



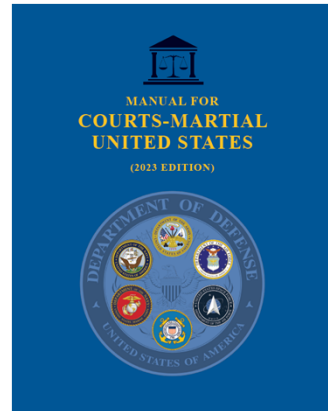
# **Military Justice Reform Training for Marine Corps Command Teams**



## BLUF

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- The FY22 and FY23 NDAA's implement holistic reforms to the Uniform Code of Military Justice tailored to improve the efficacy of, and promote confidence in, the military justice system.
- Effective 28 December 2023, the reforms impact the reporting, investigation, and prosecution of covered offenses.
- Notable areas of reform include courts-martial procedure, disposition authority, and the specialized provision of legal service support across the Marine Corps.



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Effective date of FY22 and 23 NDAA military justice reform is 27 Dec 23, but applies to offenses committed after that date (i.e., on or after 28 Dec 23).

Reforms also designed to more closely align military justice system with litigation practice in United States federal courts.



## Notable Areas of Reform

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- **Court-Martial Procedure**
  - Command Influence
  - Sexual Harassment Investigations
  - NJP
  - Expanded Military Judge Authority
  - New Sentencing Guidelines
  - Victim Rights
  
- **Covered Offenses and Disposition Authority**
  - Covered Offenses
  - Reporting and Notice
  - Related and Known Offenses
  - New Disposition Authority Roles
  
- **Vignette**



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# MILITARY JUSTICE GOING FORWARD



## Marine Corps Military Justice Litigation

### Office of Special Trial Counsel

Charges and prosecutes covered offenses

Led by Lead Special Trial Counsel (O-7)

### Trial Services Organization

Prosecutes general crimes (non-covered offenses) referred to court-martial by convening authority

+ Adseps/BOIs

Led by Chief Trial Counsel (O-6)

### Defense Services Organization

Represents Marines and Sailors accused of offenses, including covered offenses

Led by Chief Defense Counsel (O-6)

### Victims' Legal Counsel Organization

Represents victims of sexual assault, domestic violence, and other offenses

Led by Chief Victims' Legal Counsel (O-6)



## Defense Services Organization

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- **The Marine Corps' DSO is:**
  - A constitutionally mandated component of our adversarial system
  - Required by law to seek the most advantageous resolution for Marines and Sailors (their clients)
- The DSO **enables** our system to function in a manner which promotes justice, assists in maintaining good order and discipline, and enhances a unit's and the Marine Corps' warfighting readiness.

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Military justice system is designed to resolve allegations of substandard performance and misconduct in order to return a unit to its most effective and efficient state



## Command Influence

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➤ **Commanders may:**

- Withhold disposition or convening authority from subordinate commander(s)
- Generally, seek advice from superior commanders regarding the disposition of misconduct
- Speak on criminal activity or a particular type of criminal offense without advocating a particular disposition, finding, or sentence, and not relating to a particular accused
- Provide non-binding input to a disposition authority on a case relating to a particular accused or victim under their command

➤ **Commanders may not:**

- Deter a potential witness from participating in the investigatory process or testifying
- **Attempt to coerce or, by any unauthorized means, attempt to influence the discretion of a disposition authority, a preliminary hearing officer, convening authority, or a court-martial (or any member thereof)**
- Direct a subordinate commander to make a particular disposition in a specific case
- Limit the discretion of a subordinate commander in a specific case

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RCM 104 amended to account for updates to Article 37, UCMJ per FY20 NDAA



## Sexual Harassment Investigations

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- Formal complaints of sexual harassment in the military must be independently investigated
- Within 72 hours of receiving a formal complaint of sexual harassment, COs must:
  - Forward the complaint to an independent investigator;\*
  - Notify the next superior GCMCA in the chain of command; and
  - Advise the complainant of the commencement of the investigation
- Within 14 days, the investigation should be completed with a final report to the next superior GCMCA within 20 days
- Per 10 USC §1561, these changes become effective 27 Dec 2023. Updates to DoD and DON policies are pending. ALNAV 024/22 provides DON interim policy, requiring forwarding of the complaint to the next higher-level commander (at least O-6) for appointment of an IO from outside the command of both subject and complainant.

