

A SOURCEBOOK FOR ADVISING MILITARY PERSONNEL

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Introduction

Military personnel are subject to the Uniform Code of Military Justice, a federal statute that criminalizes the disobedience of lawful orders, among other offenses. If the Nation faces civil unrest requiring the deployment of military personnel or federalized National Guard personnel, questions may arise as to the legality of orders they receive. Given the authorized maximum punishments for disobeying orders, this is a serious matter. Military personnel should be fully informed of their rights and responsibilities before taking any action that might expose them to criminal prosecution or adverse personnel actions.

Military personnel have a right to consult counsel. They should first seek advice from a uniformed judge advocate in their branch and unit. That advice is free and will reflect the professional training provided by their Service branch. Because military personnel may be unable to timely connect with a judge advocate, they might seek consultation with a civilian attorney. This Sourcebook has been prepared as a refresher training resource for private practitioners of military law who make themselves available to provide real-time advice to military personnel who are either unable to consult uniformed counsel or would like a second opinion. It may also be a convenient reference for judge advocates who must advise commanders and other servicemembers.

This Sourcebook does not offer legal advice. Nor is its purpose to facilitate, much less encourage, unlawful conduct. On the contrary, in a democratic society military personnel should always conduct themselves scrupulously and in accordance with the law and should recognize that disobedience by those who wear the Nation's uniform, like civil disobedience, may lead to significant penalties and career injury. The ability to distinguish between lawful and unlawful orders is central to the conscientious performance of military duties by commanders as well as those they command.

Please send us your suggestions for improvements in this Sourcebook. Feel free to share it with others.

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About the Editors¹

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¹ Affiliations are shown for identification purposes only.

Statutory Provisions

Uniform Code of Military Justice
10 U.S.C. §§ 801 *et seq.*

10 U.S.C. § 888 - Art. 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 any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

10 U.S.C. § 890 - Art. 90. Willfully disobeying superior commissioned officer

Any person subject to this chapter who willfully disobeys a lawful command of that person's superior commissioned officer shall be punished—

- (1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and
- (2) if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

10 U.S.C. § 891 - Art. 91. Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

Any warrant officer or enlisted member who—

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

shall be punished as a court-martial may direct.

10 U.S.C. § 892 - Art. 92. Failure to obey order or regulation

Any person subject to this chapter 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 armed forces, which it is his duty to obey, fails to obey the order; . . .

shall be punished as a court-martial may direct.

Rules for Courts-Martial

Rule 916. Defenses

(d) *Obedience to orders.* It is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.

Discussion

Ordinarily the lawfulness of an order is decided by the military judge. See R.C.M. 801(e). An exception might exist when the sole issue is whether the person who gave the order in fact occupied a certain position at the time.

An act performed pursuant to a lawful order is justified. See R.C.M. 916(c). An act performed pursuant to an unlawful order is excused unless the accused knew it to be unlawful or a person of ordinary sense and understanding would have known it to be unlawful.

Part IV

¶ 14. Article 88 (10 U.S.C. 888)—Contempt toward officials

a. *Text of statute.*

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 any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

b. *Elements.*

- (1) That the accused was a commissioned officer of the United States armed forces;
- (2) That the accused used certain words against an official or legislature named in the article;
- (3) That by an act of the accused these words came to the knowledge of a person other than the accused; and
- (4) That the words used were contemptuous, either in themselves or by virtue of the circumstances under which they were used.

[Note: If the words were against a Governor or legislature, add the following element]

- (5) That the accused was then present in the State, Commonwealth, or possession of the Governor or legislature concerned.

c. *Explanation.*

The official or legislature against whom the words are used must be occupying one of the offices or be one of the legislatures named in Article 88 at the time of the offense. Neither “Congress” nor

“legislature” includes its members individually. “Governor” does not include “lieutenant governor.” It is immaterial whether the words are used against the official in an official or private capacity. If not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion, even though emphatically expressed, may not be charged as a violation of the article. Similarly, expressions of opinion made in a purely private conversation should not ordinarily be charged. Giving broad circulation to a written publication containing contemptuous words of the kind made punishable by this article, or the utterance of contemptuous words of this kind in the presence of military subordinates, aggravates the offense. The truth or falsity of the statements is immaterial.

d. *Maximum punishment. Dismissal, forfeiture of all pay and allowances, and confinement for 1 year.*

e. *Sample specification.*

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20 __, [use (orally and publicly) (_____) the following contemptuous words] [in a contemptuous manner, use (orally and publicly) (_____) the following words] against the [(President) (Vice President) (Congress) (Secretary of _____)] [(Governor) (legislature) of the (State of _____) (_____), a (State) (_____) in which (he) (she), the said _____, was then (on duty), (present)], to wit: “_____,” or words to that effect.

¶ 16. Article 90 (10 U.S.C. 890)—Willfully disobeying superior commissioned officer

a. *Text of statute.*

Any person subject to this chapter who willfully disobeys a lawful command of that person’s superior commissioned officer shall be punished—

(1) if the offense is committed in time of war, by death or such other punishment as a court-martial may direct; and

(2) if the offense is committed at any other time, by such punishment, other than death, as a court- martial may direct.

b. *Elements.*

(1) That the accused received a lawful command from a superior commissioned officer;

(2) That this officer was the superior commissioned officer of the accused;

(3) That the accused then knew that this officer was the accused’s superior commissioned officer; and

(4) That the accused willfully disobeyed the lawful command.

[Note: if the offense was committed in time of war, add the following element]

(5) That the offense was committed in time of war.

c. *Explanation.*

(1) *Superior commissioned officer.* The definition in subparagraph 15.c.(1) applies here.

(2) *Disobeying superior commissioned officer.*

(a) *Lawfulness of the order.*

(i) *Inference of lawfulness.* An order requiring the performance of a military duty or act may be inferred to be lawful, and it is disobeyed at the subordinate's peril. This inference does not apply to a patently illegal order, such as one that directs the commission of a crime.

(ii) *Determination of lawfulness.* The lawfulness of an order is a question of law to be determined by the military judge.

(iii) *Authority of issuing officer.* The commissioned officer issuing the order must have authority to give such an order. Authorization may be based on law, regulation, custom of the Service, or applicable order to direct, coordinate, or control the duties, activities, health, welfare, morale, or discipline of the accused.

(iv) *Relationship to military duty.* The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the Service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Disobedience of an order which has for its sole object the attainment of some private end, or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

(v) *Relationship to statutory or constitutional rights.* The order must not conflict with the statutory or constitutional rights of the person receiving the order.

(b) *Personal nature of the order.* The order must be directed specifically to the subordinate. Violations of regulations, standing orders or directives, or failure to perform previously established duties are not punishable under this article, but may violate Article 92.

(c) *Form and transmission of the order.* As long as the order is understandable, the form of the order is immaterial, as is the method by which it is transmitted to the accused.

(d) *Specificity of the order.* The order must be a specific mandate to do or not to do a specific act. An exhortation to "obey the law" or to perform one's military duty does not constitute an order under this article.

(e) *Knowledge.* The accused must have actual knowledge of the order and of the fact that the person issuing the order was the accused's superior commissioned officer. Actual knowledge may be proved by circumstantial evidence.

(f) *Nature of the disobedience.* "Willful disobedience" is an intentional defiance of authority. Failure to comply with an order through heedlessness, remissness, or forgetfulness is not a violation of this article but may violate Article 92.

(g) *Time for compliance.* When an order requires immediate compliance, an accused's declared intent not to obey and the failure to make any move to comply constitutes disobedience. Immediate compliance is required for any order that does not explicitly or implicitly indicate that delayed compliance is authorized or directed. If an order requires performance in the future, an accused's present statement of intention to disobey the order does not constitute disobedience of that order, although carrying out that intention may.

(3) *Civilians and discharged prisoners.* A discharged prisoner or other civilian subject to military law (see Article 2) and under the command of a commissioned officer is subject to the provisions of this article.

d. *Maximum punishment.*

(1) *Willfully disobeying a lawful order of superior commissioned officer in time of war.* Death or such other punishment as a court-martial may direct.

(2) *At any other time.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

e. *Sample specification.*

In that _____ (personal jurisdiction data), having received a lawful command from _____, (his) (her) superior commissioned officer, then known by the said _____ to be (his) (her) superior commissioned officer, to _____, or words to that effect, did, (at/on board—location), on or about ____ 20 __, willfully disobey the same.

¶ 17. Article 91 (10 U.S.C. 891)—Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

a. *Text of statute.*

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.

b. *Elements.*

(1) *Striking or assaulting warrant, noncommissioned, or petty officer.*

(a) That the accused was a warrant officer or enlisted member;

(b) That the accused struck or assaulted a certain warrant, noncommissioned, or petty officer;

(c) That the striking or assault was committed while the victim was in the execution of office; and

(d) That the accused then knew that the person struck or assaulted was a warrant, noncommissioned, or petty officer.

[Note: If the victim was the superior noncommissioned or petty officer of the accused, add the following elements]

- (e) That the victim was the superior noncommissioned, or petty officer of the accused; and
- (f) That the accused then knew that the person struck or assaulted was the accused's superior noncommissioned, or petty officer.

