial punishment and ready to be considered at that time, including all such offenses arising from a single incident or course of conduct, shall ordinarily be considered together, and not made the basis for multiple punishments.

(d) *Statute of Limitations.* Nonjudicial punishment may not be imposed for offenses which were committed more than three (3) years before the date of imposition of punishment, unless such three-year limitation is waived by the accused in writing or unless the accused has filed an appeal under this Manual.

(e) Nothing in (a) and (c) above precludes a commander from imposing more than one punishment non-judicially for the offense(s) arising from a single incident or course of conduct

as authorized in Code, Article 15 and Manual, 3-9.

3-4 Effect of Errors

Failure to comply with any of the procedural provisions herein shall not invalidate a punishment imposed pursuant to the Code, unless the error materially prejudiced a substantial right of the service member on whom the punishment was imposed.

3-5 Who May Impose Nonjudicial Punishment

(a) Commanders shall have authority to impose nonjudicial punishment upon military personnel of their commands. “Commander” means a commissioned or warrant officer who by virtue of rank and assignment exercises primary command authority over a military organization or prescribed territorial area, which under pertinent official directives is recognized as a command. The authority of a commander to impose nonjudicial punishment as to certain types of offenses, certain categories of persons, or in specific cases, to impose certain types of punishment may be limited or withheld by a superior commander.

(b) “Principal Assistant” is defined in paragraph 1-1 of this Manual.

(c) *Delegation of Authority.* Only the Governor and general officers in command may delegate their authority under Article 15 to a principal assistant (ordinarily a Vice, Assistant, or Deputy Commander, Chief of Staff, or Executive Officer). This limitation on delegation of authority itself does not take away authority of other commanding officers authorized to impose non-judicial punishment under the Code and Manual; but those other commanding officers may not delegate that authority. However, a commander superior to the commander with non-judicial punishment authority may withhold that authority.

(d) *Withholding Authority.* A commander at any echelon may withhold from any subordinate commander all or part of the authority, including the authority to impose nonjudicial punishment for specific types of offenses, that the subordinate would otherwise have under the UCMJ, MCM, this Manual, or the Code. When authority is withheld, such action should be in a clearly defined writing or permanent directive. File the original of the memorandum or directive in the office of the judge advocate servicing the commander withholding the authority. File a copy in the office of the judge advocate servicing the commander whose authority has been withheld. Any such withholding remains in effect when a new commander is appointed to or assumes either command, until and unless expressly revoked by the superior commander. Any such action should be addressed by duty title and not by name.

3-6 Right to Demand Trial

An accused has the right to demand trial by court-martial only if the commander who initiated the nonjudicial punishment proceeding elects to retain the restraint of freedom punishments. Those restraints of freedom punishments are restriction and arrest in quarters. If prior to the offer of nonjudicial punishment, the commander elects not to use the restraint of freedom punishments, the accused has no right to turn down the nonjudicial punishment and demand a court-martial trial. If the commander does not include the right of the accused to turn down the non-judicial punishment and demand a court-martial trial, on initiation, of the non-judicial punishment action, the commander has waived the right to retain the restraint of freedom punishments.

3-7 Summary Proceedings

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(a) *Preliminary Determination.* A commander, after preliminary inquiry, may use a summarized proceedings if it is determined that punishment will not include:

- (1) Restriction
- (2) Arrest in Quarters

(b) *Record of Proceeding.* DA Form 2627-1 (Summarized Record of Proceedings) or AF Form 3070 as they may be amended or replaced from time to time will be used to record the summarized nonjudicial punishment proceedings. However, the notification of right to demand court-martial will be stricken from the form. An illustrated example of DA Form 2627-1 is contained in AR 27-10.

(c) *Notification and Explanation of Rights.* If an imposing commander determines that summarized proceedings are appropriate, the service member will be notified of:

- (1) the commander's intent to initiate nonjudicial punishment;
- (2) the commander's intention to use summarized proceedings;
- (3) the service member's lack of a right to demand trial by court-martial;
- (4) the maximum punishments allowable thereunder;
- (5) the service member's right to remain silent;
- (6) the offenses that the service member has allegedly committed with reference to the sections of the law that are alleged to have been violated;
- (7) the service member's right to confront witnesses, examine the evidence and submit matters in defense, extenuation and/or mitigation; and
- (8) the service member's right to appeal.

(d) *No Right to Counsel in Summarized Proceedings.* The service member does not have the right to consult with counsel prior to the hearing nor does the service member have the right to counsel or a spokesperson during the hearing.

(e) *Hearing.* Consistent with the applicable service branch regulations of the service member, if a hearing is scheduled, notification of the date and time of the hearing will be made orally or in writing. The hearing should be scheduled no sooner than twenty-four (24) hours and no later than sixty (60) days after the service member receives notification of the commander's intent to impose nonjudicial punishment.

3-8 Formal Proceedings

(a) *Commander's Determination.* A commander, who after preliminary inquiry determines that the punishment options will include restraint of freedoms, must notify the service member of the right to demand trial by court-martial and turn down non-judicial punishment.

(b) *Notice and Rights.* If an imposing commander determines that formal proceedings are appropriate, the service member will be notified of:

- (1) the commander's intent to initiate nonjudicial punishment;
- (2) the commander's intention to use formal proceedings;
- (3) the maximum punishments allowable thereunder;

- (4) the service member's right to remain silent;
 - (5) the offenses that the service member has allegedly committed with reference to the sections of the law that are alleged to have been violated;
 - (6) the service member's right to confront witnesses, examine the evidence and submit matters in defense, extenuation and/or mitigation;
 - (7) the service member's right to consult with a judge advocate, and the location of such counsel;
 - (8) the service member's right to demand trial by court-martial at any time prior to imposition of nonjudicial punishment;
 - (9) the service member's right to appeal.
- (c) *Decision Period.* The service member will be given a reasonable time to consult with counsel, to gather matters in defense, extenuation, and/or mitigation and to decide whether to accept the nonjudicial punishment or demand a trial by court-martial.
- (d) The decision period will normally be forty-eight (48) hours depending on the availability of counsel but such period may be extended at the request of the accused service member.
- (e) *Rules of Evidence.* The imposing commander is not bound by the formal rules of evidence before courts-martial and may consider any matter, including unsworn statements, the commander reasonably believes to be relevant to the offense.
- (f) Upon imposition of non-judicial punishment the right to demand trial by court-martial is extinguished even if after appeal, the non-judicial punishment is invalidated.