\* "Independent investigator" means a DoD civilian employee or service member who is outside the immediate chain of command of the complainant and the subject of the investigation, and trained in the investigation of sexual harassment, as determined by the relevant Secretary.





## Military Justice Reform (NJP)

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- New UPB
- **Right** to consult with counsel before & after NJP
- Reducing use of the **vessel exception** (not able to refuse NJP)

**\*\* Mandatory Training before imposing NJP**



## Expanded Military Judge Authority

- Pretrial randomization of detailed members
  
- Pursuant to Article 25, Convening Authority (CA ) still details those who are best qualified to serve as members by reason of age, education, training, experience, length of service, and judicial temperament
  - CA should detail sufficient number of members to allow for randomization
  - MJ assigns random numbers to detailed members and directs the presence of only the number of members the MJ determines to be necessary; remainder temporarily excused
  - After voir dire and excusals, the MJ may direct additional detailed members to appear to maintain quorum
  
- MJ is the sole sentencing authority for all non-capital offenses committed after 27 Dec 23
  - Officers may now be sentenced to confinement at special court-martial

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RCM 309 – Proceedings conducted before referral

RCM 911 – Randomization and assembly of court-martial panel

RCM 804(a)(3) – Remote presence of the accused

Art 53, UCMJ – Sentencing authority



## New Sentencing Guidelines

- Specified offenses are now subject to either **sentencing parameters** or **sentencing criteria** set forth in the MCM
- When an offense is subject to parameters, the MJ shall adjudge a sentence within the published parameters, unless the MJ finds specific facts warranting deviation. Examples:
  - Art 86 (unauthorized absence)→ Category 1 Offense→ 0–12 months
  - Art 107 (false official statement)→ Category 2 Offense→ 1–36 months
  - Art 120 (sexual assault)→ Category 3 Offense→ 30–120 months
  - Art 120 (rape)→ Category 4 Offense→ 130–240 months
  - Art 118 (unpremeditated murder)→ Category 5 Offense→ 240–480 months
  - Art 118 (premeditated murder)→ Category 6 Offense→ Life w/o parole
- The MJ may reject plea agreements that propose a sentence outside the applicable sentencing guideline if the MJ finds it to be plainly unreasonable
- When an offense is subject to criteria, the MJ shall consider specified criteria when determining an appropriate sentence. Example:
  - Art 85 (Desertion (in time of war)): The age and experience of the accused; any mental impairment; whether the offense was committed before or in the presence of the enemy; whether the offense was committed while the accused was under charges, investigation, or adverse action; whether the offense disrupted the operations of any organization; whether the offense was committed to avoid the movement of a vessel or hazardous duty; etc.

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RCM 1002 – Sentencing determination



## Victim Rights

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### ➤ **Pre-Disposition**

- Victims shall have the "right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense" and provide non-binding input the CA is required to consider

### ➤ **Post-Disposition**

- Victims of sex-related offenses shall be notified of any administrative action if charges are not referred to court-martial
- In an unsworn statement, a victim may recommend a specific sentence, except in a capital case. The victim may make the statement themselves, through counsel or both.
- Victims must be notified of any post-trial motion, filing or hearing that addresses:
  - Findings/sentence with respect to accused;
  - Unsealing of victim's privileged or private information; or
  - Action that could result in accused's release

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10 USC 1044f(a)(5) -- victim consultation  
RCM 1001 – victim right to be heard  
RCM 1104 – victim notice of post-trial action



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## **PROCEDURES TO ADDRESS COVERED OFFENSES**



## Covered Offenses

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### After 27 Dec 23:

- Article 117a (Intimate Visual Images)\*\*
- Article 118 (Murder)
- Article 119 (Manslaughter)
- Article 119a (Death or Injury of an Unborn Child)\*\*
- Article 120 (Rape and Sexual Assault)\* \*\*
- Article 120a (Mail, Deposit of Obscene Matter)
- Article 120b (Sexual Assault of a Child)\*
- Article 120c (Miscellaneous Sex Offenses)\* \*\*
- Article 125 (Kidnapping)
- Article 128b (Domestic Violence)\* \*\*
- Article 130 (Stalking)\*
- Article 132 (Retaliation)\* \*\*
- Article 134 (Child Pornography)