(2) *Disobeying a warrant, noncommissioned, or petty officer.*

- (a) That the accused was a warrant officer or enlisted member;
- (b) That the accused received a certain lawful order from a certain warrant, noncommissioned, or petty officer;
- (c) That the accused then knew that the person giving the order was a warrant, noncommissioned, or petty officer;
- (d) That the accused had a duty to obey the order; and
- (e) That the accused willfully disobeyed the order.

(3) *Treating with contempt or being disrespectful in language or deportment toward a warrant, noncommissioned, or petty officer.*

- (a) That the accused was a warrant officer or enlisted member;
- (b) That the accused did or omitted certain acts, or used certain language;
- (c) That such behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer;
- (d) That the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;
- (e) That the victim was then in the execution of office; and
- (f) That under the circumstances the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned, or petty officer.

[Note: If the victim was the superior noncommissioned, or petty officer of the accused, add the following elements]

- (g) That the victim was the superior noncommissioned, or petty officer of the accused; and
- (h) That the accused then knew that the person toward whom the behavior or language was directed was the accused's superior noncommissioned, or petty officer.

c. Explanation.

(1) *In general.* Article 91 has the same general objects with respect to warrant, noncommissioned, and petty officers as Articles 89 and 90 have with respect to commissioned officers, namely, to ensure obedience to their lawful orders, and to protect them from violence, insult, or disrespect. Unlike Articles 89 and 90, however, this article does not require a superior-subordinate relationship as an element of any of the offenses denounced. This article does not protect an acting noncommissioned officer or acting petty officer, nor does it protect military police or members of the shore patrol who are not warrant, noncommissioned, or petty officers.

(2) *Knowledge.* All of the offenses prohibited by Article 91 require that the accused have actual knowledge that the victim was a warrant, noncommissioned, or petty officer. Actual knowledge may be proved by circumstantial evidence.

(3) *Striking or assaulting a warrant, noncommissioned, or petty officer.* For a discussion of “strikes” and “in the execution of office,” see subparagraph 15.c. For a discussion of “assault,” see subparagraph 77.c. An assault by a prisoner who has been discharged from the Service, or by any other civilian subject to military law, upon a warrant, noncommissioned, or petty officer should be charged under Article 128 or 134.

(4) *Disobeying a warrant, noncommissioned, or petty officer.* See subparagraph 16.c for a discussion of lawfulness, personal nature, form, transmission, and specificity of the order, nature of the disobedience, and time for compliance with the order.

(5) *Treating with contempt or being disrespectful in language or deportment toward a warrant, noncommissioned, or petty officer.* “Toward” requires that the behavior and language be within the sight or hearing of the warrant, noncommissioned, or petty officer concerned. For a discussion of “in the execution of his office,” see subparagraph 15.c. For a discussion of “disrespect,” see subparagraph 15.c.

d. *Maximum punishment.*

(1) *Striking or assaulting warrant officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Striking or assaulting superior noncommissioned or petty officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(3) *Striking or assaulting other noncommissioned or petty officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(4) *Willfully disobeying the lawful order of a warrant officer.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(5) *Willfully disobeying the lawful order of a noncommissioned or petty officer.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(6) *Contempt or disrespect to warrant officer.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

(7) *Contempt or disrespect to superior noncommissioned or petty officer.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(8) *Contempt or disrespect to other noncommissioned or petty officer.* Forfeiture of two-thirds pay per month for 3 months, and confinement for 3 months.

e. *Sample specifications.*

(1) *Striking or assaulting warrant, noncommissioned, or petty officer.*

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, (strike) (assault) _____, a _____ officer, then known to the said _____ to be a (superior) _____ officer who was then in the execution of (his) (her) office, by _____ (him) (her) (in) (on) (the _____) with (a) _____ ((his) (her)) _____.

(2) *Willful disobedience of warrant, noncommissioned, or petty officer.*

In that _____ (personal jurisdiction data), having received a lawful order from _____, a _____ officer, then known by the said _____ to be a _____ officer, to _____, an

order which it was (his) (her) duty to obey, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, willfully disobey the same.

(3) *Contempt or disrespect toward warrant, noncommissioned, or petty officer.*

In that _____ (personal jurisdiction data) (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, [did treat with contempt] [was disrespectful in (language) (department) toward] _____, a _____ officer, then known by the said _____ to be a (superior) _____ officer, who was then in the execution of (his) (her) office, by (saying to (him) (her), “ _____,” or words to that effect) (spitting at (his) (her) feet (_____)).

¶ 18. Article 92 (10 U.S.C. 892)—Failure to obey order or regulation

a. *Text of statute.*

Any person subject to this chapter 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 armed 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.

b. *Elements.*

(1) *Violation of or failure to obey a lawful general order or regulation.*

- (a) That there was in effect a certain lawful general order or regulation;
- (b) That the accused had a duty to obey it; and
- (c) That the accused violated or failed to obey the order or regulation.

(2) *Failure to obey other lawful order.*

- (a) That a member of the armed forces issued a certain lawful order;
- (b) That the accused had knowledge of the order;
- (c) That the accused had a duty to obey the order; and
- (d) That the accused failed to obey the order.

(3) *Dereliction in the performance of duties.*

- (a) That the accused had certain duties;
- (b) That the accused knew or reasonably should have known of the duties; and
- (c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

[Note: In cases where the dereliction of duty resulted in death or grievous bodily harm, add the following element as applicable]

(d) That such dereliction of duty resulted in death or grievous bodily harm to a person other than the accused.

c. Explanation.

(1) *Violation of or failure to obey a lawful general order or regulation.*

(a) *Authority to issue general orders and regulations.* General orders or regulations are those orders or regulations generally applicable to an armed force which are properly published by the President or the Secretary of Defense, of Homeland Security, or of a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by:

- (i) an officer having general court-martial jurisdiction;
- (ii) a general or flag officer in command; or
- (iii) a commander superior to (i) or (ii).

(b) *Effect of change of command on validity of order.* A general order or regulation issued by a commander with authority under Article 92(1) retains its character as a general order or regulation when another officer takes command, until it expires by its own terms or is rescinded by separate action, even if it is issued by an officer who is a general or flag officer in command and command is assumed by another officer who is not a general or flag officer.

(c) *Lawfulness.* A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. See the discussion of lawfulness in subparagraph 16.c.

(d) *Knowledge.* Knowledge of a general order or regulation need not be alleged or proved as knowledge is not an element of this offense and a lack of knowledge does not constitute a defense.

(e) *Enforceability.* Not all provisions in general orders or regulations can be enforced under Article 92(1). Regulations which only supply general guidelines or advice for performing military functions may not be enforceable under Article 92(1).

(2) *Violation of or failure to obey other lawful order.*

(a) *Scope.* Article 92(2) includes all other lawful orders which may be issued by a member of the armed forces, violations of which are not chargeable under Article 90, 91, or 92(1). It includes the violation of written regulations which are not general regulations. See also subparagraph (1)(e) of this paragraph as applicable.

(b) *Knowledge.* In order to be guilty of this offense, a person must have had actual knowledge of the order or regulation. Knowledge of the order may be proved by circumstantial evidence.

(c) *Duty to obey order.*

(i) *From superior.* A member of one armed force who is senior in rank to a member of another armed force is the superior of that member with authority to issue orders which that member has a duty to obey under the same circumstances as a commissioned officer of one armed

force is the superior commissioned officer of a member of another armed force for the purposes of Articles 89 and 90. See subparagraph 13.c.(1).

(ii) *From one not a superior.* Failure to obey the lawful order of one not a superior is an offense under Article 92(2), provided the accused had a duty to obey the order, such as one issued by a sentinel or a member of the armed forces police. See subparagraph 17.b.(2) if the order was issued by a warrant, noncommissioned, or petty officer in the execution of office.

(3) *Dereliction in the performance of duties.*

(a) *Duty.* A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the Service.

(b) *Knowledge.* Actual knowledge of duties may be proved by circumstantial evidence. Actual knowledge need not be shown if the individual reasonably should have known of the duties. This may be demonstrated by regulations, training or operating manuals, customs of the Service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence.

(c) *Derelict.* A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner. "Willfully" means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. "Negligently" means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances. Culpable inefficiency is inefficiency for which there is no reasonable or just excuse.

(d) *Ineptitude.* A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon.

(e) *Grievous bodily harm.* For purposes of this offense, the term "grievous bodily harm" has the same meaning ascribed to it in Article 128 (paragraph 77).

(f) Where the dereliction of duty resulted in death or grievous bodily harm, the intent to cause death or grievous bodily harm is not required.

d. *Maximum punishment.*

(1) *Violation of or failure to obey lawful general order or regulation.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Violation of or failure to obey other lawful order.* Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) *Dereliction in the performance of duties.*

(A) Through neglect or culpable inefficiency. Forfeiture of two-thirds pay per month for 3 months and confinement for 3 months.

(B) Through neglect or culpable inefficiency resulting in death or grievous bodily harm. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 18 months.

(C) Willful. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(D) Willful dereliction of duty resulting in death or grievous bodily harm. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

[Note: For (1) and (2) of this rule, the punishment set forth does not apply in the following cases: if, in the absence of the order or regulation which was violated or not obeyed, the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or if the violation or failure to obey is a breach of restraint imposed as a result of an order. In these instances, the maximum punishment is that specifically prescribed elsewhere for that particular offense.]

e. Sample specifications.