3-9 Authorized Maximum Punishments

- (a) Subject to the limitations contained in the Code and this Manual, the following are the authorized maximum punishment under nonjudicial proceedings:
- (1) Maximum punishments which can be imposed by a company grade officer upon enlisted members of the officer's command for each offense:
 - (A) Restriction, with or without suspension from duty, for not more than fourteen (14) days which need not be consecutive;
 - (B) Extra duty for not more than fourteen (14) days which need not be consecutive;
 - (C) Reduction to the next inferior pay grade if the grade from which demoted in within the promotion authority of the officer imposing the reduction;
 - (D) Forfeiture of pay for not more than seven (7) days' pay;
 - (E) Fine of not more than seven (7) days' pay;
 - (F) Withholding of privileges for not more then six consecutive (6) months;
 - (G) Reprimand; and
 - (H) Admonition.
 - (2) Maximum punishments which can be imposed by any commanding officer of the

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grade of major or lieutenant colonel, or above may impose upon enlisted members of the officer's command

- (A) any punishment authorized in subsections (1)(F), (G), and (H);
- (B) forfeiture of not more than one-half (1/2) of one (1) month's pay per month for two (2) months;
- (C) a fine of not more than one (1) month's pay;
- (D) reduction to the lowest or any intermediate pay grade, if the grade from which demoted is within the promotion authority of the officer imposing the reduction or any officer subordinate to the one who imposes the reduction, but an enlisted member in a pay grade above E-4 may not be reduced more than two (2) pay grades;
- (E) Extra duties, including fatigue or other duties, for not more than forty-five (45) consecutive days; and
- (F) restrictions to certain specified limits, with or without suspension from duty, for not more than sixty (60) consecutive days.

(3) Maximum punishments that can be imposed by the Governor, The Adjutant General, an officer exercising general court-martial convening authority, or an officer of a general or flag rank —

- (A) upon officers of the officer's command —
 - (i) any punishment authorized in subsections (2) (A), (B), (C) and (F),
 - (ii) arrest in quarters for not more than thirty (30) consecutive days.
- (B) upon enlisted members of the officer's command —
 - (i) any punishment authorized in subsection (2) .

3-10 Nature of Punishments

Fines. Fines are additional amounts of monetary payment that may be levied against a member. Generally, a fine and forfeiture should not be imposed simultaneously. A fine should not be imposed upon a service member of the grade of E4 and below in conjunction with a reduction in grade.

3-11 Limitations on Combination of Punishments

No two or more of the punishments of arrest in quarters, extra duties and restriction may be combined to run consecutively in the maximum amount imposable for each. Whenever any of those punishments are combined to run consecutively, there must be an apportionment.

3-12 Announcement of Punishments

The punishment may be announced at the next unit formation after punishment is imposed or, if appealed, after the decision on the appeal. It also may be posted on the unit bulletin board. The purpose of announcing the results of punishments is to preclude perceptions of unfairness of punishment and to deter similar misconduct by other service members. An inconsistent or arbitrary policy regarding announcement of punishments should be avoided because it could

result in the appearance of vindictiveness or favoritism. In deciding whether to announce punishment of service members in the grade of E-5 or above, the imposing commander should consider the nature of the offense, the service member's military record and duty position, the deterrent effect, the impact on unit morale or mission, the impact on the victim and the impact of the leadership effectiveness of the service member.

3-13 Suspension, Mitigation, Remission and Setting Aside

Recording of Actions. Suspensions, mitigations, remissions and setting aside shall be documented on DA Form 2627 or DA Form 2627-1 or AF Form 366 and as these may be amended or replaced from time to time, used in the imposition of the non-judicial punishment fully indicating the actions taken and the reasons therefor. Vacations of suspension shall likewise be documented, including the notice to, appearance by and response of the service member or if the service member was not notified or did not appear, why the member was not given notice and an opportunity to respond and the reasons for the vacation.

3-14 Appeals

- (a) *General.* Any service member on whom nonjudicial punishment has been imposed and who considers the punishment to be unjust or disproportionate to the offense, may appeal to the next superior commander.
- (b) *Appellate Authority.* Nonjudicial punishment appeals are made to the "next superior authority," who is generally the immediate commander superior to the officer who imposed the punishment.
- (c) *Principal Assistant.* When a principal assistant imposes punishment, the "next superior authority" is the commander superior to the commander who delegated the power.
- (d) *Number of Appeals.* Only one appeal is permissible.
- (e) *Time to Appeal.* The service member will be given a reasonable time within which to submit an appeal. A reasonable time shall normally be fifteen (15) days or the end of the next monthly drill following, whichever comes first.
- (f) *Who May Act on an Appeal.* A superior authority to the commander who imposed the nonjudicial punishment, generally, the next superior commander, may act on an appeal.
- (g) *Procedure.* Appeals shall be in writing and will be made on DA Form 2627 or DA Form 2627-1, or AF Form 3070 as applicable and shall set forth the reasons for appeal including additional documentation and evidence which supports the appeal. Normally, the superior authority shall not consider additional evidence which was not presented to the commander who imposed the nonjudicial punishment, unless, the exclusion of it would yield an unfair result.
- (h) *Legal Review.* Before acting on an appeal, the superior authority shall refer the case to a judge advocate for consideration and advice. The judge advocate shall render an opinion as to the appropriateness of the punishment and whether the proceedings were conducted in accordance with law and regulations. When a case is so referred, the judge advocate is not limited to an examination of any written matter comprising the record of proceedings, and may make any inquiries and examine any additional matter deemed necessary.
- (i) *Action by Superior Authority.* In acting on an appeal, the superior authority may exercise the same power with respect to punishment imposed as may be exercised by the officer who