### After 1 Jan 25:

- Article 134 (Sexual Harassment) (formal, substantiated complaints) \*\*

\* Offenses eligible for VLC representation, though OIC of VLCO may approve representation in more offenses

\*\* New or modified offense



## Reporting & Notice

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### > **Covered Offenses**

- COs must immediately notify STC of reports of covered offenses
- COs must immediately notify STC if a person suspected of a covered offenses is ordered into pretrial restraint or confinement

### > **Sexual Assault**

- DoD civilian employee victims of sexual assault can now make a restricted report to representatives of:
  - Sexual Assault Prevention and Response;
  - Victim Advocacy;
  - Equal Employment Opportunity;
  - Workplace violence prevention and response;
  - Employee assistance; and
  - Family advocacy

### > **Domestic Violence**

- Family Advocacy Program (FAP) personnel will be required to report domestic abuse if there is a reasonable suspicion that abuse occurred
- Military Family members who report domestic or child abuse to FAP must now receive comprehensive, clear information on available services



## Covered Offense (Charging)

- Special Trial Counsel (STC) exercise exclusive authority in determining whether a reported offense is a covered offense; the determination is binding.
- STC will only prefer a covered offense when the conduct meets both the Office of Special Trial Counsel's charging standard and there is sufficient military interest in charging the offense in a criminal forum.
- **Charging Standard:** STC must believe that it is probable (more likely than not) that the admissible evidence will be sufficient to obtain and sustain a conviction rendered by a reasonable, unbiased trier of fact.

**AND**

- **Military Interest:** STC must also believe that the misconduct is more appropriately addressed in a criminal forum (general or special court-martial) than in a non-criminal forum by a commander through administrative means such as formal counseling, NJP, administrative separation, or other adverse administrative action.

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An STC is a Judge Advocate detailed to a case by the Office of Special Trial Counsel who is well trained, experienced, highly skilled, and competent in handling covered offenses

The OSTC charging standard is higher than the baseline “probable cause” standard for charging an offense under the UCMJ, and mirrors the charging standard used by U.S. Attorneys.





## Related and Known Offenses

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- If an STC determines a reported offense is a covered offense, the STC *may* exercise authority over related and known non-covered offenses
  - The determination is binding and the CO may not exercise disposition authority over the offenses unless **deferred** by STC
  
- **Related Offense**: An offense related (as determined by STC) to the covered offense
  - Could be a different offender (e.g., person who stole weapon later used in covered offense), or collateral misconduct by victim
  
- **Known Offense**: Other offense alleged to have been committed *by the person* accused of the covered offense
  - This includes offenses that are unrelated to the covered offense (e.g., earlier drug use)