(1) Violation or failure to obey lawful general order or regulation.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, (violate) (fail to obey) a lawful general (order) (regulation) which was (his)(her) duty to obey, to wit: paragraph __ (Army) (Air Force) Regulation, dated ____ (Article, U.S. Navy Regulations, dated __) (General Order No. __, U.S. Navy, dated ____) (____), by (wrongfully _____).

(2) Violation or failure to obey other lawful written order.

In that _____ (personal jurisdiction data), having knowledge of a lawful order issued by _____, to wit: (paragraph, (the Combat Group Regulation No. __) (USS____, Regulation _____), dated____) (____), an order which it was (his) (her) duty to obey, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about ____ 20 __, fail to obey the same by (wrongfully _____).

(3) Failure to obey other lawful order.

In that _____ (personal jurisdiction data) having knowledge of a lawful order issued by _____ (to submit to certain medical treatment) (to) (not to _____) (____), an order which it was (his) (her) duty to obey (at/on board—location) (subject-matter jurisdiction data, if required), on or about__20__, fail to obey the same (by (wrongfully _____).

(4) Dereliction in the performance of duties.

In that, _____ (personal jurisdiction data), who (knew) (should have known) of (his) (her) duties (at/on board—location) (subject-matter jurisdiction data, if required), (on or about ____ 20__) (from about ____ 20__ to about ____ 20__), was derelict in the performance of those duties in that (he) (she) (negligently) (willfully) (by culpable inefficiency) failed _____, as it was (his) (her) duty to do [, and that such dereliction of duty resulted in (grievous bodily harm, to wit: (broken leg) (deep cut) (fractured skull) (____) to _____) (the death of _____)].

Permissible Maximum Punishments

The *Manual for Courts-Martial* prescribes the following maximum punishments for disobedience:

Disobedience of a superior commissioned officer:

Time of war: Death penalty

Outside time of war: Dishonorable discharge, total forfeitures, confinement for five years

Disobedience of a superior noncommissioned officer: Dishonorable discharge, total forfeitures, confinement for two years

Disobedience of a general order: Dishonorable discharge, total forfeitures, confinement for two years

Disobedience of an “other lawful order”: Bad-conduct discharge, total forfeitures, confinement for six months

Uttering contemptuous words about the President and other officials protected by Article 88, UCMJ: Dismissal, total forfeitures, confinement for one year

The permissible maximum punishment is a ceiling. If a charge is referred to a special or summary court-martial or disposed of by nonjudicial punishment, the maximum permissible punishment will be that which the forum can adjudge.

XVII. WILLFULLY DISOBEYING SUPERIOR COMMISSIONED OFFICER, ART. 90

A. Elements.

B. Disobedience to order. UCMJ ART. 90 & 91(2)

1. The Order.

a) The order must be directed to the accused specifically. It does not include violations of regulations, standing orders, or routine duties. MCM, pt. IV, ¶ 14c(2)(b) & 15c(4); *United States v. Byers*, 40 M.J. 321 (C.M.A. 1994) (order revoking driving privileges signed by JAG was a routine administrative sanction for traffic offenses and was not a personal order by the post commander); *United States v. Ranney*, 67 M.J. 297 (C.A.A.F. 2009) (revocation of driving privileges issued automatically upon drunk driving arrest was not sufficient for purposes of Art. 90, but did support a conviction under Art. 92), *overruled on other grounds by United States v. Phillips*, 74 M.J. 20 (C.A.A.F. 2015); *United States v. Gussen*, 33 M.J. 736 (A.C.M.R. 1991) (evidence that accused disobeyed an order issued by brigade commander to entire brigade, but relayed to the accused through NCOs, only supports finding of violation of orders in violation of Article 92 and not violation of a superior's personal order); *United States v. Selman*, 28 M.J. 627 (A.F.C.M.R. 1989) (letter to all minimum-security prisoners setting forth restrictions was not a personal order to the accused).

b) Form of Order. As long as understandable, the form of the order and the method of transmittal are immaterial. MCM, pt. IV, ¶ 14.c.(2)(c) & 15c(4); *United States v. McLaughlin*, 14 M.J. 908 (N.M.C.M.R. 1982) (use of the word "please" does not negate the order).

c) Scope of Order. In order to sustain the presumption of lawfulness of an order, the order must have a valid military purpose and must be a clear, narrowly drawn mandate. *United States v. Moore*, 58 M.J. 466 (2003) (holding that a "sufficiently clear, specific, and narrowly drawn" order with a valid military purpose was not unconstitutionally overbroad or vague).

(1) The order must be a specific mandate to do or not to do a specific act. MCM, pt. IV, ¶ 14c(2)(b) & 15c(4); *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989) ("safe sex" order for HIV positive airman was "specific, definite, and certain."); *United States v. Mantilla*, 36 M.J. 621 (A.C.M.R. 1992) (order to "double-time" to barracks to retrieve gear was positive command rather than advice); *United States v. Claytor*, 34 M.J. 1030 (N.M.C.M.R. 1992) (order to "shut up" on the heels of disrespectful language about a superior commissioned officer was a specific mandate to cease speaking and say nothing further); *but see United States v. Warren*, 13 M.J. 160 (C.M.A. 1982) (statement "settle

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down and be quiet” was ambiguous and lacked specificity of meaning to determine if it was an order or mere counseling); *United States v. Beattie*, 17 M.J. 537 (A.C.M.R. 1983) (where superiors of intoxicated accused did not want him at his assigned place of duty, which was the motor pool, his lieutenant’s order for defendant to report to his place of duty, without further clarification as to where that was, did not provide a clear enough mandate to establish a violation under art. 90).

(2) If the language of a communication lacks specificity of meaning, extrinsic evidence is admissible for the purpose of clarification. *United States v. Warren*, 13 M.J. 160 (C.M.A. 1982); *United States v. Mitchell*, 20 C.M.R. 295 (C.M.A. 1955).

d) An order requiring the performance of a military duty or act may be inferred to be lawful. Lawfulness of the order is a question of law that must be decided by the military judge. MCM, pt. IV, ¶ 14c(2)(a) & 15c(4); *United States v. Diesher*, 61 M.J. 313 (C.A.A.F. 2005) (holding the legality of an order is an issue of law that must be decided by the military judge (citing *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001))).

2. Knowledge.

a) The prosecution must prove, as an element of the offense, that the accused had actual knowledge of the order. MCM, pt. IV, ¶ 14c(2)(e) & 15c(2); *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985); *United States v. Pettigrew*, 41 C.M.R. 191 (C.M.A. 1970) (although knowledge may be proven by circumstantial evidence, the knowledge must be actual and not constructive).

b) The prosecution must prove that the accused had actual knowledge of the status of the victim. MCM, pt. IV, ¶ 14c(2)(e); *United States v. Young*, 40 C.M.R. 36 (C.M.A. 1060) (voluntary intoxication raised issue of whether accused knew he was dealing with his superior officer); *United States v. Oisten*, 33 C.M.R. 188 (C.M.A. 1963); *United States v. Payne*, 29 M.J. 899 (A.C.M.R. 1989).

3. Willfulness of Disobedience.

a) Disobedience must be intentional defiance of authority. Failure to comply through heedlessness or forgetfulness is not “willful” (but it may violate Article 92). MCM, pt. IV, ¶ 14c(2)(f). *See also United States v. Gumataotao*, No. ARMY 20150765, 2016 WL 3545492 (A. Ct. Crim. App. June 22, 2016).

b) Intentional noncompliance, not “flaunting of authority,” is required. *United States v. Ferenczi*, 27 C.M.R. 77 (C.M.A. 1958).

c) Voluntary intoxication might prevent the accused from having the willful state of mind required by Article 91. *United States v. Cameron*, 37 M.J. 1042 (A.C.M.R. 1993) (where accused was intoxicated and did not complete the assigned task of cleaning room by proscribed deadline, members should have been instructed on lesser included offense of failing to obey lawful order, under Article 92, which does not require willfulness).

4. Origin of the Order.

a) The alleged victim must be personally involved in the issuance of the order. *United States v. Ranney*, 67 M.J. 297 (C.A.A.F. 2009) (revocation of driving privileges issued without the knowledge or involvement of the Base Traffic Officer was not sufficient for purposes of Art. 90, but did support a conviction under Art. 92).

b) The order must originate from the alleged victim, and not be the order of a superior for whom the alleged victim is a mere conduit. *United States v. Marsh*, 11 C.M.R. 48 (C.M.A. 1953) (specification improperly alleged victim as a captain who was merely transmitting order from the Commanding General); *United States v. Sellers*, 30 C.M.R. 262 (C.M.A. 1961) (major was not a mere conduit, where he passed on order of colonel, threw the weight of his rank and position into the balance, and added additional requirement); *United States v. Wartsbaugh*, 45 C.M.R. 309 (C.M.A. 1972) (setting aside Article 90 violation where the court characterized the company commander's order as "predicated upon . . . a battalion directive").