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imposed the nonjudicial punishment. The superior authority may take such action even if no appeal has been filed. The superior authority will consider the record of proceedings, any matters submitted by the service member, any matters considered during legal review, and any other appropriate matters. If the superior authority sets aside nonjudicial punishment due to procedural error, such superior authority may authorize additional proceedings by the imposing commander or a successor, but the punishment shall be no more severe than that originally imposed. Upon completion of action by the superior authority, the service member upon whom punishment was imposed, shall be promptly notified of the result.

3-15 Filing Procedures

Article 15 proceedings and records shall be filed pursuant to applicable service regulations and directives.

Discussion

See State Code art 15, UCMJ Article 15.

Chapter 4. Courts-Martial Jurisdiction Articles 16-21

4-1 Courts-martial classified. (Article 16)

A military judge shall preside over each general and special court-martial.

Discussion

It is emphasized that a military judge must preside over both general and special courts-martial.

See State Code art 16, UCMJ Article 16. See generally R.C.M.201, 501, 801.

4-2 Jurisdiction of courts-martial in general [Reserved]. (Article 17)

Discussion

Keeping the future joint force structure in mind, this section allows for cross-component jurisdiction.

See State Code arts. 2, 3, 5, 17, UCMJ arts. 2, 3, 5, 17. See also R.C.M. 201.

4-3 Jurisdiction of general courts-martial [Reserved]. (Article 18)

Discussion

See State Code Article 18; UCMJ Article 18. See also R.C.M.201, 203.

4-4 Jurisdiction of special courts-martial [Reserved]. (Article 19)

Discussion

See State Code Article 19; UCMJ Article 19. *See also* R.C.M.201.

4-5 Jurisdiction of summary courts-martial [Reserved]. (Article 20)

Discussion

See State Code Article 20; UCMJ Article 20. *See also* R.C.M.201, 1301-1306.

4-6 [Reserved] (Article 21)

Chapter 5 Appointment and Composition of Courts Martial Articles 22-29

5-1 Who may convene general courts-martial. (Article 22)

A superior commander can withhold convening authority from a subordinate commander but shall not delegate his own authority. When authority is withheld, such action should be in a clearly defined writing or permanent directive. File the original of the letter or directive in the office of the judge advocate servicing the commander withholding the authority. File a copy in the office of the judge advocate servicing the commander whose authority has been withheld. Any such withholding remains in effect when a new commander is appointed to or assumes either command, until and unless expressly revoked by the superior commander. Any such action should be addressed by duty title and not by name.

Discussion

This section emphasizes the need for any reservation authority by a superior competent authority to be in writing with a copy filed in the unit Office of the Staff Judge Advocate. The reservation should be addressed to the position and not toward the individual occupying the position. The convening authority must be in the grade of O6 or above.

See State Code Article 22; UCMJ Article 22. *See also* R.C.M. 504, State Manual para. 3-5.

5-2 Who may convene special courts-martial [Reserved]. (Article 23)

Discussion

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See State Code Article 23; UCMJ Article 23. See also R.C.M. 504.

5-3 Who may convene summary courts-martial [Reserved]. (Article 24)

Discussion

See State Code Article 24; UCMJ Article 24. See also R.C.M. 504.

5-4 Who may serve on courts martial. (Article 25)

Any delegation of authority to a judge advocate or “principal assistant” for purposes of excusal of members must be in writing, unless exigencies prevent such written delegation. Verbal authorization shall be reduced to writing as soon as possible thereafter.

Discussion

See State Code Article 25(e); UCMJ Article 25, R.C.M. 503. See also R.C.M. 503, 505, 506.

5-5 Military judge of a general or special court-martial. (Article 26)

(a) *Designation of a Military Judge.* The Senior force judge advocate may consider the following factors when certifying an officer as a military judge:

- (1) Appropriate judicial decorum, civility and temperament;
- (2) Civilian judicial experience;
- (3) Military judicial experience;
- (4) Military legal experience;
- (5) Designation as a Judge Advocate;
- (6) Reputation;
- (7) Familiarity with the UCMJ and MCM;
- (8) Completion of the active component Military Judges Course;
- (9) Knowledge of general criminal law and procedures;
- (10) Education, training and experience;
- (11) Familiarity with the customs, procedures and organization of the service branch of the accused; and
- (12) Any other relevant factors.

(b) The designation of a military judge shall not be by political appointment. The designation of a military judge by the senior force judge advocate or designee pursuant to Article 26 (d) of the Code will ensure uniformity and impartiality, and prevent any appearance of impropriety.

(c) A military judge does not have to be in the same service as the accused. However, the court-martial shall be conducted using the implementing regulations and procedures of the military service of the accused. When a service member is tried by a court-martial convened by a combatant or joint commander, the applicable implementing regulations and procedures of the service to which the accused is a member shall be used to the extent they apply and are not inconsistent with this Code, the Manual and their implementing regulations.

Discussion

A military judge may be a member of a state bar in a state other than the state serving as the situs of the court-martial. While a military judge must be a member of a state military force, a potential conflict exists if the military judge is a member of a state wherein the definition of “state military force” includes the unorganized militia. If the judge’s membership happens to be with the unorganized militia and the state hosting the court-martial does not include the unorganized militia in its definition of “state military force,” the host state may not accept the military judge’s affiliation with the unorganized militia. If such a case occurs, the senior service judge advocate may look to other credential of the candidate and determine whether the military judge candidate should serve despite this conflict.