## New Disposition Authority Roles

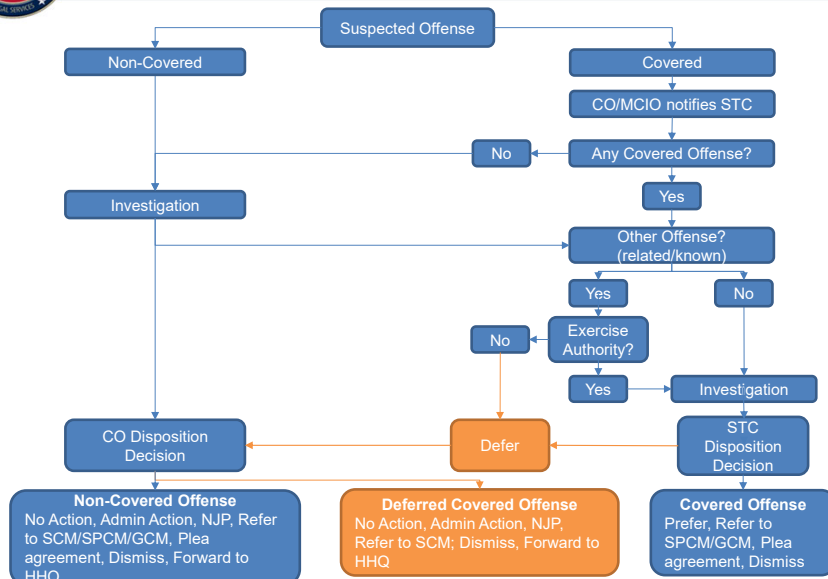
Non-Covered Offenses	Covered Offenses	
Commander	Commander	Special Trial Counsel
Makes Disposition Decision	Provides Non-Binding Input*	<b>Makes Disposition Decision</b>
Directs Article 32 Hearing	Directs Article 32 upon STC Req	Requests Appt of Article 32 PHO
Appoints Preliminary Hearing Officer	Appoints Preliminary Hearing Officer	
Refers Charges		<b>Refers Charges</b>
Funds Witnesses/Experts	Funds Witnesses/Experts	
Convenes Court-Martial	Convenes Court-Martial	
Details Court-Martial Members	Details Court-Martial Members	
Withdraws/Dismisses Charges		<b>Withdraws/Dismisses Charges</b>
Enters Into Plea Agreements		<b>Enters Into Plea Agreements</b>
Considers Victim Input		<b>Considers Victim Input</b>
Orders Depositions		<b>Orders Depositions</b>
Grants Immunity		<b>Grants Immunity</b>
Determines if Rehearing is Necessary		<b>Determine if Rehearing is Necessary</b>
Issues & Communicates MPOs/NCOs	Issues & Communicates MPOs/NCOs	
Manages wellbeing of Marines	Manages wellbeing of Marines	

\*Commanders of the Victim and Accused may provide non-binding input to the STC concerning disposition

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## Disposition of an Offense (effective 28 December 2023)





# VIGNETTE



## Uncomplicating a Complex Process

Applying a Systematic Approach to Resolving Reports of Substandard Performance or Misconduct

### Stabilization

Take Action Upon Receipt of a Report

Focus on Safety and on Preserving Potential Evidence

### Communication

Make Required Notifications

Request Needed Assistance

### Investigation

Obtain the Facts Needed to Make Informed Decisions

Utilize Available Investigative Resources

### Disposition

Determine Whether Disposition Decision is Within Your Authority

Decide the Appropriate Forum for Resolving the Allegation

### Resolution

Determine Responsibility and Appropriate Consequences

### Documentation

Ensure Procedural Compliance and Administrative Finality



## Alleged Misconduct

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- LCpl Smith, age 19, makes an unrestricted report that she was sexually assaulted by Cpl Jones.
- LCpl Smith alleges that she met Cpl Jones, 21, at a local bar, after using her fake ID to gain entry.
- LCpl Smith drank multiple alcoholic beverages bought for her by Cpl Jones.
- LCpl Smith became severely intoxicated and asked to leave the bar.
- Cpl Jones took LCpl Smith back to his barracks room, where she passed out.
- LCpl Smith awoke to Cpl Jones having sex with her.
- Cpl Jones is already pending adjudication for an unrelated larceny allegation.
- Additionally, LCpl Smith's roommate LCpl Moore alleges that Cpl Jones groped her breast 5 months ago.
- After discovering that LCpl Smith and LCpl Moore have accused him of sexual misconduct, Cpl Jones tells Sergeant Williams that he is considering escaping to Mexico



## Alleged Misconduct

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- What are the potential offenses?
  - Article 120, Sexual Assault (of Smith)
  - Article 120, Abusive Sexual Contact (of Moore)
  - Article 92, Underage Drinking
  - Article 92, Providing Alcohol to a Minor
  - Article 92, Possession of Fake ID
  - Article 121, Larceny
  
- Which offenses are potential covered offenses?
  - Article 120, Sexual Assault (of Smith)
  - Article 120, Abusive Sexual Contact (of Moore)



## What Happens Next?

- A Commander **must**:
  - Notify NCIS
  - Notify the STC that potential covered offenses have been reported.
    - Article 24a, UCMJ: Only an STC has authority to determine if a reported offense is a covered offense.
  - Submit OPREP-3/SIR
- A Commander **may**:
  - Place Cpl Jones in pretrial confinement for being a flight risk
  - Take any necessary force protection actions
    - E.g., issue an MPO, suspend security clearance, move barracks rooms
  - As Commander of Victim or Accused, provide non-binding disposition recommendation to the STC
- A Commander **should always**:
  - Ensure the welfare of Marines entrusted to their charge, both victim and accused.