5. Time for Compliance. MCM, pt. IV, ¶ 16c(2)(g) & 17c(4).

a) When an order requires immediate compliance, accused's statement that he will not obey and failure to make any move to comply constitutes disobedience. *United States v. Stout*, 5 C.M.R. 67 (C.M.A. 1952) (order to join combat patrol). Time in which compliance is required is a question of fact. *United States v. Cooper*, 14 M.J. 758 (A.C.M.R. 1982) (order to go upstairs and change clothes not countermanded by subsequent order to accompany victim to orderly room, because disobedience to first order already complete); *United States v. McLaughlin*, 14 M.J. 908 (N.M.C.M.R. 1982) (order to produce ID card required immediate compliance).

b) Immediate compliance is required by any order that does not explicitly or implicitly indicate that delayed compliance is authorized or directed. MCM, pt. IV, ¶ 14c(2)(g) & 15c(4), *United States v. Schwabauer*, 34 M.J. 709 (A.C.M.R. 1992) (direct order to "stop and come back here" clearly and unambiguously required immediate obedience without delay), *aff'd*, 37 M.J. 338 (C.M.A. 1993). However, when time for compliance is not stated explicitly or implicitly, then reasonable delay in compliance does not constitute disobedience. MCM, pt. IV, ¶ 16c(2)(g) and 17c(4). *United States v. Clowser*, 16 C.M.R. 543 (A.F.B.R. 1954) (delay resulting from a sincere and reasonable choice of means to comply with order to "go up to the barracks and go to bed" was not a completed disobedience).

c) When immediate compliance is required, disobedience is completed when the one to whom the order is directed first refuses and evinces an intentional defiance of authority. *United States v. Vansant*, 11 C.M.R. 30 (C.M.A. 1953) (order to return to his platoon and be there in one and a half hours necessitated immediate compliance, and refusal to comply constituted disobedience).

d) For orders that require preliminary steps before they can be executed, the recipient must begin the preliminary steps immediately or the disobedience is complete. *United States v. Wilson*, 17 M.J. 1032 (A.C.M.R. 1984), *pet. denied*, 19 M.J. 79 (C.M.A. 1984) (lieutenant's order to "shotgun" a truck, which entailed preparation prior to travel, was disobeyed when accused verbally refused three times and walked out of lieutenant's office).

e) Apprehension of an accused before compliance is due is a legitimate defense to the alleged disobedience. *See United States v. Williams*, 39 C.M.R. 78 (C.M.A. 1968).

f) If an order is to be performed in the future, the accused's present statement of intent to disobey does not constitute disobedience. *United States v. Squire*, 47 C.M.R. 214 (N.M.C.M.R. 1973).

6. Matters in Defense.

a) The order cannot lack content and must be a specific mandate. *United States v. Bratcher*, 39 C.M.R. 125 (C.M.A. 1969) (finding disobedience to a nonspecific mandate was not punishable).

under art. 90; Soldier disobeyed an order that did not contemplate performance or nonperformance of any special function, but rather was an order to do what he was already required to do as a soldier under a superior's command – not an enforceable order.); *United States v. Oldaker*, 41 C.M.R. 497 (A.C.M.R. 1969) (order “to train” given to basic trainee lacked content); *United States v. Beattie*, 17 M.J. 537 (A.C.M.R. 1983) (order to “follow the instructions of his NCO’s” lacked content); *but see United States v. Couser*, 3 M.J. 561 (A.C.M.R. 1977) (order to resume training with company that contemplated specific activities had content and was proper).

b) “Ultimate offense” doctrine.

(1) The order requires acts already required by law, regulation, standing orders, or routine (pre-existing) duty. *United States v. Bratcher*, 39 C.M.R. 125 (C.M.A. 1969) (order to “perform duties as a duty soldier, the duties to be performed and to be assigned to him by the First Sergeant” was not a specific mandate but rather an exhortation to do his duty as already required by law; order to obey the law can have no validity beyond the limit of the ultimate offense committed); *United States v. Sidney*, 48 C.M.R. 801 (A.C.M.R. 1974) (officer’s order to comply with local regulations on registration and safekeeping of personal weapons should have been charged under Article 92(2)); *United States v. Wartsbaugh*, 45 C.M.R. 309 (C.M.A. 1972) (order to comply with battalion uniform directive should have been charged under Article 92(2)); *but cf. United States v. Traxler*, 39 M.J. 476 (C.M.A. 1994) (commander can lift otherwise routine duty “above the common ruck” to ensure compliance but not to merely enhance punishment); *but see United States v. Phillips*, 74 M.J. 20 (C.A.A.F. 2015) (commander ordered accused who repeatedly absented himself without leave to avoid disciplinary proceedings to remain on post; absent evidence that commander issued the order to escalate the accused’s criminal liability, the government was free to choose between charging a violation of the order or breaking restriction).

(2) Minor offenses may not be escalated in severity by charging them as violation of orders or willful disobedience of superiors. *United States v. Hargrove*, 51 M.J. 408 (C.A.A.F. 1999) (failure to report for restriction improperly charged as disobeying order; should have been charged as failure to go to appointed place of duty); *United States v. Quarles*, 1 M.J. 231 (C.M.A. 1975) (holding maximum punishment cannot be increased by charging disobedience rather than failure to repair).

(3) Violation of a personal order is punishable as a separate offense if it is given for the purpose of having the full authority of the superior’s position and rank to ensure compliance. *United States v. Traxler*, 39 M.J. 476 (C.M.A. 1994) (willful disobedience of superior commissioned officer and missing movement); *United States v. Landwehr*, 18 M.J. 355 (C.M.A. 1984) (willful disobedience of superior commissioned officer and failure to repair); *United States v. Pettersen*, 17 M.J. 69 (C.M.A. 1983) (willful disobedience of superior noncommissioned officer and AWOL); *United States v. Greene*, 8 M.J. 796 (N.M.C.M.R. 1980) (willful disobedience of superior of lawful orders from superior petty officer and superior commissioned officer); *United States v. Bivins*, 34 C.M.R. 527 (A.B.R. 1964).

c) Repeated orders.

(1) If the sole purpose of repeated personal orders is to increase the punishment for an offense, disobedience of the repeated order is not a crime. *United States v. Tiggs*, 40 C.M.R. 352 (A.B.R. 1968).

(2) Repeated orders may constitute an unreasonable multiplication of charges. *United States v. Graves*, 12 M.J. 583 (A.F.C.M.R. 1981) (dismissing conviction for willful disobedience of lieutenant's order that immediately followed and was identical to order from sergeant, which was the basis of a separate conviction); *United States v. Greene*, 8 M.J. 796 (N.M.C.M.R. 1980) (subsequent orders of superior commissioned officers merely reiterating original order of petty officer could not form basis for additional convictions for willful disobedience of superior commissioned officers); *but see United States v. Bivins*, 34 C.M.R. 527 (A.B.R. 1964) (absent a showing of a deliberate design on the part of the Government to exaggerate the accused's alleged wrongs or a lack of legitimate purpose in setting forth the charges, no basis exists to set aside the specifications).

d) Violation of an order that is part of an apprehension constitutes resisting apprehension rather than disobedience of an order. *United States v. Nixon*, 45 C.M.R. 254 (C.M.A. 1974) (officer's order "to leave the . . . room and get into a jeep" was the initial step of an apprehension, and disobedience should have been prosecuted under Article 95 rather than Article 90); *United States v. Burroughs*, 49 C.M.R. 404 (A.C.M.R. 1974). *But see United States v. Jessie*, 2 M.J. 573 (A.C.M.R. 1977) (when already in custody, order to remain in building to reinforce status was independent lawful command).

e) The order is inconsistent with a service regulation. *United States v. Roach*, 29 M.J. 33 (C.M.A. 1989) (Coast Guard regulation on drug and alcohol policy).

f) The defense of conflicting orders. *United States v. Clausen*, 43 C.M.R. 128 (C.M.A. 1971); *United States v. Patton*, 41 C.M.R. 572 (A.C.M.R. 1969) ("criminal prosecution for disobedience of an order cannot be based upon a subordinate's election to obey one of two conflicting orders when simultaneous compliance with both orders is impossible"); *but cf. United States v. Hill*, 26 M.J. 876 (N.M.C.M.R. 1988) (no defense where accused obeyed neither of the conflicting orders but rather remained in his "rack").

g) Orders must not conflict with, or detract from, the scope or effectiveness of orders issued by higher headquarters. *United States v. Clausen*, 43 C.M.R. 128 (C.M.A. 1971); *United States v. Green*, 22 M.J. 711 (A.C.M.R. 1986).

h) Conscientious objection is not a defense to disobedience of lawful orders. *United States v. Johnson*, 45 M.J. 88 (C.A.A.F. 1996); *United States v. Walker*, 41 M.J. 462 (1995); *United States v. Austin*, 27 M.J. 227 (C.A.A.F. 1988).

i) State of mind defenses may apply. *United States v. Young*, 40 C.M.R. 36 (C.M.A. 1969).