The considerations enumerated in the main text are possible considerations for a senior service Judge Advocate when selecting a candidate for judicial certification. This list is not exclusive, and a senior service Judge Advocate may consider other relevant factors when considering certification of a military judge to preside over a court-martial. Finally, the State Code created a statutory basis for admitting a military judge licensed in another jurisdiction *pro hac vice*, provided the state procedures for such practice are followed.

See State) Code Article 26; UCMJ Article 26. See also R.C.M.. 501, 503, 505.

5-6 Detail of trial counsel and defense counsel. (Article 27)

(a) *Trial Counsel.* The trial counsel and assistant trial counsel cannot be a person who was the convening authority, the accuser, or the investigating officer. However, the trial counsel and assistant trial counsel could have provided advice to the convening authority, the accuser, or the investigator. Trial counsel does not have to be in the same service as the accused.

(b) *Defense Counsel.*

(1) *Military Defense Counsel.* The detailed defense counsel will not be in the chain of command of the court martial members or president of the court-martial. Defense counsel may be a judge advocate of a military state force, a reserve force, or the armed forces of the United States.

(2) *Civilian Defense Counsel.* The accused has a right to retain civilian defense counsel to represent the accused at no cost to the State of State or the United States. Civilian counsel must comply with RCM 502(d)(3).

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- (c) *Record of detail.* The order detailing a counsel shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial and shall indicate by whom counsel was detailed.
- (d) *Cross-command assignments.* A trial or defense counsel from one command may be assigned to a court-martial in a different command and then detailed by the convening authority.
- (e) *Cross-component assignments.* A trial or defense counsel from one component may be assigned to a court-martial in a different component and then detailed by the convening authority.

Discussion

The convening authority has the freedom to select the best judge advocate for prosecution of a particular matter without the limitation to the pool of judge advocates within a service branch.

Defense counsel need not be a member of the state military forces but may be a member of another state military force, the United States reserve component, or the active component. Furthermore, as with the military judge, defense counsel may appear in the proceeding *pro hac vice*. Defense counsel must not be in the chain of command of the convening authority and must be protected from any influence there from. While the member will be detailed a military defense counsel, the member can refuse such representation. Defense counsel, however, is not conflicted from representing a member just because advice was provided to the convening authority at some time in the past. The member has the right to retain civilian defense counsel at no expense to the state. Civilian counsel must comply with R.C.M. 502(d)(3).

See State Code Article 27; UCMJ Article 27. *See also* State Code Article 38, UCMJ Article 38, R.C.M. 504. *See generally* R.C.M. 502, 506.

5-7 Detail or employment of reporters and interpreters [Reserved]. (Article 28)

Discussion

See State Code Article 28; UCMJ Article 28. *See also* R.C.M. 502(e).

5-8 Absent and additional members [Reserved]. (Article 29)

Discussion

See State Code Article 29; UCMJ Article 29. *See also* R.C.M. 505.

Chapter 6. Pretrial Procedure

Articles 30-35

6-1 Charges and specifications [Reserved]. (Article 30)

Discussion

See State Code Article 30; UCMJ Article 30. *See generally* R.C.M. 307, 401, 603, 604.

6-2 Compulsory self-incrimination prohibited. (Article 31)

Any military person suspected of committing a crime punishable by the Code must be read Article 31 rights. The civilian right against self-incrimination is based on custody. The military right against self-incrimination is not based on custody.

Discussion

Civilian law enforcement authorities are required to inform a suspect of rights against self incrimination when the suspect is in custody and before any questioning. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Article 31, however, attaches when authorities are questioning a suspect regardless of custody. *See United States v. Mapes*, 59 M.J. 60, 65-66 (CAAF 2003). Thus, Article 31 imposes a higher standard for law enforcement authorities and more protection for a member against self-incrimination. *Id.* The state military force may not use civilian authorities for purposes of questioning in order to take advantage of the lower standard under *Miranda*.

See State Code Article 31; UCMJ Article 31, App. 22. *See also* R.C.M. 301, 304, 305.

6-3 Investigation [Reserved]. (Article 32)*Discussion*

See State Code Article 32; UCMJ Article 32. *See also* R.C.M. 303, 405.

6-4 Forwarding of charges [Reserved]. (Article 33)*Discussion*

See State Code Article 33; UCMJ Article 33, R.C.M. 401.

6-5 Advice of judge advocate and reference for trial. (Article 34)

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There is no requirement that only a staff judge advocate provide the pretrial advice. The Code allows any judge advocate to provide Article 34 advice, however, the judge advocate providing the advice should ensure that no ethical conflicts exist. A judge advocate should refer to all applicable military and civilian professional codes of conduct that may apply.

Discussion

There is no requirement that a staff judge advocate perform this function, therefore, this provision allows a judge advocate to provide the advice. The judge advocate must ensure that there are not ethical conflicts. A judge advocate should refer to all resources on ethics such as the appropriate service regulation, the joint ethics regulation, and any state ethical guidelines under rules or codes of professional responsibility.

See State Code Article 34; UCMJ Article 34. *See also* R.C.M. 406.

6-6 Service of charges [Reserved]. (Article 35)

Discussion

See State Code Article 35; UCMJ Article 25. *See also* R.C.M. 308, 602.

Chapter 7. Trial Procedure

Articles 36-54

7-1 Governor or The Adjutant General may prescribe rules. (Article 36)

The Military Rules of Evidence are only applicable to courts-martial. They are not applicable to nonjudicial punishment, administrative boards, promotion boards, medical retention boards, retention boards, or investigations and/or actions pertaining to non-punitive or administrative punishment.