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NCIS Reports of Investigation will be provided to the STC and the Commander

Commanders must notify STC since accused of potential covered offenses

Commanders may not attempt to pressure the STC to take a particular course of action





## STC Exercises Authority

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- The STC determines that any alleged sexual offenses are covered offenses; ***must*** exercise authority (though may later defer)
  - Commander may not take any action on covered offenses unless/until STC defers the offenses.
  
- The STC ***may*** exercise authority over related or known offenses
  - If STC exercises authority over related or known offenses, a Commander may not take any action on those offenses unless/until the STC defers the offenses.

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\*\* Commanders should coordinate with STC prior to taking any action on any Related or Known offenses in the event that the STC decides to exercise authority over those offenses.



## STC Disposition Decision

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- Covered Offenses:
  - Article 120, Sexual Assault (Smith): Prefer Charge
  - Article 120, Abusive Sexual Contact (Moore): Defer
  
- Related Offenses:
  - Article 92, Underage Drinking: Exercise authority, Defer
  - Article 92, Providing Alcohol to a Minor: Exercise authority, Prefer Charge
  - Article 92, Possession of a Fake ID: Exercises authority, Defer
  
- Known Offenses:
  - Article 121, Larceny: Decline to exercise authority\*
    - The STC will notify the commander of the decision to “defer”
    - Since larceny is not a covered offense and the STC declined to exercise disposition authority over it, the commander may immediately dispose of that offense within the commander’s discretion (no action, administrative action, NJP, court-martial).



## Actions Post-Preferral/Deferral

- STC requests appointment of a Preliminary Hearing Officer (PHO) under Article 32, UCMJ
  
- After the Article 32, the STC may
  - Refer the charges to court-martial
  - Dismiss, Defer, or enter plea agreement
  
- **Deferred Offenses**
  - Upon deferral, the STC promptly forwards to convening authority for disposition
  
  - Non-Covered Offenses (underage drinking, fake ID):
    - Convening Authority may take any lawful action
      - No Action, Administrative Action, NJP, SCM, SPCM, GCM
      - Subject to victim collateral misconduct (“Safe-to-Report”) policy limitations (no action if determined to be *minor* collateral misconduct); consult SJA
  
  - Covered Offenses (abusive sexual contact of Moore):
    - Convening Authority may take any lawful action except referral to SPCM or GCM
      - No Action, Administrative Action, NJP, or Summary Court-Martial

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Convening Authority must appoint a PHO and direct a preliminary hearing.  
MUST NOTIFY THE VICTIM OF ACTION TAKEN IF A SEX OFFENSE



## ACTIONS POST-REFERRAL

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- After the Preliminary Hearing the STC decides to refer both offenses (sexual assault and providing alcohol to minor) to GCM
  
- What must the Convening Authority do?
  - Convene a Court-Martial and detail members in accordance with Article 25, UCMJ
  - Fund expert consultants and witness travel
  
- Who can enter into a Plea Agreement?
  - STC (binds commander)
    - Commander may provide non-binding input



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QUESTIONS?



# Back-up Slides



# Sentencing Parameters and Criteria

## MCM, Appendix 12B

Offense Category	Months
1	0-12
2	1-36
3	30-120
4	120-240
5	240-480
6	Confinement for life with eligibility for parole

Sentencing Parameter Table – Confinement Range Categories

As an example, a conviction for Article 96 (releasing prisoner without authority) will result in MJ adjudging a sentence within the 1-36 mos parameters

Whereas, a conviction for Article 98 (misconduct as prisoner) will result in consideration of identified criteria by MJ in adjudging sentence

## MCM, Appendix 12D

**Article 98. Misconduct as prisoner.**

The age and experience of the accused;

Any mental impairment or deficiency of the accused;

Whether the offense caused damage to the national security of the United States, regardless of whether the accused intended such damage;

Whether the accused was the actual perpetrator of the offense or was a principal whose participation in the offense was major;