XX. VIOLATION OF A LAWFUL GENERAL REGULATION/ORDER, ART. 92(1)

A. Authority to Issue a General Order. MCM, pt. IV, ¶ 18c(1)(a).

1. President; Secretary of Defense; Secretary of Homeland Security; and Secretaries of the Army, Navy, and Air Force.

2. A GCM convening authority.

3. A flag or general officer in command.

4. Superiors commanders to (2) and (3) above.

5. To be a lawful general order, the order must be issued as the result of the personal decision of the person authorized to issue general orders. *United States v. Ayers*, 54 M.J. 85

(C.A.A.F. 2000) (as long as the decision remains with the commander, the delegated signature authority is ministerial in nature); *United States v. Townsend*, 49 M.J. 175 (C.A.A.F. 1998) (order signed by Acting Chief, Office of Personnel and Training was issued by the Commandant of the Coast Guard); *United States v. Bartell*, 32 M.J. 295 (C.M.A. 1991) (general order signed “By Direction”); *United States v. Breault*, 30 M.J. 833 (N.M.C.M.R. 1990) (general order signed by chief of staff).

B. Regulation Defects.

1. The regulation must prohibit conduct of the nature of that attributed to the accused in the specification. *United States v. Baker*, 40 C.M.R. 216 (C.M.A. 1969) (charged conduct was beyond the scope of the conduct prohibited in the regulation); *United States v. Sweitzer*, 33 C.M.R. 251 (C.M.A. 1963).

2. The regulation must apply to a group of persons that includes the accused. *United States v. Jackson*, 46 C.M.R. 1128 (A.C.M.R. 1973) (finding that regulation was intended to guide military police rather than the individual soldier).

3. The regulation must set the conduct of individual members of a command or delineate a code of conduct rather than provide general guidance. *United States v. Green*, Army 20010446, 2003 Lexis 137 (A. Ct. Crim. App. June 6, 2003) (DoD Directive intended to update policies and responsibilities on drug abuse and prevention held to be general guidance and not punitive in nature); *United States v. Blanchard*, 19 M.J. 196 (C.M.A. 1985) (USAFE customs regulation was directory in nature); *United States v. Scott*, 46 C.M.R. 25 (C.M.A. 1972) (regulation establishing drug suppression policy was not punitive order); *United States v. Nardell*, 45 C.M.R. 101 (C.M.A. 1972) (SOP for club system was predominantly instructional guidance); *United States v. Hode*, 44 M.J. 816 (A.F. Ct. Crim. App. 1996) (AFI 34-119 on the Alcoholic Beverage Program was not punitive); *United States v. Goodwin*, 37 M.J. 606 (A.C.M.R. 1993) (punitive regulation can refer to provisions in nonpunitive regulation); *United States v. Finsel*, 33 M.J. 739 (A.C.M.R. 1991) (task force commander’s “Weapons Safety” letter was punitive in nature), *aff’d*, 36 M.J. 441 (C.M.A. 1993); *United States v. Asfeld*, 30 M.J. 917 (A.C.M.R. 1990) (AR 600-21, including sexual harassment policy provisions, was not a punitive regulation).

4. It is not a defense that the regulation was superseded before the accused’s conduct, if a successor regulation contained the same criminal prohibition and it was in force at the time of the accused’s conduct, unless it misled the accused. *United States v. Grublak*, 47 C.M.R. 371 (A.C.M.R. 1973).

5. A regulation that is facially overbroad may be salvaged by including a scienter or *mens rea* requirement. *United States v. Bradley*, 15 M.J. 843 (A.F.C.M.R. 1983) (regulation prohibiting drug paraphernalia was not vague or overbroad because it required that the product was intended to be used with a controlled substance); *United States v. Cannon*, 13 M.J. 777 (A.C.M.R. 1982).

6. Local regulations must not conflict with or detract from the scope of effectiveness of a regulation issued by higher headquarters. *United States v. Green*, 22 M.J. 711 (A.C.M.R. 1986) (Fort Stewart regulation prohibiting soldiers from “[h]aving any alcohol in their system . . . during duty hours,” was not enforceable because it detracted from the effectiveness of Army Regulation 600-85). *But see United States v. Garcia*, 21 M.J. 127 (C.M.A. 1985) (conviction of violating local regulation capping chargeable interest below the cap in a Navy regulation was upheld because the

local regulation effectively capped at the rate in the Navy regulation once the Navy regulation was amended).

C. Knowledge.

1. Actual knowledge of the regulation or order is not an element of the crime. *United States v. Tinker*, 27 C.M.R. 366 (C.M.A. 1959); *United States v. Leverette*, 9 M.J. 627 (A.C.M.R. 1980) (knowledge imputed even if the accused soldier is merely visiting the installation and not assigned there), *aff'd*, 9 M.J. 421 (C.M.A. 1980).

2. For knowledge to be presumed, a regulation must be properly published. *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982) (Eighth Air Force general regulation not properly published because it was never received at base master publications library); *but see United States v. Moore*, 55 M.J. 772, (N.M. Ct. Crim. App. 2001) (holding that providing the “potential for knowledge is all that is required to satisfy due process” and publication. “We do not believe our superior court fashioned some inflexible rule regarding the channels to disseminate, or location of the order to achieve proper publication.”).

3. To be enforceable against service members, local regulations need not be published in the Federal Register. *United States v. Tolkach*, 14 M.J. 239 (C.M.A. 1982); *United States v. Academia*, 14 M.J. 582 (N.M.C.M.R. 1982).

D. *Mens Rea*. Knowledge of the order’s existence is a different concept than the government’s requirement to prove *mens rea*. General order prohibiting the giving of alcohol to service members under age 21 did not explicitly establish a *mens rea* requirement; as such, the proper standard of *mens rea* was recklessness. Such a general order is not analogous to a public welfare offense and therefore required the accused to at least be reckless as to his knowledge of the age of the recipients of the alcohol. *United States v. Gifford*, 75 M.J. 140 (C.A.A.F. 2016). *See also Elonis v. United States*, 135 S. Ct. 2001 (2015).

E. Pleading.

1. A specification is defective if it fails to allege that the order or regulation is “general.” *United States v. Koepke*, 39 C.M.R. 100 (C.M.A. 1969); *United States v. Baker*, 38 C.M.R. 144 (C.M.A. 1967) (specification alleging violation of a specific division regulation fails to state offense under Article 92(1)); *see United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986); *but see United States v. Watson*, 40 C.M.R. 571 (A.B.R. 1969) (specification alleging violation of a specific “Army” regulation was sufficient; distinguishing *Koepke*).

2. The specification need not allege that an accused “wrongfully” violated a lawful general regulation, because the allegation of the violation itself implies the unlawful nature of the conduct. *United States v. Torrey*, 10 M.J. 508 (A.F.C.M.R. 1980).

3. Accused, a recruiter, was charged with violation of a sub-paragraph “6(d)” of lawful general order by providing alcohol to a person enrolled in the Delayed Entry Program (DEP). The pane found him guilty of violating the superior paragraph “6” of the same general order by wrongfully engaging in a non-professional, personal relationship with the same DEP member. Court held this was a fatal variance because the substituted offense was materially different from the one originally charged in the specification, and accused was prejudiced by depriving him the opportunity to defend against the substituted paragraph of the order. *United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003). Additionally, the manner in which the accused violated the regulation must be alleged. *United States v. Sweitzer*, 33 C.M.R. 251 (C.M.A. 1963).

F. Proof. At trial, the existence and content of the regulation will not be presumed, it must be proven with evidence or established by judicial notice. *United States v. Williams*, 3 M.J. 155 (C.M.A. 1977). In judge alone trials, failure to prove existence of regulation can be cured by proceeding in revision or by an appellate court taking judicial notice. *United States v. Mead*, 16 M.J. 270 (C.M.A. 1983).

G. Exceptions. The prosecution must prove beyond a reasonable doubt that the accused's conduct did not come within any exceptions to the regulation, once the evidence raises the issue. *United States v. Lavine*, 13 M.J. 150 (C.M.A. 1982); *United States v. Cuffee*, 10 M.J. 381 (C.M.A. 1981).

H. Application. Service member need not be assigned to command of officer issuing general regulation in order to be subject to its proscriptions. *United States v. Leverette*, 9 M.J. 627 (A.C.M.R. 1980) (soldier on leave visiting Fort Campbell convicted of violating local general regulation), *aff'd*, 9 M.J. 421 (C.M.A. 1980).

I. Misconduct Otherwise Proscribed by Punitive Articles. Neither a general regulation nor an order may be used to enhance punishment for misconduct already prohibited by the punitive articles. *United States v. Curry*, 28 M.J. 419 (C.M.A. 1989) (Article 93 preempted conviction under Article 92 for disobedience of an order not to maltreat subordinates). *Cf.* MCM, pt. IV, ¶ 16e(1), (2) Note.

J. Attempts. Attempt to violate a regulation under Article 80 does not require knowledge of the regulation; the accused need only intend to commit the proscribed act. *United States v. Davis*, 16 M.J. 225 (C.M.A. 1983); *United States v. Foster*, 14 M.J. 246 (C.M.A. 1982).

K. Constitutional Rights. Where a regulation is attacked as unconstitutional or violative of a statute, "a narrowing construction" is mandated, if possible, to avoid the problem. *United States v. Williams*, 29 M.J. 112 (C.M.A. 1989) ("show and tell" regulation, narrowly construed to require service member to show physical possession or documentation of lawful disposition of controlled items, did not violate 5th amendment or Article 31).