Discussion

Judge advocates should be aware of the interpretation of the rules of evidence as set forth in applicable federal or state case law. Deference should be given to applicable federal military case law on the matter. There may be situations where the federal military rules of evidence and the State military rules of evidence conflict. Furthermore, there may be cases where the state has not adopted a federal rule such as F.R.E. 413. Where the State has not adopted a federal military rule of evidence or does not recognize certain evidentiary principles, such matters are ripe for litigation. The military judge has the discretion to decide if the military rule of evidence will apply. Such a decision, if appealed, will require resolution by the State Supreme Court.

It is recognized that this paragraph may require amendment if certain provisions of the State rules of evidence are incorporated into the military rules of evidence or if certain military rules of evidence are rejected by the State Supreme Court.

See State Code Article 36; UCMJ Article 36.

7-2 Unlawfully influencing action of court. (Article 37)

The protections provided in Article 37(b) are extended to protect witnesses in a court-martial. This protection does not extend to protection from prosecution of crimes such as perjury or false official statement.

Discussion

Article 37(b) does not immune a witness from committing perjury.

See State Code Article 37; UCMJ Article 37. *See also* R.C.M. 104.

7-3 Duties of trial counsel and defense counsel. (Article 38)

(a) *Duties of trial and assistant trial counsel.* Under the supervision of trial counsel, an assistant trial counsel may perform any act or duty which trial counsel may perform under law, regulation, or custom of the service.

(b) *Duties of defense and assistant defense counsel.* Under the supervision of the defense counsel, an assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the service.

(c) *Rights to counsel.*

(1) *Individual military counsel.*

(A) Reasonably available. Subject to this subparagraph, the senior force judge advocate shall determine reasonable availability. While so assigned, the following persons are not reasonably available to serve as individual military counsel because of the nature of their duties or positions:

- i. A general officer;
- ii. A principal legal advisor to a command.

(B) The senior force judge advocate may consider the following factors when determining that counsel is reasonably available: the nature or responsibilities of the assignment, geographic considerations, exigent circumstances, military necessity, or employment conflicts and any other relevant factors. The senior force judge advocate may grant an exception to this section when an attorney-client relationship has already been established.

(d) *Procedure.* Requests for an individual military counsel shall be made by the accused or the detailed defense counsel through the trial counsel to the senior force judge advocate in writing. If requested counsel is among those not reasonably available, the senior force judge advocate shall deny the request and notify the accused. This determination is a matter within the sole discretion of the senior force judge advocate and is final.

(e) *Excusal of detailed counsel.* If the accused is represented by individual military counsel, detailed defense counsel shall normally be excused. The senior force judge advocate, as a matter of discretion, may approve a request from the accused that detailed defense counsel shall act as associate counsel.

(f) *Excusal or withdrawal.* Except as otherwise provided, defense counsel may be excused only with the express consent of the accused or by the military judge upon application for withdrawal by the defense counsel for good cause shown.

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(g) *Waiver.* The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. The military judge shall only accept such a waiver if the military judge finds that the accused is competent to understand the disadvantages of self-representation and knowingly and voluntarily waives the right. The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

(h) *Nonlawyer present.* Subject to the discretion of the military judge, the accused may have present and seated at the counsel table for purpose of consultation, persons not qualified to serve as counsel.

(i) *Right to Counsel in a summary court-martial*

(1) The accused does not have the right to have military counsel present in a summary court-martial proceeding. The accused may have civilian counsel at no cost to the state, as long as civilian counsel meets the requirements set forth in and qualified under R.C.M. 502(d)(3). However, civilian counsel shall not be permitted to represent the accused during the proceeding if such representation will delay the proceedings unreasonably or if military exigencies do not allow it.

(2) The accused has the right to consult with military counsel prior to the trial date for advice concerning the accused rights and the consequences of any waiver of rights in voluntarily consenting to trial by summary court-martial unless military exigencies require otherwise.

Discussion

See State Code Article 38; UCMJ Article 38. *See also* R.C.M. 502, 503, 505, 506(a).

7-4 Sessions [Reserved]. (Article 39)

Discussion

See State Code Article 39; UCMJ Article 39. *See also* R.C.M. 505, 801, 802, 803, 901.

7-5 Continuances [Reserved]. (Article 40)

Discussion

See State Code Article 40; UCMJ Article 40. *See also* R.C.M. 801, 906.

7-6 Challenges [Reserved]. (Article 41)***Discussion***

See State Code Article 41; UCMJ Article 41. *See also* R.C.M. 801, 902, 903, 912.

7-7 Oaths [Reserved]. (Article 42)***Discussion***

See State Code Article 42; UCMJ Article 42. *See also* R.C.M. 505, 702, 807.

7-8 Statute of limitations [Reserved]. (Article 43)***Discussion***

Trial and defense counsel should address the running of the statute of limitation and its interplay with the rules for speedy trial.

See State Code Article 43; UCMJ Article 43. *See also* R.C.M. 403, 707, 907.

7-9 Former jeopardy [Reserved]. (Article 44)***Discussion***

See State Code Article 44; UCMJ Article 44. *See* R.C.M. 604.

7-10 Pleas of the accused [Reserved]. (Article 45)***Discussion***

***See* State Code Article 45; UCMJ Article 45. *See also* R.C.M. 904, 910.**

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7-11 Opportunity to obtain witnesses and other evidence. (Article 46)

The service of process will be issued based on criminal military law but executed in accordance with the procedures of the state where the witness or evidence is located.

Discussion

See State Code Article 46; UCMJ Article 46. See also R.C.M. 701, 703.

7-12 Refusal to appear or testify. (Article 47)

Discussion

See State Code Article 47; UCMJ arts. 47, 134.

7-13 Contempts. (Article 48)

Discussion

See State Code Article 48; UCMJ Article 48. See generally R.C.M. 801, 809.

7-14 Depositions [Reserved]. (Article 49)

Discussion

See State Code Article 49; UCMJ Article 49. See also R.C.M. 702.