Whether the accused was an organizer, leader, manager, or supervisor in the offense and the number of other participants in the offense;

## MCM, Appendix 12C

96	Release of prisoner without authority; drinking with prisoner	Category 2
	Releasing a prisoner without authority	Category 1
	Allowing a prisoner to escape through neglect	Category 2
	Allowing a prisoner to escape through design	Category 1
	Drinking with prisoner	Category 2
97	Unlawful Detention	Criteria
98	Misconduct as prisoner	Criteria
99	Misbehavior before the enemy	Criteria
100	Subordinate compelling surrender	Criteria
101	Improper use of countersign	Criteria
102	Forcing a safeguard	Criteria
103	Spies	Category 5
103a	Espionage	Category 5
	Espionage as a capital offense	Category 5
	Espionage or attempted espionage	Category 5



## Non-Covered Offenses

- Article 81 (Conspiracy)
- Article 82 (Solicitation)
- Article 83 (Malingering)
- Article 84 (Breach of Medical Quarantine)
- Article 85 (Desertion)
- Article 86 (Absence Without Leave)
- Article 87 (Missing Movement)
- Article 87a (Resistance, Flight, Breach of Arrest)
- Article 87b (Offenses Against Correctional Custody)
- Article 88 (Contempt Toward Officials)
- Article 89 (Disrespect)
- Article 90 (Disobey Superior)
- Article 91 (Insubordination)
- Article 92 (Failure to Follow Order/Regulation)
- Article 93 (Cruelty and Maltreatment)\*\*
- Article 93a (Prohibited Activities with Recruit)\*\*
- Article 94 (Mutiny)
- Article 95 (Offenses by Sentinel)
- Article 95a (Disrespect to Sentinel)
- Article 96 (Release of Prisoner)
- Article 97 (Unlawful Detention)
- Article 98 (Misconduct as Prisoner)
- Article 99 (Misbehavior Before the Enemy)
- Article 100 (Subordinate Compelling Surrender)
- Article 101 (Improper Use of Countersign)
- Article 102 (Forcing a Safeguard)
- Article 103 (Spies)
- Article 103a (Espionage)
- Article 103b (Aiding the Enemy)
- Article 104 (Public Records Offenses)
- Article 104a (Fraudulent Enlistment)
- Article 104b (Unlawful Enlistment)
- Article 105 (Forgery)
- Article 105a (False Pass Offenses)
- Article 106 (Impersonator of Officer)
- Article 106a (Wearing Unauthorized Insignia)
- Article 107 (False Official Statement)
- Article 107a (Parole Violation)





## Non-Covered Offenses

- Article 108 (Military Property Offenses)
- Article 108a (Captured/Abandoned Property)
- Article 109 (Non-Military Property Offenses)
- Article 109a (Mail Matters)
- Article 110 (Improper Hazarding of Vessel)
- Article 111 (Leaving Scene of Accident)
- Article 112 (Drunkenness)
- Article 112a (Wrongful Use of Controlled Substance)
- Article 113 (Drunken Operation of Vehicle)
- Article 114 (Endangerment Offenses)
- Article 115 (Communicating Threats)
- Article 116 (Riot/Breach of Peace)
- Article 117 (Provoking Speech)
- Article 121 (Larceny)
- Article 121a (Fraudulent use of Credit Card)
- Article 121b (False Pretenses)
- Article 122 (Robbery)
- Article 122a (Receiving Stolen Property)
- Article 123 (Gov't Computer Offenses)
- Article 123a (Check Offenses)
- Article 124 (Fraud Offenses)
- Article 124a (Bribery)
- Article 124b (Graft)
- Article 126 (Arson)
- Article 127 (Extortion)
- Article 128 (Assault)\*\*
- Article 128a (Maiming)
- Article 129 (Burglary)
- Article 131 (Perjury)
- Article 131a (Subornation of Perjury)
- Article 131b (Obstructing Justice)
- Article 131c (Misprison)
- Article 131d (Refusal to Testify)
- Article 131e (Preventing Seizure)
- Article 131f (Noncompliance Procedure Rules)
- Article 133 (Conduct Unbecoming) \*\*
- Article 134 (Miscellaneous)