XXI. FAILURE TO OBEY OTHER LAWFUL ORDER, ART. 92(2).

A. The Order. Includes all other lawful orders issued by a member of the armed forces that the accused had a duty to obey. MCM, pt. IV, ¶ 18c(2)(a).

B. Limitation on Maximum Punishment. The maximum punishments set out in MCM, pt. IV, ¶ 18.e. include a dishonorable discharge and confinement for two years for violation of general regulations and a bad-conduct discharge and confinement for six months for disobedience of other lawful orders. A note, however, sets out certain limitations in this regard.

1. A note located after MCM, pt. IV, ¶ 16e(1) and (2) provides that these maximum punishments do not apply in the following cases:

a) If in the absence of the order or regulation which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or

b) If the violation or failure to obey is a breach of restraint imposed as a result of an order.

c) In these instances, the maximum punishment is that prescribed elsewhere for that particular offense.

2. This limitation was commonly known as the “Footnote 5” limitation, because it was Footnote 5 to the Table of Maximum Punishments in older versions of the MCM.

3. This limitation is only operative, however, where the lesser offense is the “gravamen of the offense.” *United States v. Timmons*, 13 M.J. 431 (C.M.A. 1982) (gravamen of the offense was not being in the authorized uniform in violation of Article 134 rather than failing to obey order of petty officer); *United States v. Showalter*, 35 C.M.R. 382 (C.M.A. 1965) (gravamen of offense was not being in the authorized uniform in violation of Article 134 rather than failing to obey a general regulation); *United States v. Yunque-Burgos*, 13 C.M.R. 54 (C.M.A. 1953); *United States v. Buckmiller*, 4 C.M.R. 96 (C.M.A. 1952) (seminal case establishing gravamen test and rejecting a “technical and entirely literal interpretation of the footnote”).

4. The note’s rationale has been applied to offenses other than Articles 92(1) and 92(2). See *United States v. Burroughs*, 49 C.M.R. 404 (A.C.M.R. 1974) (using the maximum punishment provided for resisting apprehension under Article 95 rather than that for willful disobedience of a superior commissioned officer under Article 90, of which the accused was convicted).

C. Source of Order. The order may be given by a person not superior to the accused, but the person giving the order must have a special status that imposes upon the accused the duty to obey. MCM, pt. IV, ¶ 16c(2)(c)(ii); *United States v. Stovall*, 44 C.M.R. 576 (A.F.C.M.R. 1971) (security policeman).

D. Actual Knowledge. The accused must have actual knowledge of the order. MCM, pt. IV, ¶ 16c(2)(b); *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985) (directive by battery commander); *United States v. Curtin*, 26 C.M.R. 207 (C.M.A. 1958) (instruction on constructive knowledge was erroneous); *United States v. Henderson*, 32 M.J. 941 (N.M.C.M.R. 1991) (district order governing use of government vehicles by Marine recruiters), *aff’d*, 34 M.J. 174 (C.M.A. 1992); *United States v. Jack*, 10 M.J. 572 (A.F.C.M.R. 1980) (conviction set aside where accused violated local regulation concerning visiting hours in female barracks where sign posted at building’s entrance did not designate issuing authority).

E. Negligent Disobedience Sufficient for Guilt. Failure to comply through heedlessness or forgetfulness can be sufficient for a conviction under Article 92. MCM, pt. IV, ¶ 16c(2)(f); *United States v. Jordan*, 21 C.M.R. 627 (A.F.B.R. 1955).

XXII. THE LAWFULNESS OF ORDERS

A. Presumption of Lawfulness. Orders from superiors requiring the performance of military duties are presumed to be lawful. MCM, pt. IV, ¶ 18c(2)(a)(i), 15c(4), 16c(1)(c); *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001) (order requiring soldier to wear United Nations blue beret and insignia lawful); *United States v. McDaniels*, 50 M.J. 407 (C.A.A.F. 1999) (order to not drive personal vehicle after diagnosis of narcolepsy); *United States v. Nieves*, 44 M.J. 96 (C.A.A.F. 1996) (order prohibiting discussions with witnesses); *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001) (order requiring soldier to wear United Nations blue beret and insignia).

B. Disobedience. A superior’s order is presumed to be lawful and is disobeyed at the subordinate’s peril. To sustain the presumption, the order must relate to military duty, it must not conflict with the statutory or constitutional rights of the person receiving the order, and it must be a specific mandate to do or not to do a specific act. In sum, an order is presumed lawful if it has a valid military purpose and is a clear, specific, narrowly drawn mandate. *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003). The dictates of a person’s conscience, religion, or personal philosophy

cannot excuse disobedience. *United States v. Huet-Vaughn*, 43 M.J. 105 (C.A.A.F. 1995) (accused's philosophical, moral, and religious objections to the Operation Desert Shield/Storm not a defense to desertion with intent to avoid hazardous duty and shirk important service). *United States v. Stockman*, 17 M.J. 530 (A.C.M.R. 1973).

C. Valid Military Purpose. The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a unit and directly with the maintenance of good order in the armed forces. MCM, pt. IV, ¶ 18c(2)(a)(iv). The order can affect otherwise private activity. *United States v. McDaniels*, 50 M.J. 407 (C.A.A.F. 1999) (order to not drive personal vehicle after diagnosis of narcolepsy); *United States v. Hill*, 49 M.J. 242 (C.A.A.F. 1999) (no-contact order issued by military police had valid military purpose of maintaining good order and discipline in the military community and to protect the alleged victim during the investigation); *United States v. Padgett*, 48 M.J. 273 (C.A.A.F. 1998) (order requiring 25-year-old service member to terminate his romantic relationship with 14-year-old girl had valid military purpose); *United States v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958) (order to report financial conditions unrelated to the military while on leave, did not have valid military purpose).

1. An order that has for its sole object a private end is unlawful, but an order that benefits the command as well as serving individuals is lawful. *United States v. Robinson*, 20 C.M.R. 63 (C.M.A. 1955) (use of enlisted personnel in Officers' Open Mess at Fort McNair).

2. Punishment.

a) Orders extending punishments beyond those lawfully imposed are illegal. *United States v. McCoy*, 30 C.M.R. 68 (C.M.A. 1960) (order to continue extra duty after punishment imposed under Article 15 already completed).

b) "Extra training" must be oriented to improving the soldier's performance of military duties. Such corrective measures assume the nature of training or instruction, not punishment. MCM, pt. V, ¶ 1g; AR 600-20, ¶ 4-6b (6 Nov 2014); see *United States v. Hoover*, 24 M.J. 874 (A.C.M.R. 1987) (requiring accused to live in pup tent for 3 weeks between the hours of 2200 and 0400 was unlawful punishment).

D. Overly Broad Limitation on Personal Right. An order that is "arbitrary and capricious, overly broad in scope, or to impose an unjust limitation on a personal right" is not lawful. *United States v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958) (order to report financial conditions unrelated to the military while on leave, was not lawful); *United States v. Spencer*, 29 M.J. 740 (A.F.C.M.R. 1989) (order to turn over all civilian medical records to military clinic by specific date was unlawful, because it was broader and more restrictive of private rights and personal affairs than required by military needs and provided for by service regulation); but see *United States v. Jeffers*, 57 M.J. 13 (C.A.A.F. 2002) (no social contact order with female in unit with whom accused had adulterous relationship not overbroad).

1. Marriage. Regulations reasonably restricting marriages of foreign-based service personnel to local nationals are legal. *United States v. Wheeler*, 30 C.M.R. 387 (C.M.A. 1961) ("a military commander may, at least in foreign areas, impose reasonable restrictions on the right of military personnel of his command to marry"); but see *United States v. Nation*, 26 C.M.R. 504 (C.M.A. 1958) (six-month waiting period was unreasonable and arbitrary restraint on the personal right to marry).

2. “Safe sex” order to Servicemember infected with HIV is lawful. *United States v. Dumford*, 30 M.J. 137 (C.M.A. 1990); *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989).

3. A service member who violates the terms of a no-contact order is subject to punishment under either Article 90 or Article 92, without the necessity of proof that the contact was undertaken for an improper purpose. Public policy supports a strict reading of a no-contact order. A military commander who has a legitimate interest in deterring contact between a service member and another person is not required to sort through every contact to determine, after the fact, whether there was a nefarious purpose. *United States v. Thompkins*, 58 M.J. 43 (C.A.A.F. 2003).