7-15 Admissibility of records of courts of inquiry [Reserved]. (Article 50)

Discussion

See State Code Article 50; UCMJ Article 50.

7-16 **Votings and rulings [Reserved]. (Article 51)**

Discussion

See State Code Article 51; UCMJ Article 51. See also R.C.M. 801, 805, 921.

7-17 **Number of votes required [Reserved]. (Article 52)**

Discussion

See State Code Article 52; UCMJ Article 52. See also R.C.M. 921.

7-18 **Court to announce action [Reserved]. (Article 53)**

Discussion

See State Code Article 53; UCMJ Article 53. See also R.C.M. 922. See generally R.C.M. 918.

7-19 **Record of trial. (Article 54)**

(a) *Record of Trial.* In addition to those items required by the MCM or applicable service regulations, the trial record will also include:

- (1) all documents pertaining to appointments and detail of court members and the military judge;
- (2) all documents advising and/or waiving rights of the accused;
- (3) if the accused was represented by civilian counsel, the documents demonstrating compliance with this Manual;

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- (4) if the accused was represented by civilian counsel in a summary court-martial, documentation noting that representation;
- (5) the names of all witnesses providing testimony;
- (6) the date(s) of trial;
- (7) all written motions and/or objections with written responses or notation on all oral responses; and
- (8) the pleadings, findings, and sentence.

If the record does not contain an item listed above, the record will reflect why the item is not contained in the record.

- (b) The record must be completed within sixty (60) days of the trial. Failure to complete the record within sixty (60) days of the trial is not a basis for appeal.

Discussion

See State Code Article 54; UCMJ Article 54. See R.C.M. 808, 1103, 1104.

Chapter 8. Sentences

Articles 55-58

8-1 Cruel and unusual punishments prohibited [Reserved]. (Article 55)

Discussion

See State Code Article 55; UCMJ Article 55. See also R.C.M. 1003.

8-2 Maximum limits. (Article 56)

The maximum statutory punishments for courts-martial are provided in Article 56 of the Code. Lesser punishments may be imposed. The recommended punishments for offenses in Appendix B to this Manual are found in the MCM and may be used as a guideline. However, no sentence of confinement may exceed ten (10) years for any offense.

Discussion

See State Code Article 56; UCMJ Article 56. See also R.C.M. 1003, App. 12.

8-3 Effective date of sentences [Reserved]. (Article 57)***Discussion***

See State Code Article 57; UCMJ Article 57. See generally R.C.M. 1001, 1002, 1005.

8-4 Deferment of sentences [Reserved]. (Article 57a)***Discussion***

See State Code Article 57a; UCMJ Article 57a. See generally R.C.M. 1009, 1101.

8-5 Execution of confinement [Reserved]. (Article 58)***Discussion***

Confinement may be made in any military or civilian facility that is authorized under the State Code. General State fiscal issues of funding and payment for confinement of state prisoners will govern the confinement of military prisoners as well.

See State Code Article 58; UCMJ Article 58. See also R.C.M. 1101, 1113, See generally 1107.

8-6 Sentences [Reserved]. (Article 58a)***Discussion***

See State Code Article 58a.; UCMJ Article 58a. See generally R.C.M. 1002-10.

8-7 Sentences [Reserved]. (Article 58b)***Discussion***

See State Code Article 58b.; UCMJ Article 58b. See generally R.C.M. 1002-10.

Chapter 9. Post Trial Procedure and Appeals Articles 59-76

9-1 Error of law; lesser included offense [Reserved]. (Article 59)

Discussion

See State Code Article 59; UCMJ Article 59. See also R.C.M. 1007.

9-2 Action by the convening authority. (Article 60)

Article 60 recommendations may be provided by a judge advocate and not necessarily the staff judge advocate.

Discussion

See State Code Article 60; UCMJ Article 60b. See also R.C.M. 1107, 1108.

9-3 Withdrawal of appeal. (Article 61)

The accused has the right to appeal. This right to appeal is permissive and not automatic. There are no exceptions to the right to appeal. An accused may withdraw an appeal at any time, and the accused is barred from re-filing the same appeal. In all cases, the withdrawal must be in writing.

Discussion

Under Article 66 of the federal UCMJ, a sentence that includes a bad-conduct discharge or confinement of one year or more is automatically reviewed. Consequently, Rule 1110 does not provide for a withdrawal of this automatic appeal. Under the State Code, however, an appeal is permissive, and therefore, the service member may withdraw the appeal after filing it. The withdrawal of an appeal is effective upon the filing of the writing.

See State Code Article 61; See also R.C.M. 1110, 1112, 1201. See cf. UCMJ arts. 61, 66.

9-4 Appeal by the State. (Article 62)

Appellate procedures will be those of the court in which the appeal is filed.

Discussion

See State Code Article 62; UCMJ Article 62. See generally R.C.M. 908.

9-5 Rehearings [Reserved]. (Article 63)

Discussion

See State Code Article 63; UCMJ Article 63. See also R.C.M. 810. See generally R.C.M. 1107.

9-6 Review by the senior force judge advocate. (Article 64)

(a) The senior force judge advocate may designate another judge advocate to perform this review. This designation is required where the senior force judge advocate has acted in the case in such a manner that mere participation in the review would reduce confidence in the appellate process or create an appearance of ethical impropriety.

Discussion

See State Code Article 64; UCMJ Article 64. See generally R.C.M. 1112.

9-7 Disposition of records after review by the convening authority. (Article 65)

The Adjutant General shall designate the custodian for the record of trial. The record shall be maintained in accordance with service rules and regulations. The senior force judge advocate shall file a certified copy of the judgment of conviction or plea agreement with the local clerk of criminal trial court. Any court-martial conviction, misdemeanor or felony, will be maintained and reported pursuant to the state procedures.