4. Personal relationships and contacts. *United States v. Hill*, 49 M.J. 242 (C.A.A.F. 1999) (order to have no contact with alleged victim lawful); *United States v. Padgett*, 48 M.J. 273 (C.A.A.F. 1998) (order requiring 25-year-old service member to terminate his romantic relationship with 14-year-old girl lawful); *United States v. Nieves*, 44 M.J. 96 (C.A.A.F. 1996) (order prohibiting discussions with witnesses, during an investigation, was lawful); *United States v. Aycock*, 35 C.M.R. 130 (C.M.A. 1964) (order prohibiting accused from contacting witnesses concerning the charges was unlawful because it interfered with right to prepare a defense); *United States v. Wysong*, 26 C.M.R. 29 (C.M.A. 1958) (order “not to talk to or speak with any of the men in the company concerned with this investigation except in line of duty” was so broad in nature and all-inclusive in scope that it was illegal); *United States v. Mann*, 50 M.J. 689 (A.F. Ct. Crim. App. 1999) (order to “cease and refrain from any and all contact of any nature” with enlisted member with whom the accused allegedly fraternized, which indicated that accused’s counsel had unrestricted access, was lawful); *United States v. Button*, 31 M.J. 897 (A.F.C.M.R. 1990) (order not to go to family quarters, where alleged sexual abuse victim lived, was lawful), *aff’d*, 34 M.J. 139 (C.M.A. 1992); *United States v. Hawkins*, 30 M.J. 682 (A.F.C.M.R. 1990) (order to have no contact with alleged victims and witness, unless by the area defense counsel, was lawful); *United States v. Wine*, 28 M.J. 688 (A.F.C.M.R. 1989) (order to disassociate from neighbor’s estranged wife lawful); *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003) (order “not to converse with the civilian workers” in the galley was lawful and not over broad when given after the accused violated a policy limiting interaction between civilian employees and Servicemembers).

5. Alcohol.

a) Regulations establishing a minimum drinking age for service personnel in a command abroad are legal. *United States v. Manos*, 37 C.M.R. 274 (C.M.A. 1967).

b) A military member may also be lawfully ordered not to consume alcoholic beverages as a condition of pretrial restriction, if reasonably necessary to protect the morale, welfare, and safety of the unit or the accused; to protect victims or potential witnesses; or to ensure the accused’s presence at the court-martial or pretrial hearings in a sober condition. *United States v. Blye*, 37 M.J. 92 (C.M.A. 1993).

c) Order not to consume alcohol must have a reasonable connection to military needs; *United States v. Stewart*, 33 M.J. 519 (A.F.C.M.R. 1991) (order not to consume alcoholic beverages to see if the accused was an alcoholic was invalid); *United States v. Kochan*, 27 M.J. 574 (N.M.C.M.R. 1988) (order not to drink alcohol until 21-years old was illegal).

6. Loans. Orders restricting loans between service members may be lawful, if there is a sufficient connection between the military’s duty to protect the morale, discipline, and usefulness

of its members. *United States v. McClain*, 10 M.J. 271 (C.M.A. 1981) (upholding conviction for violation of a regulation prohibiting loans between permanent party personnel and trainees at Fort Jackson); *United States v. Giordano*, 35 C.M.R. 135 (C.M.A. 1964) (order fixing a maximum legal rate of interest on loans among military members was lawful); *but see United States v. Smith*, 1 M.J. 156 (C.M.A. 1975) (regulation prohibiting all loans for profit or any benefit without consent of commander, without a corresponding military need, was invalid as too restrictive).

7. Writing checks. *United States v. James*, 52 M.J. 709 (Army Ct. Crim. App. 2000) (order “not to write any more checks” was lawful). *contra United States v. Alexander*, 26 M.J. 796 (A.F.C.M.R. 1988) (order “not to write any checks” was much too broad to be considered valid).

8. Regulations may proscribe the use of customs-free privileges in Korea for personal gain or profit. *United States v. Lehman*, 5 M.J. 740 (A.F.C.M.R. 1978).

9. As long as not unreasonable and not unduly humiliating or degrading, an order to produce a urine specimen under direct observation is lawful. *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989).

10. Order to cooks to shower before reporting to work in the galley was lawful. *United States v. Horner*, 32 M.J. 576 (C.G.C.M.R. 1991).

11. Regulations requiring members of the service to obtain approval from their commanders before circulating petitions on military installations are lawful. *Brown v. Glines*, 444 U.S. 348 (1979) (Air Force had substantial governmental interest in limiting the general circulation of petitions on military installations that are unrelated to the suppression of free expression); *Secretary of the Navy v. Huff*, 444 U.S. 453 (1979) (similar Navy regulation).

E. Litigating the Issue of Lawfulness of the Order. Lawfulness of an order, although an important issue, is not a discrete element of a disobedience offense. Therefore, it is a question of law to be determined by the military judge. MCM pt. IV, ¶ 16c(2)(a)(ii). *United States v. Jeffers*, 57 M.J. 13 (C.A.A.F. 2002); *United States v. New*, 55 M.J. 95 (C.A.A.F. 2001); *but see United States v. Mack*, 65 M.J. 108 (C.A.A.F. 2007) (while the lawfulness of an order is a question of law to be determined by the military judge, submitting the question of lawfulness to a panel is harmless error when the accused fails to rebut the presumption of lawfulness).

Leading Cases

[*United States v. Calley*, 22 C.M.A. 534, 48 C.M.R. 19 \(1973\)](#) (Appellant was convicted of 22 specifications of premeditated murder and one of assault with intent to murder a child. His commanding officer allegedly gave him orders to kill everyone in a village and he followed the orders. He appealed his conviction and the Court of Military Appeals held that a person of any level of intelligence should have realized that the order was illegal.).

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, known to be unlawful, or if the order in question is actually known to the accused to be unlawful.

. . . In determining what orders, if any, Lieutenant Calley acted under, if you find him to have acted, you should consider all of the matters which he has testified reached him and which you can infer from other evidence that he saw and heard. Then, unless you find beyond a reasonable doubt that he was not acting under orders directing him in substance and effect to kill unresisting occupants of My Lai, you must determine whether Lieutenant Calley actually knew those orders to be unlawful.

. . . In determining whether or not Lieutenant Calley had knowledge of the unlawfulness of any order found by you to have been given, you may consider all relevant facts and circumstances, including Lieutenant Calley's rank; educational background; OCS schooling; other training while in the Army, including basic training, and his training in Hawaii and Vietnam; his experience on prior operations involving contact with hostile and friendly Vietnamese; his age; and any other evidence tending to prove or disprove that on 16 March 1968, Lieutenant Calley knew the order was unlawful. If you find beyond a reasonable doubt, on the basis of all the evidence, that *Lieutenant Calley actually knew* the order under which he asserts he operated was unlawful, the fact that the order was given operates as no defense.

[*United States v. New*, 55 M.J. 95 \(C.A.A.F. 2001\)](#). The appellant refused to wear the UN beret. It is not a defense for appellant to claim that the order is illegal based on his [personal scruples and own] interpretation of applicable law.

While the military judge determined that the order to wear the U.N. insignia was lawful, he properly declined to rule on the constitutionality of the President's decision to deploy the Armed Forces in FYROM as a nonjusticiable political question. Courts have consistently refused to consider the issue of the President's use of the Armed Forces. Two recent examples from the Persian Gulf War era are *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990), and *United States v. Huet-Vaughn*, 43 M.J. 105 (1995). In the *Ange* case, the District Court declined to rule

on the legality of deployment of troops in the Persian Gulf despite inconsistent views of Congress and the President. 752 F. Supp. at 512. In *Huet-Vaughn*, we reaffirmed the idea that personal belief that an order is unlawful cannot be a defense to a disobedience charge, holding: “The duty to disobey an unlawful order applies only to a positive act that constitutes a crime that is so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness.” 43 M.J. at 114 (internal quotation marks omitted). The Court further upheld the military judge’s decision not to consider evidence relating to the legality of the decision to deploy the Armed Forces. 43 M.J. at 115.

55 M.J. at 109.

The *New* court made the following observation which may be relevant depending on the immediacy of any decision-making.

Congress has provided him with a variety of means to communicate his views to his superiors and national policy makers. He may challenge policy through a complaint under Article 138, UCMJ, 10 U.S.C. § 938; he may raise his concerns to the Inspector General of the Department of Defense, 5 U.S.C. Appendix; and he may communicate directly with Members of Congress and Inspectors General without interference from his military superiors and with protections against reprisal, 10 U.S.C. § 1034.

United States v. Keenan, 39 C.M.R. 108, 116-17 (C.M.A. 1969).

Little v. Barreme, 6 U.S. 170 (1804). In *Little*, the Court held that Captain Little was liable in trespass (a common law tort) to the owner of a Danish ship he had captured on its way to France. Little’s defense to suit was that he captured the ship on orders from the President. Chief Justice Marshall explained, however, that Congress had implicitly prohibited seizures of such ships when heading to France, and thus had prohibited President Adams from ordering such captures. At that time, reliance on a superior officer’s order, when that order was not clearly impermissible and was otherwise reasonable, was *not* a defense to civil liability if the order turned out to be unlawful. Therefore, Marshall concluded that Captain Little could not rely upon a “superior’s orders” defense, and he was personally liable for the damages of what Marshall called his “plain trespass.”³

Events at Abu Ghraib detention facility produced several appellate cases addressing obedience to orders. “The beliefs of an accused, even if reasonable, cannot transform an unlawful order into a lawful order under R.C.M. 916(c).” *United States v. Smith*, 68 M.J. 316, 324 (C.A.A.F. 2010).

United States v. Huet-Vaughn, 43 M.J. 105 (C.A.A.F. 1995) (Appellant was convicted of desertion with intent to avoid hazardous duty and shirk important service. The Court of Military Review set aside the guilty finding because the military judge had improperly restricted Appellant from presenting evidence of her motive. CAAF held that restricting Appellant from testifying and

³ See Marty Lederman, More on Captain Smith’s “following orders” theory of standing (and *Little v. Barreme*). Just Security, Aug. 22, 2016, available at <https://www.justsecurity.org/32475/captain-smiths-standing-little-v-barreme/>

presenting other evidence of motive to contest the element of specific intent was not prejudicial error.)

United States v. Rockwood, 52 M.J. 98 (C.A.A.F. 1999) (Appellant disagreed with the decision to increase operational security instead of immediately inspecting the National Penitentiary, so he went ahead with his own “inspection.” He was convicted of conduct unbecoming of an officer. On appeal, he alleged that (1) he was denied a fair trial due to command influence and conflict of interest; and (2) the military judge improperly denied his production of witnesses. CAAF disagreed, affirming Appellant’s conviction.) Note that Appellant had previously filed an IG complaint.

United States v. Howe, 17 C.M.A. 165, 37 C.M.R. 429 (1967) (Appellant participated in a demonstration against President Johnson and the Vietnam war. He was convicted of using contemptuous words against the President and conduct unbecoming of an officer. The lower court held that the convictions did not violate the first amendment, finding that his conduct constituted a clear and present danger to discipline within the armed services. On appeal, The CMA denied the petition for reconsideration.)

United States v. Noyd, 40 C.M.R. 195 (C.M.A. 1969). See also *Noyd v. Bond*, 395 U.S. 683 (1969).

An order may be invalid for many reasons. We need not attempt to catalog all of them. Illustratively, an order may be invalid because the person who issued it lacks authority to promulgate an order of that kind (*United States v Bunch*, 3 U.S.C.M.A. 186, 11 C.M.R. 186; *United States v Matthews*, 8 U.S.C.M.A. 94, 23 C.M.R. 318); it may be illegal because it does not relate to a military duty and improperly infringes upon a private right (*United States v Milldebrandt*, 8 U.S.C.M.A. 635, 25 C.M.R. 139; *United States v Wilson*, 12 U.S.C.M.A. 165, 30 C.M.R. 165); it may be illegal because it is contrary to the command of a superior (*United States v White*, 17 U.S.C.M.A. 211, 38 C.M.R. 9); it may be illegal because it is contrary to the Constitution or a statute (*United States v Musguire*, 9 U.S.C.M.A. 67, 25 C.M.R. 329). An order, apparently valid on its face, may also be illegal because it is based on, or has its generating source in, an unlawful command of a superior. In *United States v Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83, a regulation by the Secretary of the Army attempted to control review of manuscripts by military personnel. In part, the regulation was illegal because it violated a Department of Defense directive.

United States v. Harvey, 42 C.M.R. 141, 146 (C.M.A. 1970).

Some statements may be so explicit in meaning as to support a conclusion from their language that they are disloyal to the United States. Other statements require interpretation; and their real nature may be discernible only in the context of the circumstances. Other statements require interpretation; and their real nature may be discernible only in the context of the circumstances *Watts v United States*, 394 U.S. 705. Words by themselves may not always reveal their character. *Watts v United States*, 394 U.S. 705 (1969). The Vietnam war has evoked a vast outpouring of

written and oral comment. The language of many of the comments is poised on a thin line between rhetoric and disloyalty to the United States. It is, however, unnecessary to determine in which category the accused's statements belong. Assuming, without deciding, that they are reasonably susceptible of description as statements disloyal to the United States and incorporate the lesser offense within the charge, the instructions as to the lesser offense are too deficient to allow us to uphold the court-martial's finding.

...

Willful disobedience of an order, however important the order might be, does not necessarily constitute disloyalty to the United States.

United States v. Rapert, 75 M.J. 164 (C.A.A.F. 2016). Unhappy with Pres. Obama's reelection, the appellant made various public statements interpreted to be threats against the president. He was charged under Article 134, UCMJ, for communication of a threat. Part of the court's analysis focused on the First Amendment.

Upon considering these issues, we conclude that Appellant's [First Amendment] arguments are without merit. Even assuming arguendo that Appellant's speech was within the ambit of the First Amendment's embrace, the unique nature of Article 134, UCMJ, and the interests it seeks to protect justify the proscription of Appellant's speech in this case. First, contrary to Appellant's assertions, the Government proved a palpable connection between his speech and the military mission or environment. Second, the balance of interests in this case weighs heavily in favor of proscription.

75 M.J. at 171; see also *Goldman v. Weinberger*, 475 U.S. 503 (1986).

Key Issues

1. Is there really an order? At what point does a recommendation or suggestion from a superior become an order?
2. Does the individual member actually know or, for a general order, have notice of an order? Does the test for knowledge have both a subjective and an objective component—is the order known to be unlawful or what was the person’s common understanding of unlawfulness?
3. Does the order require immediate action?
4. Did the individual seek clarification or amendment from a higher authority?
5. Was the person issuing the order authorized to give or issue orders that are enforceable under the Uniform Code of Military Justice?
6. Is the order contrary to the Constitution, the laws of the United States, or lawful superior orders, or for some other reason beyond the authority of the official issuing it?
7. Does the order relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and which is directly connected with the maintenance of good order in the Service?
8. Does the order, without a valid military purpose, interfere with private rights or personal affairs?
9. Does the order direct the commission of an offense?
10. Is it the sole object of the order to attain some private end?
11. Was the order given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit?
12. What is the effect of Executive Branch (uniformed lawyer or Justice Department) opinions with respect to lawfulness?
13. Is a President in the execution of his duties when campaigning for office?
14. Can a President divest himself of the protection afforded by Article 88, UCMJ?
15. Does the member become a whistleblower?
16. If the member reports a concern to Congress or an Inspector General, does she have the protection of 10 U.S.C. § 1034?
17. Are there remedies a member must exhaust before disobeying an order, circumstances permitting?
18. Are there conflicting orders?

Ethical Considerations

When advising clients, the rules of professional conduct applicable to the particular Service branch must be borne in mind, along with the parallel rules of the civilian jurisdiction in which the attorney is admitted to practice. As the Coast Guard legal ethics regulation notes:

The Rules are adapted directly from the American Bar Association's Model Rules of Professional Conduct, with contributions from corresponding Army, Air Force and Navy/Marine Corps rules and regulations (*see* [Army Regulation 27-26](#), Rules of Professional Conduct for Lawyers; [JAG Instruction 5803.1](#), Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General; TJAGD Standards 2, Air Force Rules of Professional Conduct and Standards of Civility in Professional Conduct).

Here is a reminder of the rules for when a member seeks advice client about future conduct that may constitute an offense under the UCMJ. They are listed by Service with the recommendation that they be applied according to the Service to which the member belongs.

- a. **U.S. Air Force**, [AFI 51-110](#), Rule 1.2(d) A lawyer shall not counsel a client to engage in, or assist a client in conduct the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law. (There is no accompanying commentary, *see infra*.)
- b. **U.S. Army** [AR 27-26](#), Rule 1.2(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal and moral consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Commentary.

(9) Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. Furthermore, an Army lawyer, and any lawyer representing an individual client in any matter or proceeding governed by these Rules, is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly counsel or assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

(10) When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where required or permitted by Rule 1.6 or Rule 3.3. However,

the lawyer is required to avoid furthering the wrongdoing, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper, but then discovers is criminal or fraudulent. Seeking to withdraw from the representation, therefore, may be appropriate.

(11) Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may include a course of action contrary to the terms of the statute or regulation or of the interpretation placed upon it by governmental authorities.

- c. **U.S. Coast Guard, COMDTINST M5800.1**, Rule 1.2(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good, faith effort to determine the validity, scope, meaning or application of the law. (There is no accompanying commentary.)]
- d. **U.S. Navy and U.S. Marine Corps**, Rule 1.2.e. A covered attorney shall not counsel or assist a client to engage in conduct that the attorney knows is criminal or fraudulent, but a covered attorney may discuss the legal and moral consequences of any proposed course of conduct with a client, and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

Commentary.

(a) A covered attorney is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make an attorney a party to the course of action. However, a covered attorney may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between advising a client on the legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

(b) When the client's course of action has already begun and is continuing, the covered attorney's responsibility is especially delicate. The attorney is not permitted to reveal the client's wrongdoing, except when required or permitted by Rule 1.6 or Rule 3.3. However, the covered attorney is required to avoid furthering the wrongdoing, for example, by suggesting how it might be concealed. A covered attorney may not continue assisting a client in conduct the attorney originally supposes is legally proper, but then discovers is criminal or fraudulent. Seeking to withdraw from the representation may be appropriate.

(c) Paragraph e of the Rule applies whether or not the defrauded party is a party to the transaction. Hence, a covered attorney should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. The last

clause of paragraph e recognizes that determining the validity or interpretation of a statute or regulation may include a course of action contrary to the terms of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Service professional responsibility rules may be found in *MILITARY COURT RULES OF THE UNITED STATES* (LexisNexis 6th ed. 2020). They are also available online.

Useful Links

[Manual for Courts-Martial, United States \(2019 ed.\)](#) (includes Uniform Code of Military Justice)

CAAFlog (U.S. military justice blog)

[Global Military Justice Reform](#) (international military justice blog)

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