Discussion

Any court-martial conviction, misdemeanor or felony, will be reported in accordance with the State criminal conviction reporting procedures. The record of trial shall be maintained by The Adjutant General's (TAG) Office. TAG shall designate the appropriate office of the state military forces as custodian for the record of trial. The senior force judge advocate is responsible for filing a certified copy of the judgment of conviction with the local clerk of criminal courts.

See State Code Article 65; UCMJ Article 65. See, e.g., R.C.M. 1111.

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9-8 Review by the State criminal appellate court. (Article 67a)

Discussion

See State Code arts. 61, 67a; UCMJ Article 67a. See, e.g., R.C.M. 1205.

9-9 Appellate counsel. (Article 70)

(a) A convicted member does not have the right to detailed military appellate defense counsel. 'Reviewing authority' as in Article 70(c) does not include appellate authority. However, the convicted member may request detailed military counsel in writing to the senior force judge advocate who may appoint counsel if reasonably available. Prior to making a request for military appellate defense counsel the convicted member first shall avail himself of any counsel appointment to which the convicted member may otherwise be entitled. Civilian counsel may represent the convicted member at no cost to the state.

(b) The senior force judge advocate may consider the following factors when determining the reasonable availability of counsel: the criteria enumerated in paragraph 7-3(c) (B) of this Manual; judge advocate resources; military exigencies and the financial means and/or hardship of the convicted member. The convicted member shall provide proof of financial hardship. Such proof may consist of tax returns, tuition bills, leave and earnings statements, denial of application for counsel appointment pursuant to other state procedures and payroll receipts, among others.

Discussion

A convicted member is encouraged to seek appellate counsel through civilian representation and is encouraged to explore such assistance through the civilian court-appointed counsel process or the state bar pro bono program. Such resources should be consulted before seeking assistance from a military judge advocate. A member found by the senior force judge advocate to have adequate resources to pay for private civilian counsel most likely will not be provided with military counsel. Withholding military counsel in such a situation also prevents exhaustion of judge advocate resources and interference with the unit judge advocate mission.

See State Code Article 70; UCMJ Article 70. See also 1202. See generally 908.

9-10 Execution of sentence; suspension of sentence [Reserved]. (Article 71)

Discussion

See State Code Article 71; UCMJ Article 71. See also R.C.M. 1108, 1113.

9-11 Vacation of suspension [Reserved]. (Article 72)

Discussion

See State Code Article 72. See also R.C.M. 1109.

9-12 Petition for a new trial [Reserved]. (Article 73)

Discussion

See State Code Article 73; UCMJ Article 73. See also R.C.M. 1210.

9-13 Remission and suspension [Reserved]. (Article 74)

Discussion

See State Code Article 74; UCMJ Article 74. See also R.C.M. 1108-09.

9-14 Restoration [Reserved]. (Article 75)

Discussion

See State Code Article 75; UCMJ Article 75. See also R.C.M. 1208.

9-15 Finality of proceedings, findings, and sentence [Reserved]. (Article 76)

Discussion

See State Code Article 76; UCMJ Article 76. See also R.C.M. 1209.

9-16 Leave required to be taken pending review of certain court-martial convictions [Reserved]. (Article 76a.)

Discussion

See State Code Article 76a.; UCMJ Article 76a.

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- 9-17** Lack of mental capacity or mental responsibility: commitment of accused for examination and treatment **[Reserved]**. **(Article 76b.)**

Discussion

See State Code Article 76b.; UCMJ Article 76b. See, e.g. 1107. See generally R.C.M. 701, 906, 909, 916, 1102, 1203.

Chapter 10. Punitive Articles **Articles 77-134**

- 10-1** Principals **[Reserved]** **(Article 77)**

Discussion

See State Code Article 77; UCMJ Article 77. See also R.C.M. 305.

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- 10-2** Accessory after the fact **[Reserved]** **(Article 78)**

Discussion

See State Code Article 78; UCMJ Article 78.

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- 10-3** Conviction of lesser included offense **[Reserved]** **(Article 79)**

Discussion

See State Code Article 79; UCMJ Article 79. See generally R.C.M. 230, 920.

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- 10-4** Attempts. **(Article 80)**

Discussion

See State Code Article 80; UCMJ Article 80.

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- 10-5** Conspiracy. **(Article 81)**

Discussion

See State Code Article 81; UCMJ Article 81.

10-6 Solicitation. (Article 82)

Discussion

See State Code Article 82; UCMJ Article 82.

10-7 Through 10-41 Military offenses see Appendix B. (Article 83-132)

10-42 Conduct unbecoming an officer and a gentleman. (Article 133)

Discussion

See State Code Article 133; UCMJ Article 133.

10-43 General Article. (Article 134)

A member subject to the Code can be tried for purely military offenses as found in Appendix B. Civilian crimes may be prosecuted under this Article when there is a nexus between the military and the offense. However, under certain conditions, a purely military offense may arise out of an act which can and/or may be tried in civilian criminal court. Although members who have been tried in civilian criminal court ordinarily will not be tried by court-martial, court-martial jurisdiction is not precluded because of the civilian criminal trial.

Discussion

See State Code Article 134; UCMJ Article 134.

Chapter 11. Miscellaneous Provisions

Articles 135-145

11-1 Courts of inquiry [Reserved]. (Article 135)

Discussion

See State Code Article 135; UCMJ Article 135. See also R.C.M. 405,703.

11-2 Authority to administer oaths and to act as notary [Reserved]. (Article 136)

Discussion

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See State Code arts. 42, 136; UCMJ Article 42, 136. See generally R.C.M. 807.

11-3 Articles to be explained [Reserved]. (Article 137)

Discussion

See State Code Article 137; UCMJ Article 137.

11-4 Complaints of wrongs [Reserved]. (Article 138)

Discussion

See State Code Article 138; UCMJ Article 138.

11-5 Redress of injuries to property [Reserved]. (Article 139)

Discussion

See State Code Article 139; UCMJ Article 139.

11-6 Delegation by the Governor [Reserved]. (Article 140)

Discussion

See State Code Article 140; UCMJ Article 140. See generally R.C.M. 304, 504, 505.

11-7 Payment of fees, costs, and expenses [Reserved]. (Article 141)

(a) In regard to the payment of fees, costs, and expenses, the following payment sources are suggested: “Title 32 funds” for training, state active duty funds in appropriate authorized status, state statutes for witness fees, state general appropriation fund, any state, federal, or private criminal justice funds or programs, the Adjutant General appropriated funds, the state military agency or department fund, any other specific funds that may be available to pay these costs, and the military justice fund pursuant to this Article.

(b) Authorized costs of apprehension and pre and post trial confinement may be paid from any available source if payment is required by law. If payment of costs is required by law, the above list in subsection (a) may be considered to include interstate, inter-county, or interagency or any other state-federal existing Memoranda of Understanding or Agreements.

Discussion

See State Code Article 141.

11-8 Payment of fines and disposition thereof. (Article 142)

All fines collected including those collected in nonjudicial punishment proceedings shall be placed in the military justice fund unless the military judge directs payment elsewhere. The military judge may direct that a fine be paid directly to a victim as restitution or to whomever the court may direct in the interest of justice.

Discussion

See State Code Article 142.

11-9 Uniformity of interpretation [Reserved]. (Article 143)

Discussion

See State Code Article 143.

11-10 Immunity for action of military courts [Reserved]. (Article 144)

Discussion

See State Code Article 144.

11-11 Severability [Reserved]. (Article 145)

Discussion

See State Code Article 145.

11-12 Short Title [Reserved]. (Article 146)

Discussion

See State Code Article 146.

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11-13 Time of taking effect [Reserved]. (Article 147)

Discussion

See State Code Article 147.

11-14 Supersedes existing state military justice codes [Reserved]. (Article 148)

Appendix A - References

United States Constitution

Article I, Section 8

Article II, Section 2

Article IV, Section 4

Second Amendment

Third Amendment

Fourth Amendment

Fifth Amendment

Sixth Amendment

Fourteenth Amendment

United States Code, Title 5, Privacy Act

United States Code, Title 10, Chapter 47 [Uniform Code of Military Justice]

United States Code, Title 32, Chapter 3 [Personnel]

Rules For Courts-Martial

Military Rules of Evidence

State Constitution

State Statute

Army Regulations:

AR 15-6, Procedures for Investigating Officers and Board of Officers

AR 24-400-2, The Modern Army Record Keeping System [MARKS]

AR 27-10, Military Justice

AR 27-13, Courts of Military Review – Rules of Practice and Procedure

Air Force Instructions:

AFI 51-201, Administration of Military Justice

AFI 51-202, Nonjudicial Punishment

AFI 51-1001, Delivery of Personnel to United States Civilian Authorities for Trial

Air Force Manuals:

AFMAN 51-203 Records of Trial

AFMAN 51-204 United States Air Force Judiciary

https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JUSTICE/JAJM/POLICY.htm

JAJM Guides, Checklists, and Briefings

Nonjudicial punishment Processing Checklist

Vacation of Suspended nonjudicial punishment Processing Checklist

Nonjudicial punishment Supplementary Action Processing Checklist

Article 32 Investigating Officer's Guide

Guide for Pretrial Confinement Reviewing Officers

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Guide for Military Magistrates
Special Court-Martial Checklist
General Court-Martial Checklist
Media Relations Guide
Article 137 Briefing
Court-Martial Handbook (1997)
Briefing: *The U.S. Military Justice system* (cover letter accompanying brief)
PowerPoint version 4
PowerPoint 97
Court-Martial Data Sheet
Sample Court Member Selection Letter
JAJM Policy Letters
Uniform Rules of Practice before Air Force Courts-Martial
ANG Commanders Legal Deskbook
Military Judges Benchbook
Military Law Deskbook
Ethics Regulations
Joint Ethics Regulation

Professional Responsibility Rules and Conduct
 Army Judge Advocates
 Air Judge Advocates
 Air National Guard Judge Advocates
 State Bar

Appendix B - Military Offenses

See the Punitive Articles (Part IV) in the Manual for Courts-Martial for the text of the article offense, elements of the offense(s), explanation, lesser included offenses, maximum punishment and sample specifications. Articles 77 through 82 are only applicable if they attach to one of the following offenses:

- Article 83. Fraudulent enlistment, appointment, or separation
- Article 84. Effecting unlawful enlistment, appointment, or separation
- Article 85. Desertion
- Article 86. Absence without leave
- Article 87. Missing movement
- Article 88. Contempt toward officials
- Article 89. Disrespect toward a superior commissioned officer
- Article 90. Assaulting or willfully disobeying superior commissioned officer
- Article 91. Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer
- Article 92. Failure to obey order or regulation
- Article 94. Mutiny and sedition
- Article 99. Misbehavior before the enemy
- Article 100. Subordinate compelling surrender
- Article 101. Improper use of countersign
- Article 102. Forcing a safeguard
- Article 103. Captured or abandoned property
- Article 104. Aiding the enemy
- Article 105. Misconduct as a prisoner
- Article 107. False official statements
- Article 108. Military property — Loss, damage, destruction. Or wrongful disposition
- Article 109. Property other than military property — Waste, spoilage, or destruction
- Article 110. Improper hazarding of vessel
- Article 112. Drunk on Duty
- Article 112a. Wrongful use, possession, etc., of controlled substances
- Article 113. Misbehavior of sentinel or lookout
- Article 114. Dueling
- Article 115. Malingering
- Article 116. Riot or breach of peace
- Article 117. Provoking speeches or gestures
- Article 132. Frauds against the government
- Article 133. Conduct unbecoming an officer
- Article 134. General Article